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HIMACHAL SERIES, 2016

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appeal was preferred, which was dismissed- held, in second appeal that plea of the defendants that clause 18 was deleted at the time of execution of agreement was not believable as PW-3 specifically denied this fact in the cross-examination - each page of the agreement was duly signed by the parties- an inference can be drawn that clause 18 was a term of the agreement- plaintiff had extracted 104.638 quintals resin more than the fixed target- therefore, he is entitled to the amount- suit was rightly decreed by the Courts- appeal dismissed. (Para-11 to 22) Title: H.P. State Forest Corporation & another Vs. Kahan Singh (since dead), through LRs. Page-2230

Code of Civil Procedure, 1908- Section 100- Plaintiff had entered into an agreement for extraction of 126.900 quintals resin @ Rs. 576/- per quintal - it was agreed that in case of extraction of resin more than fixed target by 5%, payment would be made on percentage basis- plaintiff asserted that this clause was intentionally deleted by defendants without informing him - plaintiff had extracted 175.590 quintals of resin and is entitled to Rs. 1,01,139.84/- whereas, he was paid Rs.1,39,769.64/- and is entitled to Rs. 38,629/- - suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plea of the defendants that clause 18 was deleted at the time of execution of agreement was not believable as PW-3 specifically denied this fact in the cross-examination - each page of the agreement was duly signed by the parties- an inference can be drawn that clause 18 was a term of the agreement- plaintiff had extracted 48.690 quintals resin more than the fixed target- therefore, he is entitled to the amount- suit was rightly decreed by the Courts- appeal dismissed. (Para-11 to 22) Title: H.P. State Forest Corporation & another Vs. Kahan Singh (since dead), through LRs. Page- 2225

Code of Civil Procedure, 1908- Section 100- Plaintiff was a tenant under the land owner and acquired the proprietary rights- the defendants started interfering in the land on the basis of purchase - plaintiff challenged the sale deed on the ground of fraud taking the advantage of his illiteracy-the defendants supported the sale deed and contended that it was genuine-the trial court held the sale deed to be genuine and dismissed the suit- first appeal was also dismissed - held in second appeal that, conferment of the proprietary rights is not automatic but is subject to the right of resumption in favour of widow, minor and handicapped person- as per section 113 of H.P Tenancy and Land Reforms Act, the property acquired under section 104(3) of the H.P Tenancy and Land Reforms Act cannot be alienated for a period of ten years- since the plaintiff had acquired the land in the year 1998, he could not have disposed of the same by sale deed within 10 years of the acquisition-the courts below had fallen in error in upholding the sale deed - suit of the plaintiff decreed and the judgments of the courts quashed and set aside. (Para-33 to 51) Title: Bahadur Singh Vs. Vinod Kumar & Others Page-1854

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Code of Civil Procedure, 1908- Section 114 read with Order 47– Order passed in LPA sought to be reviewed by the petitioner- held, that since the order sought to be reviewed was challenged by way of SLP which met dismissal, therefore, the review does not lie at all- even otherwise no material is available in the petition to meet the requirements of law- petition dismissed.(Para 2 to 4) Title: Bharat Bhushan Vs. Himachal Pradesh University and others (D.B.) Page-2115

Code of Civil Procedure, 1908- Section 151 and 152- An application for correction of the award was filed, which was allowed- a subsequent application for correction of judgment was filed which was dismissed- aggrieved from the order, present revision petition has been filed- held, that petitioners were entitled to compulsory acquisition charges @ 30% - they filed an application, which was allowed as not opposed – award was modified but para-32 of the award remained un-amended- once petitioners were entitled to compulsory acquisition charges, they cannot be deprived of the interest on the same- application for correction of the award could not have been

dismissed by taking hyper technical view- revision allowed and award modified. (Para-3 to 18) Title: Mohinder Thaper and Ors. Vs. State of Himachal Pradesh Page-1432

Code of Civil Procedure, 1908- Order 6 Rule 17- Suit filed by the plaintiff was dismissed- an appeal was preferred in which an application for amendment of plaint was filed- it was pleaded that plaintiff had made efforts to explain the facts to the Counsel but due to lack of communication, facts were not communicated in a chronological order- application was opposed by the defendant pleading that plaintiff was trying to wriggle out of the admissions by filing the application for amendment- application was dismissed by the Appellate Court- held, that amendment application was filed to incorporate the fact that mother of the plaintiff had contracted second marriage and the plaintiff was born from of the second marriage- Trial Court had given a specific finding that plaintiff was born from of the first marriage and second marriage was not proved- plaintiff cannot be permitted to incorporate the new facts- application has been filed to prolong the litigation and to wriggle out of the admissions made by the plaintiff as a witness in the cross-examination- allowing the application would cause prejudice to the defendant, thus, same was rightly not allowed- petition dismissed. (Para-8) Title: Ram Rattan Vs. Ashwani Kumar and another Page-1466

Code of Civil Procedure, 1908- Order 7 Rule 10- Plaintiff filed a civil suit for the recovery of money on account of work relating to the renewal of different roads- defendant filed an application under Order 7 Rule 10 of C.P.C. pleading that Court did not have jurisdiction to hear and entertain the suit- Court allowed the application and returned the plaint for presentation before a Court having jurisdiction- held, that according to the plaintiff, work order pertained to the work at Solan - contract was also executed at Solan- it was not established that defendant had any office at Shimla- cause of action had not arisen in Shimla- plaintiff had not led any evidence to show that payment was to be made within jurisdiction of the Court at Shimla- Court had rightly ordered the return of the plaint- revision dismissed. (Para-8 to 16) Title: Parmod Sood Vs. The Municipal Council, Solan Page- 2091

Code of Civil Procedure, 1908- Order 9 Rule 13- Ex-parte order was passed against the defendant on the basis of endorsement made by the postman that defendants had refused to accept delivery of the letter- defendants are residing outside the jurisdiction of the Court- therefore, it was not permissible to issue summons by way of registered post- their services were not proper and they were wrongly proceeded ex-parte- however, application for setting aside ex-parte decree was not filed within a period of one month from the date of knowledge nor the delay was properly explained- hence, application dismissed. (Para-3 to 8) Title: M/s Sturdy Industries Ltd. Vs. M/s Isotech Electrical and Civil Projects (P) Ltd. and another Page-1530

Code of Civil Procedure, 1908- Order 21- DH was deployed through a contractor- wages were not paid to him on which a reference was made to Labour Court who passed the award for Rs. 5,08,501/- a writ petition was preferred against the award which was dismissed- LPA was preferred but stay was not granted- objection was preferred that the award is not executable in view of the pendency of the appeal- held, that mere pendency of an appeal does not have the effect of automatic stay of execution proceedings – it is not necessary to frame issue whenever the objections are filed- objections were rightly dismissed by the court- petition dismissed. (Para-2 to 4) Title: The Chairman-cum-Managing Director and another. Vs. Anoop Kumar and another. Page-1469

Code of Civil Procedure, 1908- Order 21 Rule 35**-** A decree for specific performance was put to execution - objections were filed, which were dismissed- held, that the decree was affirmed up to the High Court- pleas raised in the execution had already been adjudicated by the court, which had passed the decree- the executing court is bound by the decree and cannot go behind the same- the objections were rightly dismissed- petition dismissed. (Para 2-3) Title: Shippi Devi Vs. Laja Devi Page-1409

Code of Civil Procedure, 1908- Order 22 Rule 4 & Order 1 Rule 10- Appeal filed by one of the defendants was dismissed on the ground to have been abated for not bringing on record the legal heirs of some of the deceased defendants-in second appeal held that, when the deceased respondents died long back in the years 1996, 1998 and 2002 respectively and applications were filed in the year 2004, the same should have been accompanied by the applications under Section 5 of the Limitation Act- even no evidence worth name was led in support of the contents/averments of the application- the first appellate court has rightly dismissed the application for bringing the legal heir of the deceased on the record- appeal dismissed. (Para 30 to 40) Title: State of H.P. Vs. Hari Ram & Ors. Page-1878

Code of Civil Procedure, 1908- Order 22 Rule 4- Suit filed by the plaintiffs was decreed- an appeal was preferred in which respondents No. 1, 4 and 5 died- applications for bringing on record their legal representatives were filed, which were dismissed and the appeal was also dismissed as having abated- respondents No. 1, 4 and 5 had died on 2.12.1998, 10.7.1996 and 13.4.2002 respectively- applications were moved in the year 2004- the Court had framed issues for deciding the application but no evidence was led to prove the contents of the applications - no application for condonation of delay was filed- no prayer for setting aside the abatement was made - applications were rightly dismissed being barred by limitation – appeal dismissed. (Para-22 to 34) Title: Bardu & Another Vs. Brij Lal & Others Page-2081

Code of Civil Procedure, 1908- Order 23 Rule 3- Reference petition was filed- it was pleaded that during the pendency of the Reference Petition, matter was amicably settled between the parties and reference petition be disposed of in accordance with the settlement- application was dismissed by the Court- aggrieved from the order, present revision was filed- held, that similar applications were dismissed in other cases - revisions were preferred in which orders were passed to decide the applications afresh and to record the satisfaction about the execution of the agreement after recording evidence – hence, similar order passed in the present petition. (Para- 5 and 6) Title: Jay Pee Himachal Cement Project Vs. Daya Ram s/o Sh. Najru and others Page-2275

Code of Civil Procedure, 1908- Order 26 Rule 1- Plaintiff filed an application seeking examination of her General Power of Attorney in her presence by a Local Commissioner- application was dismissed by the trial Court- held, that no such relief can be sought or granted- General Power of Attorney is son of the plaintiff and she must have faith in him, if plaintiff does not have faith on the General Power of Attorney then she should examine herself- petition dismissed. (Para-2) Title: Indira Mahindra Vs. Ashok Pal Sen and others Page-2274

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff filed a civil suit for injunction pleading that land is not partitioned- defendants started raising construction over the valuable portion of the land without getting it partitioned- application for interim injunction was also filed, which was dismissed by the trial Court- an appeal was preferred, which was allowed- CMPMO was filed, which was disposed of with a direction that defendants will not remove the construction found in excess of their shares- application for appointment of Local Commissioner was filed, which was allowed- aggrieved from the order, present petition was filed- held, that the fact whether defendants have raised construction exceeding their shares or not can only be determined by the demarcation of the land- appointment of Local Commissioner is within the discretion of the Court- co-owner is not entitled to raise construction in excess of his share- trial Court had rightly appointed the local Commissioner to determine the shares of the defendants- petition dismissed. (Para-10 to 15) Title: Naresh Kumar s/o Sh. Munshi Ram & Anr. Vs. Tej Ram s/o Sh. Gawainu Ram Page-1874

Code of Civil Procedure, 1908- Order 32 Rule 15- Husband was deaf and dumb - he filed a petition for seeking divorce- it was contended that the petition is not maintainable as it was not filed through the next friend- held, that a deaf and dumb person is not incapable of filing a

petition, if he is of a sound mind - an inquiry is to be conducted prior to granting permission to file the petition through next friend and the Court has to be satisfied that the person is not of sound mind and that he is incapable of protecting his interest. (Para-11 to 13). Title: Kamal Sharma Vs. Minakshi Sharma Page-1373

Code of Civil Procedure, 1908- Order 39 Rules 1 & 2- Plaintiffs sought interim injunction for restraining the respondents from transferring, encumbering, damaging or dispossessing the plaintiff from the suit land- it was pleaded that predecessor-in-interest of the plaintiffs was priest and suit land was given to him by Raja Dalip Singh - suit land was declared surplus by defendant no. 1 and the defendants no. 2 to 6 started interfering with the possession of the plaintiffs- State filed a reply pleading that suit land had vested in the State of H.P. as per provisions of the Ceiling Act - the application for interim relief was dismissed by the Trial court - an appeal was preferred which was also dismissed - held, that plaintiffs had based their case on oral transfer- revenue record does not support the case of the plaintiff - whether Raja was competent to gift the land or not is a matter of evidence- plaintiffs failed to prove their prima facie possession- the State had proposed construction of Divisional and Sub-Divisional offices, which are in public interest- the injunction cannot be granted in such situation as the right of individual is subservient to the right of public at large- the injunction was rightly declined - appeal dismissed. (Para-14 to 20) Title: Ganpatu & Others Vs. State of H.P. and others Page-1473

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendants from interfering in the suit land- it was pleaded that plaintiff is owner in possession of the suit land- defendants are interfering with the same without any right to do so- application for ad-interim injunction was filed- application for amendment was also filed pleading that the signatures were obtained on the written statement earlier without explaining the same- defendants are in settled possession of the suit land- held that suit land was recorded in joint possession earlier but now it is recorded in separate possession- suit land is shown to be owned by N and M to the extent of 1/3rd and 2/3rd shares respectively- both the parties have claimed the settled possession over the suit land- therefore, it is expedient that parties be directed to maintain status quo- petition disposed of. (Para-8 and 9) Title: Tulsi Ram son of late Shri Kharku Ram Vs. Narain Dass son of Shri Banshi Ram Page-1896

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendants from impeding the passage by raising construction over the same- defendants pleaded that construction was being raised by H.P. Tourism Development Board through Project Manager- land is owned by State which has not been impleaded as party- suit was filed for stopping the public work- application was partly allowed by the trial Court- an appeal was preferred, which was dismissed- held, that plaintiff had claimed the existence of the passage- land is recorded as non-cultivable road in the revenue record- urinal and lavatories are being constructed for the benefit of public - in case of conflict between the interest of general public and the individuals, interest of general public should prevail- order passed by the Court modified to the extent that urinals and lavatories will be constructed in such a manner that no part of waste water or sewerage would flow towards the land of plaintiff. (Para-11 to 16) Title: Tilak Raj son of Shri Balak Ram Vs. State of H.P. through the Commissioner Una & others Page-2208

Code of Civil Procedure, 1908- Order 41 Rule 22**-** Cross objections were filed to the judgment passed by the Appellate Court in the Revision Petition- held, that the provisions of Code of Civil Procedure are not applicable to the Revisional jurisdiction- however, the court will have ample power to consider the objections raised by the parties- Rent Controller is a designated authority and is not a Judge/ Presiding Officer of a Civil Court- Rent Act is a complete code in itself dealing with the control of rent and eviction within the urban areas of State of Himachal Pradesh- Rent Act provides for a complete mechanism for adjudication of rights, duties and obligations of the landlord and the tenant - the provision of Order 41 Rule 22 will not be applicable in the exercise

of Revisional jurisdiction. (Para 19-27) Title:- Yog Raj Sood Vs. Sunita Kaushal & another. Page-1632

Code of Civil Procedure, 1908 -Order 41 Rule 27- Landlord filed an eviction petition on the ground that tenant was in arrears of rent and the tenant had started running a restaurant which had diminished the value and utility of the tenanted premises and caused nuisance to the occupiers of the building- the petition was allowed by the Rent Controller- an appeal was filed which was allowed- a revision was preferred and an additional issue was framed by the High Court- the issue was answered by the Rent Controller- appeal preferred by the tenant was dismissed- Tenant filed an application for leading additional evidence- held, that the tenant wants to establish two facts which relate back to the year 2000 – 2001- tenant never led evidence to prove these facts despite having adequate opportunity to do so- the court has power to take note of subsequent events but such events have to be brought promptly to the notice of the Court in accordance with the procedure enabling the Court to take note of such events and such events must have a material bearing on right to relief of any party- the application was not filed at the first instance but subsequently and is meant to procrastinate proceedings- the event is not necessary to adjudicate the controversy between the parties- hence, application dismissed. (Para-14 to 18) Title:- Yog Raj Sood Vs. Sunita Kaushal & another Page-1632

Code of Civil Procedure, 1908- Order 41 Rule 27- Plaintiff laid a claim to the estate of 'M' on the basis of a Will- the suit was partly dismissed by the Trial Court- an appeal was preferred- an application for leading evidence was filed before appellate court, which was allowed - another application under order 6 Rule 17 CPC was filed which was also allowed- held, that the application for amendment was filed to correct the error in the date of execution of the Will which had arisen due to error in translation - such amendment will help the Appellate Court to arrive at a just decision- petition dismissed. (Para 5-6) Title: Dass Ram Vs. Daler Singh & others. Page-1420

Code of Criminal Procedure, 1973- Section 125- Applicant filed an application stating that she had solemnized marriage with the respondent as per Hindu rites and customs – she was harassed and was forced to leave the matrimonial house- respondent denied that he had married the applicant- trial Court concluded that marriage was not proved- revision was preferred, which was allowed- order passed by the trial Court was set aside- held, in revision that photographs show bride, bridegroom and 2-3 girls- respondent admitted that he was a bridegroom in those photographs – girls behind bridegroom were sisters of the applicant- findings recorded by Revisional Court that marriage was duly proved cannot be interfered- revision dismissed. (Para-9 to 20) Title: Ajay Kumar Vs. Rita Devi Page-2182

Code of Criminal Procedure, 1973- Section 144**-** A fair is being organized by the devotees of Baba Kyalu Ji Maharaj along with local inhabitants and surrounding Gram panchayats- a dispute regarding organizing the Mela arose in the year 2016 because one new committee was formed, which started collecting membership fee and even published advertisement regarding management of the Mela- applications were filed before SDM, Nurpur who issued the prohibitory orders under Section 144- held, that the order under Section 144 can be passed by the officer if there is need for immediate prevention and there are sufficient grounds for passing the order - the perception of the officer recording the desired satisfaction has to be reasonable, least invasive and bonafide- further the restraint should not be allowed to exceed the constraints of the particular situation either in nature or in duration- the perception of threat to public peace and tranquility should be real and not quandary, imaginary or a mere likely possibility- the Court will not normally interfere with the matters relating to law and order- the petitioners had stated in the application that they apprehended a problem of law and order and it cannot be said that power was exercised on imaginary grounds- there was no infirmity, illegality or perversity in the order- Petition dismissed. (Para 14-22) Title: Baba Kyalu Ji Maharaj Chhinjh Mela Vs. Sub Divisional Magistrate, Nurpur & anr. Page-1570

Code of Criminal Procedure, 1973- Section 319- Trial Court summoned the petitioner as co-accused- he preferred revision, which was dismissed- held, that complainant had neither mentioned in the statement made under Section 154 of Cr.P.C nor in the statement before the Court that petitioner was present at the spot or that he had abetted the commission of crime- power under Section 319 of Cr.P.C should be exercised sparingly to advance the criminal justice and not as a handle to harass the accused- petition allowed- orders passed by the Courts set aside. (Para-6 to 10) Title: Ved Prakash Vs. State of Himachal Pradesh Page-2201

Code of Criminal Procedure, 1973- Section 360- Section 360 is not applicable in the State of Himachal Pradesh as provisions of Probation of Offenders Act have been brought into force. (Para-23 to 25) Title: Ajay Kumar @ Aju Vs. State of HP Page-2267

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 17, 18, 27 and 36AC of Drugs and Cosmetics Act and Section 420 of Indian Penal Code- held, that the investigation shows that the drugs manufactured by company were found to be spurious- similar case is pending in police station, Kala Amb- one FIR has also been lodged against son of the petitioner for the commission of similar offence - the possession of factory was handed over to the petitioner with a condition that no manufacturing activity will be carried out - however, the petitioner continued to manufacture the drugs unauthorizedly- custodial interrogation of petitioner is required- the accused had committed the offence against the public at large – petitioner is not entitled to bail- Petition dismissed. (Para 2-5) Title: Maman Chand Jain Vs. State of HP. Page-1599

Code of Criminal Procedure, 1973- Section 438-An FIR was registered against the petitioner no. 1 for the commission of offences punishable under Sections 420 and 406 of IPC- status report shows that the petitioner no. 1 has absconded – he had received Rs. 9.60 lakh for the construction, operation and maintenance of Jan Suvidha Parisars- the work was stopped without any intimation- the investigation has not proceeded due to non- availability of accused- petition dismissed. (Para 2-4) Title: Sh. R.K. Jha & anr. Vs. State of Himachal Pradesh & ors. Page-1613

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 406, 498-A and 506 of I.P.C. - matter was compromised between the parties- held, that parties may approach the High Court for quashing the proceedings on the basis of compromise in a non-compoundable offence- parties have mutually settled the matter and no useful purpose will be served by allowing the criminal proceedings to continue- petition allowed. (Para- 4 to 6) Title: Gursewak Singh and others Vs. State of HP and another Page-1429

Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioner and one I- trial Magistrate held that Courts at Shimla had no territorial jurisdiction as demand of dowry was made at Dehradun- revision was preferred before learned Sessions Judge, Shimla who held that Courts at Shimla had territorial jurisdiction- aggrieved from the order, present petition has been filed- held, that investigation has been completed and, therefore, all the documents have to be seen- statements of the witnesses recorded by police show that cruelty was also inflicted at Sanjauli- thus, there is prima facie material to show that offence was committed within local area of Shimla- petition dismissed. (Para-6 to 20) Title: Manoj Chhabra & others Vs. State of H.P. and Another Page-2237

Constitution of India, 1950- Article 226- **Industrial Disputes Act, 1947-** Section 25- Services of the respondent were terminated- dispute was referred to Labour Court-cum-Industrial Tribunal- Tribunal made award in favour of the respondent- writ petition was filed challenging the award- held, that High Court can interfere with the award of the Tribunal only on the procedural level and cannot interfere with the findings of the fact, unless, Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted

inadmissible evidence- it was not established that inadmissible evidence was made the foundation of the award or that the award was passed without any evidence- writ petition dismissed. (Para- 3 to 6) Title: The State of Himachal Pradesh and another Vs. Rajinder Singh (D.B.) Page-1932

Constitution of India, 1950- Article 226- It was found that inadvertently pay was fixed at a higher rate of Rs. 59,845/- and the amount was recoverable from the petitioner - petitioner filed a writ petition- held, that it was not the case of the appellants that petitioner had played any role in fixation of the pay- hence, no recovery can be effected from the petitioner- appeal dismissed. (Para-3 to 7) Title: Himachal Road Transport Corporation and others Vs. Siri Ram (D.B.) Page-2116

Constitution of India, 1950- Article 226- Land of the petitioner was acquired for the construction of Nathpa Jhakri Project- Compensation was paid to her - it was provided in the rehabilitation scheme that employment will be provided to those persons who had been affected by the construction of the project- petitioner contended that benefit of employment was not provided to her- order of priority for consideration of employment is (i) the persons who have been rendered completely landless, (ii) the persons who are left with land holding less than five bighas, (iii) the person whose business is served completely and who does not have any alternative to earn his livelihood, and (iv) others affected by the acquisition subject to verification of their overall financial position - the benefit was to be provided to the family who is rendered landless- term 'family' is defined as husband/wife who is entered owner/co-owner of land in the revenue record, children including step or adopted children and parents and those brothers and sisters who are jointly living as per Pariwar Register on the date of notification- the petitioner was married and her name was entered in her husband's family in district Kullu- she returned to Village Jhakri to educate her children- she has not produced any record to show that her name was registered as a separate family unit in the Pariwar Register of Gram panchayat 'D' in the year 1992- Writ petition disposed of with a direction to the respondent to permit the petitioner to prove whether she was part of family or not on the date of acquisition. (Para 11-23) Title:- Nisha Devi Vs. Satluj Jal Vidyut Nigam & others. Page-1605

Constitution of India, 1950- Article 226- Petitioner applied for the allotment of fair price shop- resolution was passed by respondent No. 4, a co-operative Society that it was not in a position to run fair price shop – petitioner was appointed but respondent No. 4 withdrew the resolution- an appeal was preferred by the respondent No. 4 against the allotment of fair price shop to the petitioner- appeal was allowed as it was found that case of the petitioner was recommended to the Government without relaxation of norms – writ petition was filed against the order of the Appellate Authority- held, that respondent No. 4 had itself passed the resolution that it was unable to run a fair price shop- allotment was made thereafter in favour of the petitioner, he continued to run the fair price shop without any complaint- relaxation was granted in other cases but was not granted to the petitioner which is arbitrary and colourable exercise of power- writ petition allowed and respondents directed to allow the petitioner to run the fair price shop. (Para-16 to 25) Title: Gulshan Kumar Vs. State of H.P. & Others (D.B.) Page-1899

Constitution of India, 1950- Article 226- Petitioner attached his truck with the ACC Ltd., Barmana for carriage of cement on behalf of the respondent-Corporation- petitioner was appointed as Inspector Grade I with Food Civil Supplies Department- truck was detached by the Corporation- present writ petition was filed against the order- Court had directed earlier in CWP No. 2402 of 2008, titled as Baldev Singh versus H.P. Ex-Servicemen Corporation & Ors., that bye-laws will be amended providing inter alia that in case of re-employment of the Ex-servicemen, he will have to surrender his right to get the truck attached- it was contended that contractual appointment does not amount to re-appointment- held, that contractual appointment also means the re-employment and the petitioner does not have right of attachment of his truck- petition

dismissed. (Para-4 to 8) Title: Bachittar Singh Vs. H.P. Ex-servicemen Corporation and another Page-2186

Constitution of India, 1950- Article 226- Petitioner filed an application for premature retirement - he withdrew the application, still he was prematurely retired- he filed a writ petition which was dismissed by the Writ court holding that the request for premature retirement was accepted prior to the request for withdrawal - however, the record shows that his request for voluntary retirement was pending when the request for withdrawal was received- Appeal allowed. (Para-3 to 7) Title: Desh Raj Thakur Vs. State of Himachal Pradesh & Another. Page-1654

Constitution of India, 1950- Article 226- Petitioner filed an application for correcting dimensions of his land – the correction was ordered- there was some error in the order on which the petitioner filed a review petition- respondent no. 3 sought permission of respondent no. 2 which was declined on the ground that file could not be reopened after the lapse of one year and 6 months- held, that when the error was committed by the respondent no. 3, the delay could be no ground for not correcting the same - procedure is handmaid of justice and should not be used to defeat the justice - order passed by respondent no. 2 set-aside and respondent no. 3 directed to carry out correction in accordance with law. (Para- 7 to 23) Title: Pawan Sharma Vs. State of H.P. and others Page-1778

Constitution of India, 1950- Article 226- Petitioner had retained government accommodation – he pleaded that retention was due to circumstances beyond his control- some other persons had also retained the government accommodation but they were not directed to pay such huge penalty- Writ Court allowed the writ petition- held, that equity can be claimed only for lawful things and not for unlawful things – however, State had reduced the amount of penalty – writ petition disposed of with a direction to the writ petitioner to pay the reduced amount of penalty and to the respondent to release all the service benefits. (Para-3 to 8) Title: State of Himachal Pradesh and another Vs. Dr. Ramesh Chauhan (D.B.) Page-2061

Constitution of India, 1950- Article 226- Petitioner is a widow and belongs to BPL family- her case for appointment as Part Time Water Carrier was forwarded by Pardhan, School Management Committee- her case was approved by State Government but respondent No. 5 was selected in place of the petitioner- held, that recommendation was made on 4.8.2014 and respondent No. 5 was appointed as part Time Water Carrier on 2.8.2014- respondent No. 5 was also a widow and she belonged to BPL family- respondent No. 5 is also suffering from breast tumour- appointment of respondent No. 5 was made as per policy- writ petition dismissed. (Para-11 to 14) Title: Sunita Kumari Vs. State of Himachal Pradesh & others Page-1954

Constitution of India, 1950- Article 226- Petitioner pleaded that he is the owner in possession of the land- respondents constructed a road through the land of the petitioner without acquiring it or without paying compensation for the same- respondents pleaded that petitioner had permitted the construction of the road – held, that State was not denying the fact that some portion of the land of the petitioner was used for the construction of the road- It was contended that road was constructed with the consent of the petitioner - however no consent in writing, no gift deed or undertaking was produced on record- petition allowed and directions issued to acquire the land or in the alternative to re-align/re-grade the road after vacating the land of the petitioner or to pay compensation for the damage caused to the land of the petitioner with interest. (Para- 9 to 15). Title:- Liaq Ram Vs. The State Government of Himachal Pradesh through the Secretary (PWD) and ors. Page-1595

Constitution of India, 1950- Article 226- Petitioner pleaded that he was a Member of Bilaspur District Truck Operator Society- he was being allotted work which was stopped abruptly w.e.f. 8.5.2016 – he filed a petition seeking direction to the Society to allot work to him- Society pleaded that membership of the petitioner was transferred in the name of P- Additional Registrar

(Administration) dismissed the petition- revision was preferred which was also dismissed- writ petition was filed challenging the orders- held that petitioner had not disclosed initially that he had transferred the truck along with membership in favour of P - thus, he had not approached the authority with clean hands- authority had taken a correct view – writ petition dismissed. (Para-22 to 30) Title: Vishal Bansal Vs. State of H.P. and others Page-1934

Constitution of India, 1950- Article 226- Petitioner submitted a tender - the rates quoted by him were found to be lowest, he was called for negotiation but work was not allotted to him- subsequently tender was recalled- State pleaded that work was reviewed in accordance with the decision of Scrutiny Committee- held, that tender submitted by the petitioner was the lowest and the tender was recalled without any discussion- no notice was issued to the petitioner, even petitioner was not called for negotiation- Secretary, PWD directed to issue necessary directions/guidelines to avoid misuse of power. (Para-6 to 16) Title: Navneet Singh Vs. State of HP and Ors. Page-1438

Constitution of India, 1950- Article 226- Petitioner was appointed as GDSBPM- charge-sheet was served upon him- Regular inquiry was conducted- it was found that petitioner had absented himself on two days and had unauthorisedly allowed R to work in his place- petitioner was removed from the service- an appeal was preferred against this order, which was rejected by the Appellate Authority- an original application was filed before the Central Administrative Tribunal, which was dismissed- aggrieved from the order, present writ petition has been filed- held, that Appellate Authority had passed a detailed order, wherein, all the contentions had been dealt with – Court cannot re-appreciate the evidence led during the inquiry- Disciplinary and Appellate Authority had considered the statements of the witnesses and had passed the order thereafter- petition dismissed. (Para-9 to 16) Title: Shiv Kumar Vs. Union of India & ors. (D.B.) Page-2256

Constitution of India, 1950- Article 226– Petitioner was appointed as a Junior Engineer (Electrical) in the year 1990 on daily wages - he qualified Sections `A' and `B' of AMIE examination conducted by the Institute of Engineers (India) in 1990 and 1994, and became Bachelor of Engineers in Electrical Trade-108 JE's were promoted for the post of Assistant Engineer but the case of the petitioner was not considered-representations made by him were rejected-writ petition filed by him was dismissed holding that the claim of the petitioner was hit by the delay and laches as he had approached the court in the year 2002 whereas, cause of action had accrued to him in the year 1997- held, in appeal that the petitioner has not challenged the decision taken by the department to promote other JE's and has acquiesced to the same- promoted persons were not arrayed as parties - seniority list was also not brought on the record to show the actual order of the seniority- writ petition rightly dismissed by the writ court- appeal dismissed. (Para-23 to 25) Title: Vikas Gupta Vs. H.P.S.E.B & Another (D.B.) Page-1726

Constitution of India, 1950- Article 226- Petitioner was appointed as a teacher through Parents Teacher Association- however, grant-in-aid was not provided to him- respondents claimed that petitioner was engaged without conducting interview and he is not entitled for grant-in-aid- he does not possess essential qualifications- held, that petitioner was appointed on the basis of norms prevailing at the time of appointment prior to the enforcement of Grant-in-Aid Rules, 2006 - petitioner possessed academic qualification for the post of Language Teacher - State has exploited the petitioner, which is contrary to essence of the Constitution- petition allowed and respondents directed to release the grant-in-aid to the petitioner. (Para-6 to 10) Title: Vikas Sharma Vs. State of H.P. and others Page-2142

Constitution of India, 1950- Article 226- Petitioner was arrested by the police for the commission of offences punishable under Sections 302, 382 read with Section 34 of I.P.C.- he was released on bail- he was subsequently convicted and sentenced to imprisonment for a period of three years- he preferred an appeal, which was accepted – he was reinstated by the respondents after acquittal- his period of absence was regularized by granting him leave of kind

due- held, that Rule 26.1 providing for the payment of full pay will be applicable when an employee is exonerated and not when he remained imprisoned and was acquitted by the Court- writ petition dismissed. (Para-3 to 7) Title: Pritam Singh Vs. NHPC & Anr. (D.B.) Page-1484

Constitution of India, 1950- Article 226- Petitioner was engaged as computer clerk under the project- project came into end in the year 1991- held, that petitioner cannot claim regularization against the post which was not sanctioned or against any other post- Writ Court had rightly declined the relief to the petitioner- appeal dismissed. (Para-2 to 6) Title: Shashi Bala Vs. Dr.Y.S. Parmar University of Horticulture and Forestry (D.B.) Page-1926

Constitution of India, 1950- Article 226- Petitioner was engaged as salesman/commission agent by respondent No. 4, a Society, on commission basis- it was found on the basis of audit report that sum of Rs. 56115.60/- was due from petitioner - services of the petitioner were terminated by General House- he filed a representation which was treated as a revision petition and the petitioner was held liable for an amount of Rs. 15,507/-- a direction was issued to deposit the amount within a period of 60 days- an appeal was preferred, which was dismissed- second appeal was filed, which was also dismissed as not maintainable- a writ petition was filed, which was also dismissed by Single Judge- held, that it was specifically pointed out in the audit report that amount of Rs. 56115.60/- is recoverable from the petitioner- conduct of the petitioner for preceding few years was examined- General House took a unanimous decision to terminate the services of the petitioner- 60 persons were present in the meeting of General House- General house has a quorum of 1/3rd or 30 whichever is less, therefore, quorum was also complete - previous secretary was also held liable for depositing some of the amount- second appeal is not maintainable- writ petition was rightly dismissed- appeal dismissed. (Para-15 to 22) Title: Nikku Ram Vs. State of H.P. & Other (D.B.) Page-2118

Constitution of India, 1950- Article 226- Petitioner was facing trial before Additional Chief Judicial Magistrate, in which he was acquitted- an appeal was preferred against the acquittal, which was dismissed- petitioner was placed under suspension - sealed-cover procedure was followed in his case - subsequently petitioner was promoted without any fetters and restrictions- held that respondents had erred in not releasing the service benefit of increased pay to the petitioner from the date of his promotion. (Para-2 to 6) Title: Managing Director H.P. State Handicrafts and Handloom Corporation Ltd Vs. Subhash Sood and another (D.B.) Page-2090

Constitution of India, 1950- Article 226- Petitioner was found to have made encroachment upon the forest land after demarcation - challan was sent to DFO, Kullu exercising the power of Collector in H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- collector issued the notice- petitioner filed reply- fresh demarcation was ordered – demarcation was conducted in the absence of the petitioner- petitioner was found to be in unauthorized possession- Collector ordered the eviction of the petitioner – an appeal was preferred before the Divisional Commissioner, which was dismissed- a writ petition was filed against the order – held, that demarcation was conducted at the instance of the petitioner but he had not remained present during the demarcation- petitioner was provided many opportunity to produce the evidence but he failed to do so- petitioner had taken contrary pleas- petitioner had abused proceedings of the Courts – hence, petition dismissed with cost of Rs. 50,000/-. (Para-9 to 14) Title: Deen Chand Vs. State of H.P. and others (D.B.) Page-1868

Constitution of India, 1950- Article 226- Petitioner was selected for the post of Mid Day Meal Worker - however, the appointment letter was not issued to her- she filed a writ petition seeking direction to issue the appointment letter to her- held, that the petitioner was appointed on the resignation of existing occupant - however, the existing occupant had withdrawn his resignation - therefore no post is lying vacant – the petitioner has no right to claim appointment- petition dismissed. (Para-6 to 9) Title- Ramesh Chand Vs. State of H.P. & others. Page-1551

Constitution of India, 1950- Article 226- Petitioners challenged the amendment made in Himachal Pradesh High Court Officers and the Members of the Staff (Recruitment, Conditions of Service, Conduct & Appeal) Rules, 2003 and decision of the grievance committee to revise the ratio for promotion of Section Officer from 5:1 to 7:1- held, that Rules were framed in exercise of the power conferred by Article 229 of the Constitution of India which is a legislative power- the Rules cannot be struck down because the Court thinks that they are unreasonable but they can be struck down only on the ground on which a legislative measure can be struck down - fixing limitation and restrictions to the criterion of promotion exclusively falls within the domain of the State and a scheme cannot be held to be arbitrary or mala-fide or unconstitutional because it does not satisfy every employee – Grievance committee had considered all the relevant material while enhancing the ratio from 5:1 to 7:1- opportunity of hearing was given to the affected persons - the committee had taken into consideration entire cadre strength and the promotional avenues of petitioners -quota is to be fixed so that each category gets equal promotion - the petitioners had failed to show as to how their chance of promotion will be affected - the record on the other hand shows that the chances will not be affected- petition dismissed. (Para 7-75) Title: Avnish Kant Tiwari & others Vs. Hon'ble High Court of H.P. & others. Page-1737

Constitution of India, 1950- Article 226- Petitioners claimed that Sewerage Treatment Plant (STP) was being constructed in violation of the instructions- land on which STP is being constructed is a common area and the forest land which cannot be diverted to any other use- respondents denied the allegations - held, that process of construction started in the year 2006- writ petition was filed in the year 2015- even as per petitioners they became aware of the construction of STP in the year 2012- no explanation was given for the delay- no material was placed on record to show that the damage was caused to the ecology- NOC was taken from Nagar Parishad, Theog- writ petition has been filed to stop the public work – petition dismissed with cost of Rs. 25,000/-. (Para-17 to 33) Title: Residents of village Jatain, Dochi and Reha Vs. State of H.P. & Others Page-1694

Constitution of India, 1950- Article 226- Petitioners prayed that the respondents be directed to frame policy to deal with the problems of hawkers, Rehari and Khoka holders in accordance with the aims and objective of National Hawkers Policy, 2004 framed by the Central Government and to resettle the petitioners by allotting them small stalls on suitable terms and conditions – held, that the land of the petitioners was not acquired for the construction of Bhakara Dam- State has formulated a proposal for rehabilitation of the persons like petitioners- Petitioners have encroached upon public places including public paths and pavements in Bilaspur town and around it - the petitioners cannot claim themselves to be hawkers/street vendors as the hawkers/street vendors do not have a permanent structure / place for their activities, whereas petitioners have constructed permanent structures by encroaching upon the govt. land - Notices have been served upon the petitioners under HP Road Infrastructure Protection Act, 2002- Petitioners have alternative remedy of appeal/revision which was not availed by them- Petitioners have encroached upon the existing road of the bus stand and surrounding area - public interest demands that encroachment be removed at the earliest – The petitioners being rank encroachers cannot be permitted to ask the State to formulate a policy for protecting their interest- Petition disposed of with liberty to the petitioner to move appropriate application for their resettlement which shall be considered by the authorities in accordance with law- liberty granted to the respondents to take appropriate steps to remove unauthorized encroachments made by the petitioners. (Para-21-28) Title: Ashok Kumar and others Vs. State of Himachal Pradesh and others. Page-1565

Constitution of India, 1950- Article 226- Petitioners were appointed as Assistant Engineers (Electrical) by HPSEB- Recruitment and Promotion Rules provide 6% quota for AMIE holders, 34% quota for J.E. (Electrical) and equivalent quota for promotion to the posts of AEs (E) - 60 % vacancies stand reserved for direct recruitment – Promotee Officers in excess were rendering services on ad-hoc basis as AE or JE- they were promoted as AE against 104 vacancies meant to

be filled by direct recruitment- Aggrieved from the orders, writ petitions were filed- Office Order No. 302 dated 31.12.1997 was assailed whereby one time relaxation was granted – amendment application was filed for challenging the order, which was allowed- held, that appointment of promotees on the posts, in excess of the quota, was fortuitous and will confer no right of seniority- persons appointed in excess have to be pushed out and will get seniority from the date of the vacancy - amendment will relate back to the date of filing of the petition- writ Court had passed contradictory orders in different writ petitions- orders set aside and a fresh direction issued to draw a comprehensive seniority list in accordance with the promotion and recruitment rules. (Para-4 to 18) Title: Pankaj Sharma & others Vs. H.P. State Electricity Board & Others (D.B.) Page-2282

Constitution of India, 1950- Article 226- Predecessor-in-interest of the petitioners was appointed as a Depot Holder by the Punjab Government for the sale and receipts of food-grains at Village Keylong - it was agreed that money would be deposited in the Treasury within a period of six months from the date of sale- amount of Rs. 7969.64/- was demanded from him- one S was appointed as Depot Holder- it was found that there was shortage of food-grains amounting to Rs. 97,568.18/-- notice was issued to the petitioners for the recovery of the amount as arrears of land revenue- a civil suit was filed by the petitioners - an application for arbitration was filed- matter was referred to Arbitrator but no Arbitrator was appointed – subsequently a notice was received by the petitioners calling upon them to appear before the Arbitrator for the recovery of the money – a writ petition was filed against the notice – held, that no action was taken in the matter for a long time- proceedings had been initiated after 23 years- period of limitation for the recovery of the amount is 30 years- writ petition allowed- notice of demand quashed and set aside. (Para-18 to 29) Title: Prem Singh & Others vs. State of H.P. & Others Page-1506

Constitution of India, 1950- Article 226- **Public Premises (Eviction of Unauthorized Occupants) Act, 1971-** Section 4- **H.P. Tenancy and Land Reforms Act, 1972-** Section 104- Notice was issued to petitioners to show cause as to why they be not evicted- they replied that land was in possession of their forefathers as non-occupancy tenants- mutation was not attested inadvertently regarding the land- possession of the petitioners was lawful- order was passed to evict petitioners and all other persons within 15 days from the date of passing of the order- an appeal was filed, which was dismissed- held, that H, the person recorded to be in possession as non-occupancy tenant had executed a will - he had a right to execute a Will regarding the property in his possession- the person in possession of the land as non-occupancy tenant becomes owner automatically on the date of commencement of H.P. Tenancy and Land Reforms Act- aim of land laws is to protect the tillers/farmers/cultivators and to put an end to absentee landowners- land laws have to be examined with reference to dominant purpose of the Act- writ petitioners are in possession as non-occupancy tenants- they are to be evicted in accordance with the mandate of H.P. Tenancy Act - writ petitioners have raised many questions including question of title and they could not have been evicted summarily without adjudicating upon the questions raised by them- matter referred to Large Bench to determine the question of constitutionality of the proviso to Section 104 (9) of H.P. Tenancy and Land Reforms Act - operation of the order passed by the Collector stayed till further orders. (Para-11 to 95) Title: Asif Beg and another Vs. Estate Officer/Station Commander (D.B.) Page-2033

Constitution of India, 1950- Article 226- Relief was granted to similarly situated person by the Court which was upheld by the Apex Court- hence, direction issued to consider the case of the petitioner in accordance with the judgment passed by the High Court as upheld by Supreme Court. (Para-4 and 5) Title: State of H.P. Vs. Bhagi Rath and another (D.B.) Page-1927

Constitution of India, 1950- Article 226- Respondent no. 2 issued a notice inviting tender for laundary service for a period of five years - tender was awarded in favour of the respondent no. 8- the petitioners challenged the same on the allegations of mala-fide -held, that mala-fide has to be established through cogent evidence and an inference/conclusion of mala-fide cannot be drawn

on the basis of some vague and unsupported material- burden of proving mala-fide is on the person making the allegation- mala-fide can be established if the action is taken with the specific object of damaging the interest of aggrieved party or helping another party- merely because the rates of the respondents no. 8 are marginally lower than the rates quoted by other persons cannot lead to an inference of mala-fide - rates quoted by different persons show that the rates of the petitioners were not second lowest - the petitioners do not have any locus standi as they will not get the tender even if the tenders are cancelled- petition dismissed with a cost of Rs. 50,000/- (Para-10 to 30) Title: Scancraft Grafiks Pvt. Limited & Another. Vs. The State of Himachal Pradesh & others. Page-1705

Constitution of India, 1950- Article 226- Writ petitioners were selected for the post of library assistant - their services were terminated on the ground that interviews were not held in accordance with the procedure and certain irregularities were committed - applications were filed before the Administrative Tribunal which were allowed - State was left with liberty to hold proper inquiry- Civil Writ petitions were filed which were disposed of with a direction to issue show cause notices to the petitioners and to pass final orders- show cause notices were issued and services of the petitioner were terminated- original applications were filed which were transferred to the High Court - on transfer some of the applications were allowed while others were dismissed- held, in appeal that termination orders were stigmatic- A regular inquiry was to be conducted - the inquiry was not conducted and directions were not followed – appeals allowed with a direction to permit the petitioners who are out of service to join their duties- period spent during these proceedings is to be computed for all service benefits, except monetary benefits- liberty granted to conduct regular inquiry. (Para-8 to 23) Title: Sudesh Kumari Vs. State of H.P. and others Page-1721

Constitution of India, **1950**- Article 227- High Court can exercise jurisdiction under article 227 when the order passed by the court is vitiated by an error, which is manifest and apparent on the face of the proceedings - the power must be exercised sparingly to keep the subordinate courts and tribunal within the bounds of their authority-power is not available to correct mere errors of facts or laws nor is it a cloak of an appeal in disguise. (Para-5 to 13) Title: Ganpatu & Others Vs. State of H.P. and others Page-1473

Contempt of Court Act, 1971- Section 10- Petitioner had sought eviction of the respondent - an ex-parte eviction order was passed – parties entered into compromise and the execution petition was ordered to be dismissed in view of the compromise- petitioner claimed that respondent had failed to abide by the terms and conditions of the compromise and proceedings for contempt of courts be initiated against him - held, that the DH had only sought the withdrawal of the execution petition- the court had not added its mandate to compromise and had dismissed the petition as having been compromised - no undertaking was given by the counsel or the party- there is distinction between a compromise and a consent order on the basis of an undertaking - in case of former, party has to execute the compromise by filing execution application, while in the later case, proceedings for contempt can be initiated- since there was no undertaking, proceedings for contempt of court cannot be initiated- petition dismissed. (Para- 5 to 19). Title: Ram Gopal Sood Vs. Jai Pal Chauhan. Page-1683

Contempt of Courts Act, 1971- Section 12- Appellants/contemnors had not complied with direction passed by the Court - they have not taken into consideration the recommendations made by the review Departmental Promotion Committee - in these circumstances, they were rightly held guilty of contempt- Petition dismissed.(Para-3)Title:-State of H.P. and another Vs. Yashpal Dhiman. Page-1564

Contempt of Courts Act, 1971- Section 12- Petitioner contended that respondents had not complied with the direction passed by the Court- he had prayed for compassionate appointment in lieu of death of his father- respondents were directed to appoint petitioner to the post of

Chowkidar- respondent had filed a detailed compliance report which shows that they had appointed petitioner on compassionate grounds against the post of Chowkidar- therefore, respondents have complied with the direction passed by the Court- petition dismissed. (Para-2 to 4)Title: Ramesh Chand Vs. Tarun Shreedhar and others (D.B.) Page-2095

Contract Labour (Regulation and Abolition) Act, 1970- Section 23 and 24- Petitioner entered into a contract with National Thermal Power Corporation Limited (NTPC) for erection, testing and commissioning of 4X200 MW Hydroelectric Project –petitioner had a right to subcontract the work awarded to it- it engaged M/S Purvanchal Engineering Projects for execution of the work- a complaint was filed for violation of Sections 23 and 24 of the Act by the respondent- petitioner was summoned by the Court- petitioner filed an application, which was dismissed- held, that M/S Purvanchal Engineering Projects is carrying the work assigned to it by the petitioner - M/S Purvanchal Engineering Projects had the authority to engage the workmen either through contractor or through subcontract- petitioner does not fall within the definition of the contractor and will not be liable for violation of the provisions of the Act- petition allowed. (Para-2 to 6) Title: Bharat Heavy Electrical Limited Vs. Union of India Page-1454

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H.P. Panchayati Raj Act, 1994- Section 33- Gram Panchayat imposed a fine of Rs. 5/- on the petitioner, which was to be deposited on or before 26.8.2005 and in case of default, a fine of Rs. 10/- was to be charged each day- an appeal was preferred in the Court of Judicial Magistrate 1st Class, Naudan, which was dismissed on 10.8.2009- petitioners challenged the order passed by Gram Panchayat by filing the present petition - held, that appeal filed before Judicial Magistrate was barred by limitation and was rightly dismissed - petitioners have challenged the original order of the Panchayat which has merged in the order of the Judicial Magistrate 1st Class- they should have challenged the order of Judicial Magistrate instead of challenging the order of Gram Panchayat- petition dismissed. (Para-2 and 3) Title: Kamira Devi and another Vs. Munshi Ram and others Page-1463

H.P. Municipal Corporation Act, 1994- Section 253 (2)- Learned Commissioner, Municipal Corporation, Shimla has been directed to record the statement of Architect Planner on oath and to afford an opportunity of his cross-examination as well as to record the statement of the respondent and its witnesses and to allow their cross-examination- held, that proceedings under Section 253 of the Act are quasi judicial in nature and principle of natural justice should be followed- it was held previously that cross-examination of witnesses is not part of natural justice- therefore, case remanded to District Judge, Shimla for a fresh decision in accordance with law. (Para-2 and 3) Title: Municipal Commissioner, Shimla Vs. Bhanu Dutt Sharma Page-2248

H.P. Urban Rent Control Act, 1987- Section 14- Eviction of the tenant was sought on the ground of bona fide requirement for reconstruction- it was contended that no sanctioned plan was placed on record- held, that there is no requirement of getting the plan sanctioned before seeking eviction- petition dismissed with the right of re-entry to the tenant. (Para- 1 to 7) Title: Suresh Kumar Vs. Om Prakash Page-1367

H.P. Urban Rent Control Act, 1987- Section 14- Petitioner filed a petition for eviction of the tenant on the ground of arrears of rent and sub-letting - petition was dismissed by the Rent Controller- an appeal was preferred which was allowed- it was contended in revision that the petitioner does not fall within the definition of landlord – held that the plea that petitioner is not a landlord and is not entitled to file the rent petition cannot be taken by the tenant as he is estopped from questioning the title of the landlord or to set up the title in third person - Appellate Court had wrongly allowed the appeal- revision accepted. (Para-8 to 16) Title: Atul Soodan & others Vs. Ajit Kumar & another Page-1394

H.P. Urban Rent Control Act, 1987- Section 24 (5)- Landlord sought ejectment on the ground of non-payment of the rent, use of the building for a purpose other than for which it was leased and tenant having committed acts which are likely to impair the value or utility of the building- the premises was let out for running business of carpet but tenant started running a restaurant- held, that if the dominant purpose for which a building is let out is maintained, then a tenant may not be liable to be evicted in the absence of a contract prohibiting a user different from the one mentioned in the deed- however, if a building is let out for residential or business purpose and the tenant started manufacturing activity then it would amount to change of user - a businessman cannot be compelled to carry on a particular commercial activity, if he feels it to be non-viable, non-manageable or non-profitable – Landlord had specifically led the evidence to show that the nature of business was changed - the tenant did not appear in the witness box despite opportunity- It was proved that there was no proper ventilation and the fumes emitted from the ground floor, straightaway entered on the first floor of the landlord- Rent Controller had allowed ejectment of the tenant on the ground of nuisance to the occupiers of the buildings which was affirmed by the Appellate Court- there was no infirmity in the orders passed by the courts. (Para-34 to 50) Title: Yog Raj Sood Vs. Sunita Kaushal & another Page-1632

Hindu Marriage Act, 1955- Section 13- Marriage between the petitioner/husband and respondent/wife was solemnized as per Hindu rites and customs- respondent started treating the petitioner with cruelty- respondent/wife denied the contents of the application and asserted that petitioner had treated her with cruelty- the petition was dismissed by the Trial Court- held, in appeal that the instances of cruelty highlighted in the petition do not constitute the cruelty but amount to normal wear and tear of married life- cruelty is a conduct of such a nature as to have caused danger to life, limb or health or to raise a reasonable apprehension of such danger- the wife is taking care of the children and is residing in the matrimonial home- the fact that wife is not accompanying the husband to social gathering , not sharing bed room, not preparing food for family or finding excuses not to have sexual relation with husband are not instances of cruelty- the trial Court had rightly held that cruelty was not proved - appeal dismissed.(Para-15 to 18) Title:- Kamal Sharma Vs. Minakshi Sharma. Page:-1373

Hindu Marriage Act, 1955- Section 24- An application for interim maintenance was filed before Ld. District Judge, Shimla- the relief was denied by the Ld. District Judge on the basis that maintenance of Rs. 2,000/- has already been awarded in favour of the applicant under Section 125 Cr.P.C.- a revision was filed by the applicant against the order- held, that Ld. District Judge has not committed any illegality by taking in to account maintenance awarded by the Criminal Court- however, litigation expenses enhanced from Rs. 5,000/- to Rs. 15,000/-. (Para-3 to 5) Title: Vidya Vs. Arvind. Page-1413

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Indian Evidence Act, 1872- Section 67 and 73- Application was filed for comparison of admitted signatures with the disputed signatures on the counterfoils of check books, which was dismissed by the trial Court- held, that loan was sanctioned by the plaintiff in favour of the predecessor-in-interest of the defendants- defendant No. 2 was a guarantor, counterfoils bear the signatures of Rakesh- name of defendant No. 2 is Rohit- no useful purpose will be served by comparing signatures- this would lead to the delay – petition dismissed. (Para-8) Title: Ankit Hire Purchase (P) Ltd. Vs. Neelam Kumari and others Page- 1543

Indian Forest Act, 1927- Section 52-A- Two vehicles were found to be transporting walnut bark and scants of deodar without any permit- the vehicles were seized by the Authorized Officer-cum-D.F.O. - an application for release of the vehicle was filed which was rejected – an appeal was preferred before Sessions Judge which was dismissed- held, in revision that it was prima facie proved that son of the petitioner was driving the vehicle – the vehicle was not stopped despite directions by the police official- there were no hammer/property marks on the forest timber and

upon bags of walnut bark which were carried in vehicle- felling of trees from forest area disrupts ecological balance ehicle seized for committing forest offence should not normally be returned to party till culmination of proceedings- the release for vehicle will not be expedient at this stage- revision petition dismissed. (Para 6 to 11) Title: Khem Singh s/o Sh. Dile Ram Vs. State of H.P. and another. Page:-1579

Indian Limitation Act, 1963- Section 5- There is a delay of 298 days in filing the appeal- it was not explained as to what steps were taken from the passing of judgment till the filing of the appeal- the delay was not explained - application dismissed. (Para-2) Title: HP State Electricity Board Ltd & Ors Vs. Ram Dass. Page-1578

Indian Evidence Act, 1872- Section 45- Defendant filed an application for comparison of his signatures on the disputed documents, verify tampering/removal of original photographs and removal/ pasting of photograph as well as the life of the ink used in the documents- the application was dismissed by the court- held, that power of Revision can be exercised where no appeal lies and the order passed by the court attains finality- High court has to satisfy itself whether the order of the Subordinate Court is within jurisdiction and whether the Court has acted in breach of provisions of law or with material irregularities – Revisional Court cannot substitute its view in place of the view of the trial court -when the case was listed for recording defendant's evidence, it was found that no steps had been taken for summoning the witnesses and the witnesses were also not present – the application was filed when the evidence of the defendant was being recorded- signatures were admitted by the husband of the defendant- the conduct of the defendant shows that she was procrastinating the proceedings- The court had not acted with material irregularity and the application was rightly rejected by the Trial court- Revision dismissed with costs of Rs. 25,000/-. (Para 2 to 30). Title:- Neelam Rana Vs. Meera Dewan. Page-1545

Indian Penal Code, 1860- Section 147, 148, 149, 307, 353, 352, 341, 395, 397 and 120-B- Police laid a Nakka on the basis of information - a Mahindra Jeep was intercepted - 2-3 persons who were inside the jeep fled away- another jeep came on the spot- 2-3 persons came out of the jeep who also ran away- the jeep was searched and was found loaded with cartons of country liquor - meanwhile a jeep being plied by one of the accused reached on the spot -occupants of the jeep attacked the police with the stones- one of the accused fired gunshot in the air- the police took the jeep with the liquor but one of the accused brought his jeep in front of the jeep carrying the liquor - they forced the driver of the vehicle out of the jeep and took it along with liquor- the accused were tried and acquitted by the Trial court - held in appeal that the complainant had made major improvements in his statement- he could not identify the accused due to darkness- other witnesses had also given contradictory versions- the court had elaborately dealt with all the evidence and had held the prosecution case was not proved beyond reasonable doubt- Appeal dismissed. (Para-27 to 31) Title: State of Himachal Pradesh Vs. Ajay Guleria and others Page-1537

Indian Penal Code, 1860- Section 279 and 338- Accused was driving a bus with high speed, which hit the husband of the complainant- he sustained simple and grievous injuries – accused was convicted by the trial Court- an appeal was preferred, which was allowed- held, in appeal that trial court had relied upon the site plan - however, names of the persons whose assistance was taken while preparing site plan were not mentioned, which shows that site plan was prepared arbitrarily- PW-5 had improved her version- in these circumstances, Appellate Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 12) Title: State of H.P. Vs. Onkar Chand Page-1928

Indian Penal Code, 1860- Section 279 and 338- Complainant was going towards his vehicle- a car came and hit him- he sustained injuries- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that the persons named in the

FIR as eye witnesses were not examined to prove the prosecution version- R, an eye-witness had not supported the prosecution version- site plan did not reflect the spot position correctly- in these circumstances, Courts had wrongly convicted the accused- revision accepted and accused acquitted. (Para-9 to 12) Title: Vivek Kumar Vs. State of Himachal Pradesh Page-2212

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Tata Sumo, which hit the scooter- scooterist and pillion rider suffered injuries- accused was tried and acquitted by the trial Court- held, in appeal that complainant had admitted that the name of the driver of Tata Sumo was not mentioned by him - pillion rider admitted that driver of Tata Sumo had run away from the spot- identity of the accused was not established- view taken by the trial Court was reasonable- appeal dismissed. (Para-14 to 17) Title: State of Himachal Pradesh Vs. Tarun Chopra Page-2264

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Mahindra Pick Up on the wrong side of the road and hit the car- complainant and one labourer sustained injuries- accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held, in appeal that a plea was taken by the defence that vehicle had skidded after applying brakes on the frost- however, no frost was shown in the site plan- Mahindra Pick Up had travelled towards inappropriate side of the road- Appellate Court had wrongly acquitted the accused - appeal accepted- judgment of Appellate Court set aside and that of trial Court restored. (Para-9 to 12) Title: State of H.P. Vs. Naresh Kumar Page-2058

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the bus- he suddenly started the bus, when complainant was getting down from the same - complainant fell down and sustained injuries- accused was tried and acquitted by the trial Court- held, in appeal that no witness except PW-2 had deposed that accused had moved the bus without getting signal from the conductor- Investigating Officer had not ascertained from the passengers the truthfulness of assertion of PW-2 that bus was started without getting a signal from the conductor- conductor himself had not asserted such fact and had not supported the prosecution version- in these circumstances, accused was rightly acquitted by the Court- appeal dismissed. (Para-9 to 11) Title: State of H.P. Vs. Prem Raj Page-2148

Indian Penal Code, 1860- Section 279, 337 and 338**-** Accused while driving a vehicle, hit a bicycle- complainant and his brother sustained injuries – the accused was acquitted by the Trial Court- held, in appeal, it was admitted by the prosecution witnesses that the place of accident has a steep gradient and was extremely narrow- there were pot holes on the road – hence, the prosecution version that the accused was driving the vehicle with a high speed was not believable - the evidence was properly appreciated by the Trial Court - Appeal dismissed. (Para 9-10) Title: State of H.P. Vs. Sharanjit. Page-1410

Indian Penal Code, 1860- Section 279, 337 and 338- **Motor Vehicles Act, 1988-** Section 181, 192 and 196- Accused was driving a motor cycle in a rash and negligent manner- his motorcycle hit another motorcycle being driven by the complainant- accused was tried and acquitted by the trial Court- held, in appeal that testimony of the complainant did not inspire confidence- PW-2 feigned ignorance that accident had taken place as accused had become perplexed after his vehicle had skidded – statements of prosecution witnesses did not prove the prosecution case- appeal dismissed. (Para-9 to 12) Title: State of H.P. Vs. Sanjay Page-1930

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a bus- bus went off the road and fell into a nallah – two women and one boy died on the spot- other passengers suffered injuries- accused was convicted by the trial Court- an appeal was preferred which was dismissed – held, in revision that PW-3 to PW-6 had categorically stated that accident had taken place due to the negligence of the accused as he was trying to overtake another vehicle- their testimonies were not shaken in the cross-examination - they are best witnesses as

they were in the bus at the time of accident- prosecution case was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- however, sentence modified, keeping in view the time lapsed from the date of incident. (Para-15 to 24) Title: Salender Pal Vs. State of Himachal Pradesh Page-1514

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Complainant along with school girls was returning after attending a cultural programme in a bus- Maruti van came from opposite side and hit the bus- bus fell down on the right side of the road- driver of the van expired on the spot- passengers in the bus suffered injuries- accident had taken place due to the negligence of the accused who was driving the bus - accused was tried and acquitted by the trial Court- an appeal was preferred, which was allowed- held, in appeal that Investigating Officer had prepared the site plan in absence of the vehicle- hence, no reliance can be placed on the same- testimonies of the prosecution witnesses contradicted each other – accused was rightly acquitted by the Court- appeal dismissed. (Para-9 to 12) Title: State of H.P. Vs. Surinder Singh Page-2100

Indian Penal Code, 1860- Section 287, 337 and 304- petitioner parked the truck on the left side of the road and got down - he was talking to owner of vehicle at a short distance- some children entered into the cabin of driver - truck started moving backward and fell into gorge- children were seriously injured and two children succumbed to the injuries- prosecution asserted that petitioner had failed to take precautions to lock the door and to apply gutka/stopper to the truck- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that death of children was a direct result of omission or commission on the part of the accused and not on account of interference of some other persons in the present case- death was caused due to meddling with gear and clutches by the children- an error of judgment is not negligence- however, petitioner was negligent in parking the truck without Gutka/stopper and without locking- hence, revision partly allowed - sentence imposed under Sections 304-A and 337 of I.P.C. set aside and conviction under Section 287 of I.P.C. upheld- benefit of Probation of Offenders Act granted to the petitioner. (Para- 9 to 21) Title: Sania Dhanwal Vs. State of Himachal Pradesh Page-2250

Indian Penal Code, 1860- Section 302- Ceremony was going on in the Village- children were playing in the courtyard – accused picked up coins of the children and threw them away- deceased objected to the same- a quarrel started between them- accused pushed the deceased due to which he fell down- deceased gave a firewood blow to the shoulder of the accused- accused inflicted a stick blow on the temple region of the head - deceased succumbed to the injuries- accused was convicted by the trial Court- held, in appeal that only one injury was noticed on the person of the deceased- deceased had given a blow on the shoulder of the accused and the accused had inflicted the blow in retaliation – there was no pre- meditation and incident started suddenly – accused had knowledge that blow on temple region of head would result in the death of the person, therefore, he is liable to be convicted of Section 304 (Part-II) instead of Section 302 of I.P.C.- Appeal partly accepted and judgment modified- accused convicted of Section 304 (Part-II) I.P.C. (Para-16 to 19) Title: Jhabe Ram Vs. State of Himachal Pradesh (D.B.) Page-1527

Indian Penal Code, 1860- Section 302- PW-4 had purchased a new vehicle- accused was driving the vehicle- PW-4 and deceased were travelling in the vehicle – vehicle met with an accident- deceased slapped the accused and accused threatened to see the deceased- accused called the deceased- deceased was found missing- belongings of the deceased were found in the cowshed of the accused- dead body was recovered from Nalla- accused was arrested - he made a disclosure statement leading to the recovery of buckle and leather strip - one leather belt without buckle was also taken into possession- accused was tried and acquitted by the trial Court- held, in appeal that motive projected by prosecution that deceased had slapped the accused on which accused had murdered the deceased is not sufficient - disclosure statement was also not proved - material witnesses were not examined- 375.2 mgs percent liquor was found present in the viscera- injuries noticed on the person of the deceased could have been caused by way of fall-

testimonies of prosecution witnesses were contradicting each other- view taken by trial Court was a reasonable one which could have been taken in the circumstances of the case- appeal dismissed. (Para- 16 to 28) Title: State of Himachal Pradesh Vs. Ramesh Sharma (D.B.) Page-2018

Indian Penal Code, 1860- Section 302 and 34- Dead body of J was found covered with the blanket- it was suspected by the wife of the deceased that N and K had killed her husband- N was arrested- he made a disclosure statement leading to the discovery of a stick - K was also arrested- he made a disclosure statement on the basis which a stick, one Pajama and mobile phone were recovered- accused were tried and acquitted by the trial Court- held, in appeal that case was based upon circumstantial evidence- circumstances from which the guilt of the accused is to be drawn have to be established and they should lead only to the inference of guilt and not to any other inference- it was duly proved that accused no. 1 and deceased were working in one factory and they were residing in adjoining premises- it was also proved that family of J and N had returned and they were residing in one premises, thereafter - it was also proved that dispute erupted between deceased and accused relating to the payment of the ration charges – however, it was not proved that there was illicit relation between deceased and wife of the accused- disclosure statements of the accused were also not proved- there are contradictions in the testimonies of the witnesses regarding this fact- the presence of the accused at the spot was not established- it was also not established that the deceased was physically attacked by the accused with sticks - guilt of the accused was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused- appeal dismissed. (Para-30 to 45) Title: State of Himachal Pradesh Vs. Nanhe Lal & another Page-2150

Indian Penal Code, 1860- Section 302 and 120-B- Accused R was married to the deceased- relationship between the parties was strained- a compromise was effected- deceased lodged a complaint against the accused R after 2-3 days of the compromise- deceased died under suspicious circumstances- he had committed suicide by hanging himself from ceiling of the house- matter was reported to police- it was found during investigation that accused H and R had intimate relation and they had murdered the deceased- recoveries were effected on the basis of disclosure statement made by R- accused were tried and acquitted by the trial Court- held, in appeal that acrimony in the matrimonial relation was duly established- however, the illicit relation between the accused was not proved- cause of death was asphyxia- there was no injury on the body of the deceased- there was no evidence of any poison or intoxicant in the viscera- disclosure statement was not proved- there was no evidence that deceased had died due to consumption of poison- these circumstances do not lead to any inference that accused had murdered the deceased- accused were rightly acquitted- appeal dismissed. (Para-15 to 35) Title: State of Himachal Pradesh Vs. Rekha Devi and another (D.B.) Page-2106

Indian Penal Code, 1860- Section 302 and 201- Accused and deceased were married to each other- accused used to harass the deceased under the influence of liquor- deceased left for Dera Sacha Sauda- accused contracted second marriage in her absence- deceased delivered a male child- brother of the deceased requested the accused to take the deceased and her child but the accused told that he was ready to take the child but not the deceased- matter was compromised- proceedings under Domestic Violence Act were also initiated - deceased made a complaint with M that accused had kept her in Dogari and she was apprehending that the accused would kill her- when M made inquiry from the accused about the deceased, accused told that deceased had gone to attend Bhagwat and had fled away with some Sadhu- when the deceased could not be found, his brother made inquiry- a report was made against the accused on the basis of suspicion – accused made a disclosure statement that he could show the places where dead body of the deceased was buried- place was identified and when digging was conducted one human skeleton was found- investigation revealed that accused had killed the deceased- accused was tried and convicted by the trial Court- held, in appeal that case is based upon the circumstantial evidence – circumstances from which the guilt of the accused is to be drawn, must be complete and

incapable of any other hypothesis except guilt- deceased was last seen with the accused after compromise- she was missing till her dead body was exhumed- accused had given different explanations to different persons regarding the whereabouts of the deceased- explanations were misleading and dead body was recovered at the instance of accused- it was duly proved that death of the deceased was homicidal- all these circumstances, pointed towards the guilt of the accused- he was rightly convicted by the trial Court- appeal dismissed. (Para-10 to 35) Title: Kalyan Singh alias Bitto Vs. State of Himachal Pradesh (D.B.) Page-1843

Indian Penal Code, 1860- Section 302 and 364- Deceased went to Puruwala to purchase medicines but did not return- His wife lodged a report with the police-The deceased was seen going with the accused on a scooter towards Paonta Sahib by PW-2- Deceased and accused had gone to the house of PW-5 and had left towards Malva for purchasing fish- The accused was seen with the deceased sitting on a parapet by PW-4- An unidentified body was found lying in the canal which was subsequently identified as the dead body of the deceased- accused was tried and acquitted by the trial court- held, in appeal that in case of circumstantial evidence, the circumstances from which the guilt of the accused is to be determined should be fully established – The circumstances should be consistent only with the hypothesis of the guilt of the accused- circumstantial evidence should be of conclusive in nature and should exclude every possible hypothesis except the guilt of the accused- deceased was missing on 10-10-2004 after 2:00 p.m. - wife of the deceased had not suspected the involvement of the accused in the missing report lodged by her- It was not proved that accused was last seen with the deceased - motive projected by the prosecution that the accused suspected illicit relations of his wife with the deceased was not proved - No explanation was given as to why no independent witness was associated at the time of making the disclosure statement- There are contradictions regarding the time at which the disclosure statement was made- Recovery of dead body cannot lead to any inference that murder was committed by the accused– chain of circumstances do not lead to the inference of the guilt- The accused was rightly acquitted by the Trial court- Appeal dismissed. (Para-12 to 46) Title: State of Himachal Pradesh Vs. Budh Ram. Page-1617

Indian Penal Code, 1860- Section 302, 201 and 34- Accused persons hatched conspiracy and after committing the murder of R destroyed the evidence by throwing away his body - the accused were tried and acquitted by the Trial Court- held, in appeal that there was no direct evidence - prosecution relied upon circumstantial evidence– the prosecution has to establish not only each of the circumstance but also the link connecting the circumstances – circumstances should lead to the inference of guilt and not to any other inference– medical Officer found that the death was caused due to asphyxia, as a result of strangulation by a ligature- It was not proved that accused were last seen with the deceased and they had consumed liquor- No motive to murder the accused was proved- disclosure statement was also not proved- time of death was not established to infer that accused was last seen with the deceased- the evidence was rightly appreciated by the court- Appeal dismissed. (Para-6 to 23)Title: State of Himachal Pradesh Vs. Jagmohan alias Mohini. Page-1628

Indian Penal Code, 1860- Section 304-B- Deceased was married to the accused- accused demanded dowry and when she failed to satisfy the demand, the accused harassed her – the deceased committed suicide by consuming poison- the accused was tried and acquitted by the Trial court - held in appeal that the deceased died an unnatural death within 7 years but mere fact that death had taken place within 7 years does not mean that presumption will not have to be substantiated by the prosecution by placing on record, the cogent evidence- the prosecution has to adduce evidence to show that soon before her death deceased was subjected to cruelty and harassment- PW-1 admitted in cross-examination that relations between the accused and deceased were cordial – no specific instance of demand of dowry or harassment was given – the matter was not reported to police or any other authority - no signs of external injuries were noticed - testimonies of prosecution witnesses are contradictory- Trial Court had rightly acquitted

the accused- appeal dismissed. (Para- 13 to 22) Title: State of Himachal Pradesh. Vs. Shyam Lal. Page-1818

Indian Penal Code, 1860- Section 304-B- Deceased was married to the accused- accused called the father of the deceased on his mobile phone and told that deceased was seriously ill and was referred to IGMC for treatment- father of the complainant found a car coming from the opposite side in which deceased was lying unconscious- deceased died on the way- deceased had consumed poison as she was being maltreated for dowry- accused was tried and acquitted by the trial Court- held, in appeal that father of the complainant had not made any inquiry about the cause of illness of the deceased either from the accused or the Doctor- no complaint was lodged on the date of death- FIR was lodged subsequently- delay was not explained- parents had not reported the factum of harassment either to police or any other person- no independent witness was examined to prove that deceased was being subjected to harassment – trial Court had taken a reasonable view, which was possible- appeal dismissed. (Para-22 to 30) Title: State of Himachal Pradesh Vs. Yashwant Singh (D.B.) Page-2067

Indian Penal Code, 1860- Section 306**-** Deceased was married to the accused- the accused started harassing the deceased for dowry- she committed suicide - the accused was tried and acquitted by the Trial court- held in appeal that the deceased used to complain that she was being subjected to beating and harassment - accused demanded Rs. 10,000/- and when Rs. 5,000/- were given, accused returned them and demanded the whole of the amount – complainant and K had gone to the house of the accused to counsel and advise him – a mediator was called and deceased was sent to her matrimonial home-the accused had failed to intimate about the death of the deceased or to provide medical care - testimonies of prosecution witnesses regarding the demand of dowry were consistent – there was no major contradiction in the testimonies of the witnesses - the plea taken in defence that the deceased was depressed was not corroborated- the accused had failed to rebut the presumption of dowry death-the Court had wrongly acquitted the accused- appeal accepted and accused convicted of the commission of offence punishable under Section 306 of IPC. (Para- 11 to 37) Title: State of Himachal Pradesh Vs. Satpal. (D.B.) Page-1809

Indian Penal Code, 1860- Section 307- Additional Sessions Judge found on committal that accused had prima facie committed the offence punishable under Section 324 and not under Section 307 of IPC - he remanded the case for trial to the Committing Magistrate- held, that the accused had repeatedly inflicted injuries by Kripan - the fact that injuries were inflicted repeatedly shows that the offence falls within Section 307 and not 324 of IPC - order set-aside. (Para 2-6) Title: State of H.P. Vs. Narottam Singh & others Page-1417

Indian Penal Code, 1860- Section 320 and 201- Dead body of the deceased was found in the field- burn injuries were found on his person - accused confessed that he had connected the wire for protection of fields and for hunting wild animals- accused was tried and acquitted by the trial Court- held in appeal that accused was implicated on the basis of confession made before the police that he had connected service wire with electricity line 15 meters away from the place where dead body was recovered – no confession made to a police officer can be proved before a Court of law - PW-1 had not supported the prosecution version that any recovery was made from the place mentioned by the accused- no witness was examined to prove that accused had put wire in the field for hunting animal and had connected wire with electricity line- it was a case of no evidence- Court had rightly acquitted the accused- appeal dismissed. (Para-8 to 31) Title: State of Himachal Pradesh Vs. Shayam Lal and others (D.B.) Page-2304

Indian Penal Code, 1860- Section 323 and 325- Accused had attacked the complainant with ladle (kadchhi)- he was tried and acquitted by the trial Court- held, in appeal that the person who was cited in the FIR as rescuer was not examined by the prosecution nor any reason was assigned for his non-examination- ladle was not recovered promptly- disclosure statement was

not recorded prior to the recovery- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-10 and 11) Title: State of H.P. Vs. Bhumi Dev Page-1614

Indian Penal Code, 1860- Section 341, 323, 326 & 34**-** Complainant, his wife, son and brother were thrashing their wheat crop- The complainant asked the owner of thrasher to remove the same on completion of thrashing - the accused objected to the same and an altercation started between complainant and the accused- accused went to his house, came out with darat and inflicted a blow on the left wrist -when brother of the complainant tried to save the complainant, the accused inflicted a darat blow on his right thumb- other accused came armed with stick and started beating the complainant party- the accused were tried and convicted by the trial court – an appeal was preferred which was allowed- held in appeal, that it was undisputed that there is animosity between the complainant and the accused - the bone of contention was the location where the thrasher was placed – there are major contradictions in the testimonies of witnesses- Recovery of the weapon of the offence was also not satisfactorily proved- Both the parties had suffered injuries and it was not proved which party was aggressor – the prosecution case was not proved beyond reasonable doubt and the accused were rightly acquitted by the court- Appeal dismissed. (Para-25 to 31) Title: State of Himachal Pradesh Vs. Om Parkash and others.(D.B.) Page-1554

Indian Penal Code, 1860- Section 341, 324, 147 and 149- Complainant was going towards Kangra – when he reached at Chhatri, all the accused restrained and gave beatings to him by grip (a pointed object) – Trial court convicted five accused- an appeal was preferred which was partly allowed and conviction of only one accused was upheld - held in revision, testimony of the complainant was duly corroborated by his driver- medical officer had found the injuries which could have been sustained by a pointed object- statements of PWs 3, 4 and 6 do not leave any doubt that petitioner was identified as one of the accused who had wrongfully restrained the complainant - there was no necessity to hold test identification parade as the petitioner was known to the complainant- the Courts had rightly convicted the accused- revision dismissed. (Para 9-17) Title: Yash Pal @ Jassu Vs. State of Himachal Pradesh Page-1839

Indian Penal Code, 1860- Section 341, 324, 147 and 149- Complainant was going towards Kangra - when he reached at Chhatri, the accused restrained and gave him beatings by grip (a pointed object) – Trial court convicted five accused- an appeal was preferred which was partly allowed and conviction of only one accused was upheld- the State preferred an appeal against the acquittal of remaining accused- held, that complainant or his driver had not identified any person except the convicted accused- no identification parade was conducted and no reason was assigned for non holding of identification parade- the Appellate Court had rightly acquitted the remaining accused- Appeal dismissed. (Para- 8 to 11) Title: State of Himachal Pradesh Vs. Vinod alias Lucky Rana & Ors.Page-1825

Indian Penal Code, 1860- Section 341, 325 and 506 read with Section 34- Accused assaulted complainant and her daughter due to which she sustained simple and grievous injuries- they were tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that complainant and her two sons were involved in a case of murder- brother of the petitioner was cited as a witness in that case, therefore, relations between parties are hostile- general statement was made by the complainant and her daughter - no specific role was assigned to the petitioner-, petitioner was present in his school till 4 P.M as per testimony of DW-2- distance between school and the place of incident is 190 k.m- travel time is 4-5 hours, therefore, it was not possible for the accused to reach at the place of the crime at 6:30 P.M.- merely because plea of alibi was not suggested to the prosecution witnesses is no ground to reject the same- Court had wrongly convicted the accused- revision accepted and accused acquitted. (Para 7 to 20) Title: Shiv Lal Vs. State of H.P. Page-2326

Indian Penal Code, 1860- Section 341, 354 and 506– Prosecutrix was going to her house - accused intercepted her and caught her by arm – he outraged her modesty- her sweater and shirt were torn - accused was tried and convicted by the Trial Court - an appeal was preferred, which was partly allowed and accused was acquitted of the commission of offence punishable under Section 506 of IPC- held in revision, the testimony of the prosecutrix was not corroborated by PWs 2 and 3 - they had not noticed that sweater and shirt of the prosecutrix were torn - the Courts had wrongly relied upon the evidence to convict the accused- revision accepted - accused acquitted. (Para 9-11) Titile: Taru alias Ude Ram Vs. State of H.P. Page-1391

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix had left her Village informing her sister that she was going to Village D- however, she did not return in the evening- accused was also found absent from the work- matter was reported to the police- prosecutrix was recovered from the native place of the accused in West Bengal- prosecutrix revealed on inquiry that she was subjected to sexual intercourse- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix was aged 16 years on the date of incident- prosecutrix had voluntarily accompanied the accused to his native place- no efforts were made by her to contact her parents – this shows that she had voluntarily married the accused- however, she was taken out of the custody of her parents without their consent- she was less than 18 years on the date of incident and her consent was immaterial –accused was wrongly acquitted of the commission of offence punishable under Section 363 of I.P.C- appeal partly allowed and accused convicted of the commission of offence punishable under Section 363 of I.P.C. (Para-11 to 38) Title: State of Himachal Pradesh Vs. Devu Rai (D.B.) Page-2002

Indian Penal Code, 1860- Section 363, 366, 376 and 506- Prosecutrix had gone to Bazar for shopping but had not returned – prosecutrix and accused rang up father of the prosecutrix to inform him that they had married- FIR was registered- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix was more than 16 years on the date of incident- father of the prosecutrix had not entered into the witness box- there was delay in reporting the matter to the police- prosecutrix had not raised any hue and cry- possibility of the prosecutrix running away with the accused cannot be ruled out - testimony of prosecutrix does not inspire confidence- in these circumstances, trial Court had taken a reasonable view- appeal dismissed. (Para-22 to 32) Title: State of Himachal Pradesh Vs. Hemant Kumar (D.B.) Page-2195

Indian Penal Code, 1860- Section 364, 302, 201, 120-B read with Section 34- Complainant made a complaint that his daughter was kidnapped by the accused- investigation revealed that A-1 had got attested an affidavit regarding marriage with the daughter of the complainant- A-1 was not taking her to his house on which she pressurized him to transfer the property in her name- she demanded to Rs.20-30 lakhs or transfer of the house- A-1 had taken her in a car towards Barad road- accused had entered into a criminal conspiracy and had killed her- accused were tried and acquitted by the trial Court- held, in appeal that prosecution case is based upon circumstantial evidence- evidence must be complete and should point towards the guilt of the accused – statement of prosecution witness that he had seen a bag being thrown in river from a distance of about 1 km is highly improbable- PW-4 and PW-20 had not supported the prosecution case regarding the making of disclosure statement- circumstances do not point towards the guilt of the accused- accused were rightly acquitted by the trial Court- appeal dismissed. (Para-35 to 47) Title: State of Himachal Pradesh Vs. Praveen Kumar and others (D.B.) Page-2329

Indian Penal Code, 1860- Section 367 read with Section 34- Complainant, his family members and one S were taking lunch in the residence- accused U came along with other co-accused and asked the complainant and his mother to pay Rs. 6,200/- for Karyana articles supplied 2 ½ years ago - complainant and his mother requested the accused to give sometime for arranging the money - accused U insisted on making the payment - accused forcibly took members of the complainant party except S in a jeep – D, S, R and P were kept in confinement- matter was reported to police on which police recovered the family members of the complainant- accused

were tried and acquitted by the trial Court- held, in appeal that there are contradictions regarding the names of the person who came to the residence of the complainant and the role played by each of the accused- identities of the accused except U were not established- PW-6 stated that some person had requested for shelter on which they were adjusted in the 'Janjghar' – witnesses are interested as they owe money to accused U- view taken by the trial Court was reasonable- appeal dismissed. (Para- 6 to 10) Title: State of Himachal Pradesh Vs. Uttam Chand and others (D.B.) Page-2027

Indian Penal Code, 1860- Section 376- Accused raped the prosecutrix aged 5 years- he was tried and acquitted by the Trial court- held, in appeal prosecutrix was examined by Medical Officer who found no sign of injury, inflammation, redness, bruises or laceration on the body of the prosecutrix - however, this by itself is not sufficient to doubt the prosecution version- the prosecutrix supported the prosecution version – her testimony was not impeached in cross-examination – however, trial court discarded her testimony on the ground that no blood was found on her person/clothes and there was a discrepancy regarding the place of incident - mother of the prosecutrix has explained that she had washed the clothes of the prosexutrix and therefore the absence of blood was accounted - incorrect description of place of incident by Investigating Officer will not make the testimony of prosecutrix doubtful- her testimony was corroborated by other independent witnesses- Trial Court had wrongly acquitted the accused- the accused convicted of the commission of offence punishable under Section 376 of IPC. (Para 4-42) Title: State of Himachal Pradesh Vs. Ram Singh. Page-1799

Indian Penal Code, 1860- Section 376- Complainant hired a taxi of the accused – accused raped the prosecutrix on the way- matter was reported to the police- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had narrated the incident to PW-1- accused was also apprehended by public- Medical Officer had noticed signs of vaginal penetration- DNA profile obtained from Pajami and vaginal swab of the prosecutrix matched with DNA profile of the accused- statement of the prosecutrix is duly corroborated by medical and DNA evidence- accused was rightly convicted by the trial Court- appeal dismissed. (Para-19 and 20) Title: Ajay Kumar Vs. State of Himachal Pradesh Page-2214

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was alone in her house- accused entered inside the house and raped her- he also threatened to kill the prosecutrix- accused was tried and acquitted by the trial Court- held, in appeal that Medical Officer had not given any opinion regarding the assault on the person of the prosecutrix- FIR was lodged after the lapse of two years – PW-3 and PW-4 had not supported the prosecution version- the view taken by the trial Court cannot be said to be perverse and was reasonable – appeal dismissed. (Para-19 to 24) Title: State of Himachal Pradesh Vs. Piar Chand (D.B.) Page-1793

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was raped by accused repeatedly- she narrated the incidents to her parents- accused was tried and acquitted by the trial Court- held, in appeal that date of birth of the prosecutrix was proved to be 2.10.1994- incidents had taken place in the year 2009, therefore, prosecutrix was minor at the time of incidents- prosecutrix had improved upon her previous statement in the Court and she had disowned the contents of FIR in her cross-examination- her testimony was contradicted by other prosecution witnesses- trial Court had rightly appreciated the evidence- appeal dismissed. (Para-9 to 16) Title: State of H.P. Vs. Dheeraj Kumar (D.B.) Page-2096

Indian Penal Code, 1860- Section 376 and 506- **Protection of Children From Sexual Offences Act, 2013-** Section 6- Prosecutrix was called by accused in his room and was raped- she became pregnant- DNA sample of the child was matched- child was found to be biological son of the accused- accused was convicted by the trial Court- held, in appeal that date of birth of prosecutrix was proved to be 15.05.2000 – incident had taken place on 27.7.2013- thus, she was minor on the date of incident- skeletal/radiological age of the prosecutrix was between 12 ½ and

15 ½ years- she was opined to be 12 to 14 years of age medically- child was found to be biological son of the accused- accused had undergone mental treatment subsequent to the incident but it cannot be said that he was of unsound mind at the time of incident or was incapable of knowing the nature of his act- testimony of prosecutrix was satisfactory- appeal dismissed- H.P. State Legal Services Authorities directed to pay Rs.10,000/- per month as victim compensation in addition to Rs. 50,000/- awarded to her by way of fine- State directed to provide education to girl child up to post graduate level. (Para-31 to 45) Title: Vinod alias Dinesh Vs. State of Himachal Pradesh Page-2169

Indian Penal Code, 1860- Section 420, 468 and 471- Accused appeared before medical board for renewal of his disability certificate- disability certificate produced by the accused had some over writing, which excited suspicion of the board - record was inspected and it was found that original certificate was issued showing the disability as 03% which was altered to 83%- accused was tried and convicted by the trial Court for the commission of offences punishable under Sections 420, 468 and 471 of I.P.C.- an appeal was preferred, which was partly allowed and sentence passed under Section 468 of I.P.C. was set aside- aggrieved from the judgment of the Appellate Court, present revision has been preferred- held, in revision, that the Court will interfere in revision when there is a failure of justice or misuse of the judicial machinery or the sentence or order is not correct- it was admitted by the Investigating Officer in the cross-examination that accused is illiterate having no knowledge of Hindi and English and his specimen signatures were not taken due to this fact- Appellate Court had come to conclusion that accused had not forged the document- no appeal was preferred against the judgment of Appellate Court- had the accused forged the document, he would not have appeared before the Medical Board- evidence shows that accused remained under bona fide belief that disability certificate is a genuine document- once a conclusion was reached that accused had not forged the document, he could not have been held guilty of the commission of offences punishable under Sections 420 and 471 of I.P.C. (Para-26 to 33) Title: Amar Singh Vs. State of Himachal Pradesh Page- 1497

Indian Penal Code, 1860- Section 451, 341, 147, 323 and 506 read with Section 149- Accused gave beatings to the wife of the complainant – he had also damaged television and other articles- when complainant was coming to police Station to report the matter, accused slapped and gave him beatings- accused were tried and acquitted by the trial Court- held, in appeal that incident had taken place during Trilokpur fair – many persons had gathered but only interested witnesses were examined - Medical Officer stated that injuries could not have been caused by stick blow- there was a property dispute between the parties and litigation was pending between them- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 13) Title: State of Himachal Pradesh Vs. Baikunth Lal & others Page-2102

Indian Penal Code, 1860- Section 452, 376 and 506- **Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act 1989-** Section 3(1)(XI)- Prosecutrix was present in her home with her children- somebody knocked at her door in the middle of the night- she opened the door thinking that her husband might have come- however, accused was found standing outside- he came inside the house and raped the prosecutrix- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had narrated the incident to her husband after considerable delay- her husband stated that he used to inform the prosecutrix about his late arrival, thus there was no question of opening the door by the prosecutrix thinking that her husband had come- prosecutrix had not raised any alarm- she had made various improvements in the Court- her testimony is not trustworthy and does not inspire confidence- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-19 to 22) Title: State of Himachal Pradesh Vs. Amit Kumar (D.B.) Page-2062

Indian Penal Code, 1860- Section 452, 427, 325 and 506- Accused placed an order for chilly chicken and went inside the kitchen – query was made from the accused as to what he wanted- accused got infuriated and inflicted injuries to D and R- accused was tried and acquitted by the

trial Court- an appeal was preferred, which was dismissed- held, in appeal that evidence of the prosecution witnesses remained unshattered- accused had entered inside the kitchen- he was customer and had no right to enter into the kitchen of the hotel- accused had given beatings to D and R- merely because of the fact that there was no medical evidence, it cannot be said that hurt was not caused- Courts below had taken a reasonable view- revision dismissed. (Para-10 to 22) Title: Ajay Kumar @ Aju Vs. State of HP Page-2267

Indian Penal Code, 1860- Section 489-B and 489-C read with Section 34- Accused purchased three handkerchiefs from the complainant and handed over a currency note of Rs. 500/-- note was found to be fake- matter was reported to police- it was found that accused had handed over one currency note to another shopkeeper- accused was apprehended- search of the accused was conducted during which three fake currency notes were recovered- accused were tried and convicted by the trial Court- held, in appeal that currency notes were sent to FSL and were found to be fake- accused were identified by shopkeepers- shopkeepers had specifically stated that accused had visited their shops and had handed over fake currency notes- statements of witnesses were corroborated by the statement of the Investigating Officer- non explanation of the source of the currency note is a circumstance against the accused- appeal dismissed. (Para-16 to 25) Title: Neeraj Sharma Vs. State of H.P. Page-2277

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused- she told her father that accused was demanding dowry- subsequently deceased died- accused was tried and acquitted by the trial Court- held, in appeal that there are contradictions in the testimonies of the parents of the deceased- allegations which are general in nature have been levelled- no specific instance was given- PW-3 admitted that accused had never tortured the deceased nor any complaint was made by the deceased- the harassment on account of dowry was not proved- it was not proved that accused had abetted the deceased to commit suicide – trial Court had taken a reasonable view- appeal dismissed. (Para-18 to 28) Title: State of H.P. Vs. Jasbir Singh and others (D.B.) Page-1890

Indian Succession Act, 1925- Section 63- Plaintiffs filed a suit for declaration and possession pleading that suit land was owned and possessed by D, their predecessor- mutations attested on the basis of Will stated to have been executed by D were wrong as no Will was executed by D- suit was partly decreed by the trial Court- an appeal was preferred which was dismissed- held, in second appeal, that it was duly proved by the evidence of the plaintiffs that deceased was 80 years old at the time of his death and that he was not in sound disposing state of mind about 4 to 5 years prior to his death- it was admitted by the defendants that defendant No. 1 was present at the time of execution of the Will and that D used to do everything on the asking of the defendants which shows that D was under the influence of the defendants- evidence led by the defendants was contradictory and the view taken by the Courts that Will was not executed by the deceased in sound and disposing state of mind is correct- Courts had taken a reasonable view which was supported by evidence- appeal dismissed. (Para-13 to 38) Title: Lachhi Ram and another Vs. Dassi Devi and others Page-1916

'J'

Juvenile Justice (Care and Protection of Children) Act, 2000- Section 7- Petitioner moved an application for forwarding the juvenile to the concerned board- the application was allowed by ld. sessions Judge but the order was set-aside with a direction to hold an inquiry – Ld. sessions Judge conducted an inquiry and held that the juvenile was more than 18 years of age- held, that juvenility has to be determined after recording the evidence- the court can rely upon the matriculation certificate and in absence of the same, upon the date of birth certificate from the school first attended or the certificate given by a corporation or a municipal authority or a panchayat - if no documents are available, medical board is to be constituted for determination of age- Ld. Sessions judge has relied upon school leaving certificate but it was not issued by the

school first attended by the juvenile - petition allowed and ld. Sessions Judge directed to decide the question afresh. (Para 4-12) Title:Aman Chaudhary Vs. State of Himachal Pradesh and another. Page-1731

'L'

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for the construction of Hydro Electric Project- Collector determined the market value @ Rs. 1,65,400/- per hectare- a Reference Petition was filed, which was allowed- compensation was enhanced to Rs. 64.31 per centare- solatium was awarded on the additional compensation- aggrieved from the award, present Reference Petition has been filed- held, that claimants are entitled to additional amount @ 12% per annum on the market value of the acquired land from the date of publication of notification- claimants are also entitled for additional amount @ 30% on the enhanced amount- however, no solatium is payable on additional amount @ 12%- appeal allowed and it is held that amount of solatium shall not be payable on the additional amount. (Para-3 to 7) Title: HPSEB through its Secretary, Shimla & others Vs. Shamsher Singh & others Page-2321

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of water source- land acquisition collector determined market value of the land category wise at different rates - reference petitions were filed which were allowed and the market value was enhanced to Rs. 7.20 lakh- held, in appeal that the land was acquired for public purpose - no land was left for carrying any developmental activity- claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization- acquired area was accessible by motorable road - it had great potential of being put to both agricultural/horticultural as well as commercial use- sale deeds executed prior to acquisition were proved on record- the average value was Rs. 9.6 lakh and after deduction of 25 % on account of small area of the land, the market value of acquired land is Rs. 7.5 bigha per hectare- the court had rightly awarded the compensation- appeal dismissed. (Para-5 to 37) Title: Land Acquisition Collector & another Vs. Jatinder Singh. Page-1588

Limitation Act, 1963- Section 14- Truck owned by the respondent/ plaintiff suffered damages on account of accident – a complaint was filed before Consumer Forum, Bilaspur which was dismissed holding that respondent/plaintiff was not a consumer - an appeal was preferred, which was dismissed but liberty was granted to the respondent/plaintiff to avail any remedy prescribed by law- plaintiff filed a civil Suit – he also filed an application under Section 14 of Limitation Act for explanation of the delay- the application was allowed by the trial court- held that the plaintiff had filed complaint before consumer forum under a bona-fide belief - hence, the time spent by her before the Consumer Forum is to be excluded especially when liberty was granted to the plaintiff to avail remedy prescribed under law- the application was properly allowed by the trial court-revision dismissed. Title: The New India Assurance Company Limited VS. Meera Verma Page- 1495

'M'

Minimum Wages Act, 1948- Section 2(e)- Work was allotted to the petitioner by the National Thermal Power Corporation Limited – petitioner assigned the work to M/s Purvanchal Engineering Projects- a complaint was filed against the petitioner for violation of the provision of Minimum Wages Act- petitioner was summoned- application was filed, which was dismissed- held, that the term 'employer' means a person who employs another person either by himself or through some other person- therefore, even if the petitioner had assigned the work to M/s Purvanchal Engineering Projects, workman was engaged by the petitioner through M/s Purvanchal Engineering Projects- Minimum Wages Act is a beneficial provision and is applicable to assignor- petitioner was rightly summoned- petition dismissed. (Para-2 and 3) Title: Bharat Heavy Electrical Limited Vs. Union of India Page-1457

Motor Vehicles Act, 1988- Section 149- Accident was caused by the Tractor in which one person sustained injuries and one person died- insurance policy covered the risk 1+1- held that it was for the insurer to plead and prove that owner had committed willful breach of the terms and conditions of the policy- insurer had not led any evidence to establish the same- he was rightly saddled with liability- appeal dismissed. (Para-9 to 13) Title: Oriental Insurance Company Ltd. Vs. Dev Sawroop & others Page-1971

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased had hired the vehicle for carrying the rice and wheat seed bags- vehicle met with an accident due to rash and negligent driving of the driver, who had also died in the said accident- owner of the vehicle had not denied the facts- held, that it is beaten law of the land that the evasive denial is an admission as per the mandate of Order 8 of C.P.C.- Tribunal had rightly recorded the findings in the award- Award upheld and appeal dismissed. (Para-5 to 11) Title: United Indian Assurance Co. Ltd. Vs. Tikkam Ram and others Page-2031

Motor Vehicles Act, 1988- Section 149- Deceased had died due to rash and negligent driving of the driver- Insurer contended that driver did not possess a valid driving licence at the time of accident, award is excessive and the Tribunal had awarded interest on the higher side – held, that accident had taken place on 2nd August, 2006- licence was renewed on 24th July, 2004 and was valid up to 20th January, 2007, meaning thereby that driver had valid and effective driving licence at the time of accident- it was for the insurer to plead and prove this fact, but no evidence was led by the insurer to prove this plea - Tribunal had awarded interest @ 9% per annum, which is excessive and is reduced to 7.5% per annum - appeal dismissed. (Para-9 and 17) Title: Oriental Insurance Company Vs. Neelma Devi & others Page-1978

Motor Vehicles Act, 1988- Section 149- Deceased was driving the offending vehicle at the time of accident - he died in the accident- Insurer contended that driver did not possess a valid driving licence and vehicle was being plied in contravention of terms of the insurance Policy, but insurer has not led any evidence to prove these facts- insurance policy has been proved on record - compensation awarded by the Tribunal cannot be said to be on the higher side- there is no merit in the instant appeal and the same is dismissed. (Para-7 to 13) Title: Oriental Insurance Co. Ltd. Vs. Prajwal Singh and others Page-1969

Motor Vehicles Act, 1988- Section 149- Insurance policy shows that risk of three persons was covered- premium was also paid for third party- additional amount was paid which covered the risk of driver and the insured- risk of passengers was covered and it was not pleaded that deceased was a gratuitous passenger- therefore, insurer was rightly held liable to pay the compensation. (Para-16 to 29) Title: Oriental Insurance Company Ltd.Vs. Shanta and others Page-1974

Motor Vehicles Act, 1988- Section 149- Insurer contended that it is not liable to pay compensation- held that offending vehicle was a tractor, which falls within definition of a light motor vehicle- tractor along with trolley was insured with the Insurer- hence, insurer was rightly saddled with liability. (Para-13 to 20) Title: Bajaj Allianz General Insurance Company Limited Vs. Pawan Kumar and others Page-1957

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that deceased was travelling in the vehicle as gratuitous passenger- however, it had not led any evidence to prove this fact- it was subsequently pleaded in the claim petition that deceased had hired the vehicle from Mandi to Jaipur to bring goats but the vehicle met with an accident before reaching the destination- this fact was admitted by the owner – thus, deceased was not travelling in the vehicle as gratuitous passenger but had hired the vehicle and his risk was covered. (Para- 10 to 17) Title: Sarita Devi & others Vs. Ashok Kumar Nagar & others Page-

Motor Vehicles Act, 1988- Section 149- It was contended that insurer was wrongly discharged from liability- held, that claimant cannot file appeal for discharging the insured from liability- appeal dismissed. (Para-3 and 4) Title: Devi Singh Vs. Reeta Devi and others Page-1960

Motor Vehicles Act, 1988- Section 149- Sitting capacity of the tractor was 2+1 which means that risk of two labourers and one driver was covered- driver has a valid driving license- insurer had failed to prove the breach of terms and conditions of the insurance policy- the insurer was rightly held liable to pay compensation by the Tribunal- appeal dismissed. (Para- 3 to 9) Title: Oriental Insurance Company Ltd. Vs. Babita Kumari & others Page-1774

Motor Vehicles Act, 1988- Section 149- Tribunal granted the right of recovery to the insurer- held, in appeal that it was for the insurer to plead and prove that the driver did not have a valid driving license at the time of the accident – the insurer had not led any evidence to prove this fact – the insurer had not even asked the legal representative to place on record the driving license or to examine any official from the registration and licensing authority- the insurance policy was duly proved and thus the insurer is liable to indemnify the insured- Tribunal had fallen in error in exonerating the insurer from the liability- appeal allowed and insurer saddled with liability. (Para 12-15) Title: Prem Singh Vs. Bimla Devi and others Page-1782

Motor Vehicles Act, 1988- Section 149- Tribunal had granted the right of recovery to insurer- insured had not placed on record certain documents for which he filed an application - the route permit was also not placed on record - hence, the case remanded to the Tribunal to decide the issue no. 4 afresh after affording an opportunity to the owner as well as insurer to lead evidence in support of their contentions. (Para 4-7) Title: Ram Dhan and another Vs. Mehar Chand and another Page-1784

Motor Vehicles Act, 1988- Section 149- Tribunal held that the license of the driver of the vehicle was not renewed within the prescribed time and the driver did not have a valid driving license at the time of accident - the insured was saddled with liability-held, in appeal, it was for the insurer to plead and prove that the driver did not have a valid driving license at the time of accident- the insurer had not examined any witness to prove this fact- the driver had applied for the renewal of driving license on 7-5-2007 -license had expired on 16-04-2007- the driver is supposed to apply for the renewal of license within a period of one month from the date of expiry- the license was renewed on 30-05-2007 after verification - it was the duty of the licensing authority to renew the license within time and reject the application in case of some defect– the driver cannot be held liable for the delay caused by the authority- the Tribunal had wrongly saddled the insured with liability by holding that driver did not have a valid driving license at the time of accident - appeal allowed. (Para- 9 to 22) Title: Lalit Kumar Vs. Sanjiv Kumar and others Page-1763

Motor Vehicles Act, 1988- Section 149- Tribunal held that accident had taken place due to rash and negligent driving of drivers of both the offending vehicles- driver of the offending bus was having a valid and effective driving license and the driver of offending van was not having valid and effective driving license- insurer of the offending bus and owner and driver of the offending van were saddled with liability in the ratio of 50:50- held, that it was specifically pleaded in the claim petition that accident had occurred as a result of contributory negligence on the part of the drivers of the offending vehicles - it was duly proved from the pleadings of the parties and statements of witnesses that accident was the outcome of contributory negligence - insurer of the bus was rightly held liable to pay compensation of 50% - owner of the van had specifically pleaded that the driver of the van had a valid license- copy of the license was also placed on record- once the copy of the license was placed on record, it was for the insurer to prove that the driver did not have a valid and effective driving license at the time of the accident - however, no evidence was led by the insurer to this effect - even the police had not booked the driver for violation of the provisions of M.V. Act which shows that the driver had a valid driving license at

the time of accident- Insurance policy was duly proved and thus, the insurer was liable to indemnify the insured - risk of four passengers was covered hence, insurer held liable to pay the compensation to the claimants and to indemnify the insured-appeal allowed. (Para 10-21) Title: Sarvan Kumar Vs. Asha Kumari and others. Page-1785

Motor Vehicles Act, 1988- Section 149- Tribunal held the driving license was fake but directed the insurer to indemnify the insured without any right of recovery- held, that owner had nowhere pleaded or proved that he had checked the driving license and had satisfied himself regarding the genuineness of the same- the insurance company examined clerk of Licensing Authority, Agra who stated that license possessed by the driver of the offending vehicle was not issued by his office- he admitted that there are two RTOs in Agra -thus, it cannot be stated that license of the driver was proved to be fake- onus to prove breach of terms and conditions of the policy was upon the insurer and the insurer was to prove that driver did not have a valid and effective driving license at the time of the accident-in these circumstances, the Tribunal had wrongly held the license to be fake - Appeal dismissed. (Para 6-34). Title: The New India Assurance Company Ltd. Vs. Indu Bala and others Page-1829

Motor Vehicles Act, 1988- Section 166- A claim petition was filed pleading that ground floor of the house was damaged, when a truck rammed into the dwelling house – amount of Rs. 2,37,000/- was awarded as compensation to the claimants- held, that claimants had duly proved that their house was damaged- roof had collapsed and furniture was damaged- damage was assessed by PW-5- it was admitted by respondent No. 6 that truck had rammed into the house of the claimants- a sum of Rs. 10,000/- was given to help the claimant no. 1- MACT had rightly deducted Rs. 10,000/- from the compensation and had awarded the compensation correctly- petition dismissed. (Para-13 to 15) Title: Oriental Insurance Company Ltd. Vs. Kamla Devi and others Page-1464

Motor Vehicles Act, 1988- Section 166- Claim petition was filed by the legal heirs of the deceased H, who died in an accident- accident was caused by rash and negligent driving of driver of the offending vehicle- Tribunal had awarded compensation of Rs. 3,34,000/- along with interest at the rate of 9% per annum in favour of the claimants- the owner-insured and the driver were saddled with the liability - the insurer and the claimants have not questioned the award and the same has attained finality – feeling aggrieved from the award, an appeal was preferred- held, that it was for the insurer to plead and prove that the claim petition was not maintainable and vehicle was being driven in breach of terms and conditions of insurance policy- an application was moved for placing on record copy of the insurance policy and the copy of the driving licence, which is allowed and documents are ordered to be taken on the record - insurer shall also be afforded opportunity to lead evidence- Tribunal is directed to conclude the case afresh after recording the evidence within three months. (Para- 8 to 15) Title: Ramesh Kumar & another Vs. National Insurance Company Ltd. & others Page-1985

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in the accident- he remained admitted in the hospital for 12 days- Tribunal had awarded compensation of Rs. 35,000/-, which on the face of it is not legally correct- claimant is entitled to Rs. 50,000/- under the head 'pain and suffering', Rs. 10,000/- under the head 'Attendant Charges" and Rs. 10,000 under the head 'Medical Expenses'- claimant was not in position to earn for at least four months- he is entitled to Rs. 25,000/- under the head "Loss of Income" and Rs. 25,000/- for "Loss of Amenities of Life"- claimant had sustained 50% disability and is entitled to Rs. 50,000/- under the head 'loss of future income'- claimant is held entitled to Rs. 1,70,000/- along with interest @ 7.5% per annum from the date of claim petition till realization. (Para-5 to 10) Title: Sajjal Kumar Vs. Baldev Singh and others Page-1987

Motor Vehicles Act, 1988- Section 166- Claimants had specifically pleaded that respondent no. 2 was driving the vehicle in a rash and negligent manner which caused the accident- PW-2 had

deposed that accident was the outcome of rash and negligent driving of the driver- the respondents had failed to lead any evidence to show that accident had taken place due to mechanical defect - thus it was rightly held that accident was the outcome of rashness and negligence of the driver- appeal dismissed. (Para 10-12) Title: The National Insurance Co. Ltd. Vs. Tek Chand and others. Page-1827

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that the deceased was earning Rs. 10,000/- per month- even taking the income of the deceased as a labourer, he would have been earning Rs. 4,500 per month- one half of the amount was to be deducted towards personal expenses – loss of dependency is Rs. 2,250/- the deceased was aged 23 years and multiplier of 16 is applicable- the claimants are entitled to Rs. 2250x12x16= Rs. 4,32,000/- the claimants are also entitled to Rs. 10,000/- each for loss of love and affection, loss of estate and funeral expenses - the claimants are entitled to Rs. 4,62,000/- along with interest @ 7.5% per annum from the date of award till realization. (Para 10-11) Title: Karnail Singh and another Vs. Rattan Lal Gujjar and others Page- 1761

Motor Vehicles Act, 1988- Section 166- Claimants were the victims of motor vehicle accident which was caused by the driver while driving Mahindra Max- Compensation of Rs. 5,86,000/- along with interest @ 7.5 % was awarded by the Tribunal- held, that the insurer had not led any evidence to prove the breach of terms and conditions of the policy and it was rightly held liable to pay the compensation- appeal dismissed. (Para 6-9) Title: National Insurance Company Ltd. Vs. Smt. Rama @ Babita & others. Page-1773

Motor Vehicles Act, 1988- Section 166- Compensation is to be awarded for pecuniary as well as non-pecuniary damages - claimant remained admitted in the hospital w.e.f. 27th September, 2005 to 27th October, 2005- she had to go for follow-up after one and half month- she suffered spinal injury and plates were inserted- she had suffered 40% temporary disablement- she was unable to work for one year- taking the income of the deceased as Rs. 5,000/- claimant is entitled to Rs. 5000 x 12 = Rs. 60,000/-- she had suffered 25% permanent disability and her loss of income is Rs. 1,250/- per month- she is entitled to Rs. 1250/- x 12 x15 = Rs.2,25,000/- under the head 'loss of future income'- she is entitled to Rs.50,000/- under the head 'pain and suffering', Rs.25,000/- under the head 'loss of amenities of life'- she is entitled to Rs.16,221/- under the head 'expenditure on medical treatment', Rs.8,000/- under the head expenditure on attendant and transportation charges- thus, she is entitled to total amount of Rs.3,84,221/-. (Para-13 to 23) Title: Savitri Devi Vs. National Insurance Company & another Page-1999

Motor Vehicles Act, 1988- Section 166- Compensation of Rs. 13,45,064/- along with interest @ 9% per annum awarded in favour of the claimants - the insurer was saddled with liability- Insured has not questioned the impugned award, thus, the same has attained finality- insurer had opposed the award on the ground that the awarded amount is excessive- held, that Tribunal had fallen in error in awarding interest at the rate of 9% and rate of interest reduced from 9% to 7.5% per annum - Accounts Branch had deducted Rs. 8 lacs towards income tax- awarded amount and interest accrued on the deposits made under the orders of the Court in Motor Accident Claims cases is not liable for income tax - awarded amount be strictly released in favour of the claimants as per terms and conditions contained in the award. (Para- 4 to 11) Title: National Insurance Company Ltd.Vs. Jhansi Devi and others Page-1961

Motor Vehicles Act, 1988- Section 166- Deceased was a business man - he was running an agency of Bajaj Allianz Insurance Company - he was also having agricultural income- Tribunal had rightly treated the annual income of the deceased as Rs. 96,000/- per annum- four persons were dependent upon deceased - Tribunal had wrongly deducted 1/3rd amount towards personal expenses whereas 1/4th amount was to be deducted - loss of dependency will be Rs. 72,000/-- the deceased was 43 years of age and multiplier of 14 is applicable - the claimants are entitled for a compensation of Rs. 72,000/- x 14= 10,08,000/- claimants are also entitled to Rs. 10,000/-

each (Rs. 40,000/- in total) under the heads 'loss of estate', 'loss of consortium', 'loss of love and affection' and 'funeral expenses' - total compensation of Rs. 10,08,000/- + Rs. 40,000/- = Rs. 10,48,000/- awarded. (Para 23-28) Title: Lalit Kumar Vs. Sanjiv Kumar and others. Page-1763

Motor Vehicles Act, 1988- Section 166- Deceased was driving the Scooty and A was pillion rider - a Jeep coming from opposite side being driven by R rashly and negligently hit the Scooty due to which deceased sustained injuries and succumbed to the same- while pillion rider sustained multiple injuries- Tribunal allowed the Claim Petition and granted compensation of Rs. 3,39,000/- along with interest at the rate of 6% per annum in favour of the claimant and saddled the insurer with the liability- Tribunal also allowed the Claim Petition and granted compensation of Rs. 99,800/- along with interest at the rate of 6% per annum in favour of the injured and the insurer was saddled with the liability – feeling aggrieved from the awards, appeals were preferred- held, that Tribunal had relied upon the statement of claimant / pillion rider, who appeared as PW-4 and had brushed aside the evidence led by the respondents- Tribunal had not discussed the statements of RW-1, RW-3, RW-4 and RW-5, who are independent witnesses and not related to any of the parties- claimant / pillion rider was an interested witness - an FIR was registered against the driver of the Scooty, whereas, no FIR was registered against the driver of the Jeep- it was duly proved that accident was the outcome of rash and negligent driving of the driver of the Scooty, therefore, the claim petition filed by the mother of the deceased was not maintainable- appeals are allowed, impugned awards are set aside and claim petitions are dismissed. (Para-17 to 27) Title: Oriental Insurance Co. Ltd. Vs. Anjana Sharma and another Page-1965

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the offending vehicle- vehicle met with an accident due to rash and negligent driving – deceased had died on the spot- An FIR was registered against the driver of the offending vehicle under Sections 279, 337 and 304-A of the Indian Penal Code - challan was filed against the driver before the Court of competent jurisdiction- Legal heirs of deceased claimed compensation of Rs. 45 lacs- deceased was 35 years old, who was M.A. in Economics, employed as Sales Executive in a private firm - his monthly income was Rs. 29,166/- salary certificate was proved- after statutory deduction, total annual income of the deceased for the purposes of determining the compensation would be Rs. 4,60,625/- [Rs. 5,25,000 – Rs. 62,500 (tax) – Rs. 1250 (Edu. Cess @ 2%) – Rs. 625 (Higher Edu. Cess @ 1%)] - multiplier of 15 was applied, which is correct- claimants are entitled to Rs. 46,06,260/- (Rs. 3,07,084 X 15) under the head 'loss of dependency', however, in view of the principle of law laid down by the apex Court in **Ranjana Prakash & others vs. Divisional Manager & another, (2011) 14 SCC 639**, claimants shall be entitled to only a sum of Rs. 34,95,000/- on this count, as awarded by the Tribunal. Title: National Insurance Company Ltd. Vs. Ritu Sharma & others Page-1666

Motor Vehicles Act, 1988- Section 166- Injured had sustained injuries in the accident- he was admitted in hospital on 9th Dec., 2005 and was discharged on 16 Dec., 2005 - while assessing the compensation, some guess work has to be made- the injured had suffered pain and suffering for 8 days- he was attended by an attendant and must have spent some amount for medicines and special diet - hence, an amount of Rs. 35,000/- awarded in lump sum in addition to the amount already awarded by the Tribunal along with interest @ 7.5 % per annum. (Para 7-14) Title: Bago Devi and others Vs. Sat Pal Saini and others. Page-1754

Motor Vehicles Act, 1988- Section 166- **Limitation Act, 1963-** Section 5- **Code of Civil Procedure, 1908-** Order 22 Rule 3- Sole proprietor of the claimant firm died during the pendency of the claim petition- application for substituting his son as legal representative was filed along with an application for condonation of delay- applications were dismissed by the Tribunal- claim petition was also dismissed as having abated – held, in appeal that limitation was prescribed earlier for filing claim petition- however, provision relating to limitation was deleted w.e.f. 14.11.1994- claim petition can be filed at any time- provisions of order 22 are not applicable to the proceedings under the Act- Tribunal had erred in dismissing the application- appeal allowed

and Tribunal directed to proceed with the claim petition, after bringing on record the Legal representatives of deceased. (Para-6 to 14) Title: M/s Bakshi Ram Rattan Chand Vs. Vijay Kumar and others Page-1769

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 6% per annum- rate of interest should be awarded as per prevailing rate - hence, rate of interest enhanced to 7.5% per annum from the date of filing the claim petition till realization of amount. (Para-54 and 55) Title: Sarita Devi & others Vs. Ashok Kumar Nagar & others Page-1988

Motor Vehicles Act, 1988- Section 173- It was contended that Appellate Court cannot set aside the findings recorded against the owner and driver who had not preferred any appeal- held, that the Court is under an obligation to decide all issues of facts and law after appreciating the evidence- Appellate Court can pass an order which ought to have been passed by the Tribunal even if there is no appeal or cross-objections. (Para-18 to 52) Title: Sarita Devi & others Vs. Ashok Kumar Nagar & others Page-1988

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N.D.P.S. Act, 1985- Section 8, 20 and 29- Accused P was carrying a red and blue coloured bag on his shoulder - accused R was with him- search of bag was conducted during which 1.3 kg charas was recovered- they were tried and convicted by the trial Court- held, in appeal that accused P was apprehended with the bag- an option to be searched was given to him- he consented to be searched by the police- all the codal formalities were completed on the spot- independent witness had not supported the prosecution version but he admitted his signatures on the memo and the parcels- contraband was found to be charas- prosecution case was proved beyond reasonable doubt- accused were rightly convicted by the trial Court- appeal dismissed. (Para-11 to 13) Title: Raj Kumar Vs. Narcotics Control Bureau (D.B.) Page-2323

N.D.P.S. Act, 1985- Section 15- Accused was found in possession of 1.6 kg poppy straw- accused was tried and convicted by the trial Court- held, in appeal, that testimonies of prosecution witnesses are corroborating each other- there are no material contradictions in the same- there is no evidence that Investigating Officer had prior information regarding the possession of contraband by the accused- evidence was properly appreciated by the trial Court- appeal dismissed - however, sentence modified, keeping in view the time lapsed from the date of the incident. (Para-9 to 13) Title: Rasheed Vs. State of Himachal Pradesh Page-1691

N.D.P.S. Act, 1985- Section 20- Accused came from Larji side and on seeing the police, he took out a poly bag from the pocket of his jacket and threw it towards Beas River- poly bag was found to be containing 1 kilogram charas- accused was tried and acquitted by the trial Court- held, that personal search of the accused was carried in the presence of J and T- T was a part of the police party and J was associated as an independent witness who was resident of Padiun village situated at a distance of 40 KM from the spot- it is not the case of the prosecution that the place of incident was a secluded place where no independent witness could have been associated- non-association of independent witnesses by the police raises serious doubts about the truthfulness of the prosecution version - quantity of charas was not mentioned in the NCB form and there is interpolation- NCB form is a basic document to prove the authenticity of the case and failure to fill the NCB at the spot is fatal to the prosecution case- spot map shows that the poly bag was lying on the edge of the middle of the road which belies the story of the prosecution that accused threw the poly bag towards River Beas- therefore, there is discrepancy regarding the place of recovery as well - prosecution case was not proved- in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. (Para-16 to 23) Title: State of Himachal Pradesh Vs. Sanjay Kumar (D.B.) Page-2022

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police- he was apprehended and 3.1 kg charas was recovered from him- he was tried and convicted by the trial Court- held, in appeal that accused was apprehended at an isolated place- Village was at some distance from the place, where accused was apprehended – non-association of the independent witnesses was neither deliberate nor intentional- official witnesses had no enmity with the accused- recovery was effected from boru- there was no requirement of complying the requirements of Section 50 of N.D.P.S. Act- seals were found intact when the case property reached FSL, Junga- link evidence was complete- appeal dismissed. (Para-12 to 16) Title: Chaman Lal Vs. State of H.P. (D.B.) Page-2190

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police- he was apprehended and his search was conducted during which 800 grams charas was recovered from him- he was tried and convicted by the trial Court- held, in appeal that accused was apprehended at 3:30 P.M.- all the codal formalities were completed on the spot- contraband was produced before SHO who resealed the same and deposited it with HHC- it was sent to FSL, Junga for analysis- place from where the accused was apprehended was isolated- efforts were made to associate independent witnesses but they refused – prosecution case was duly proved against the accused- appeal dismissed. (Para-13 to 16) Title: Ludar Chand Vs. State of H.P. Page-2235

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a bag on his shoulder- he tried to run away on seeing the police- he was apprehended and his search was conducted- 810 grams charas was found in his possession- he was tried and acquitted by the trial Court- held, in appeal that accused was apprehended at an isolated and deserted place – there was no possibility of associating independent witnesses- trial Court had wrongly held that police had not associated independent witnesses- testimonies of police officials are corroborating each other- trial Court had wrongly acquitted the accused- appeal allowed and accused convicted. (Para-13 to 17) Title: State of Himachal Pradesh Vs. Surjeet Kumar(D.B.) Page-2166

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 kg. charas - he was tried and acquitted by the Trial Court- held, in appeal that one independent witness had not supported the prosecution version- other independent witness was not examined- there are major contradictions in the statements of police officials regarding the manner in which the accused was apprehended and the manner in which search was conducted- the link evidence was not proved - the court had rightly acquitted the accused - appeal dismissed. (Para-20 to 30) Title: State of Himachal Pradesh Vs. Shashi Pal alias Babu. Page-1715

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg. charas - he was convicted by the Trial Court- held in appeal, independent witnesses had not supported the prosecution version – however, they had admitted their signatures on the memo and they are estopped from denying the content of the memo in view of Sections 91 & 92 of Indian Evidence Act -their testimonies will not shake the prosecution version –however, link evidence was not proved as the road certificate was not exhibited - entry in the malkhana register when the case property was brought to the Court was not proved and the exhibited case property was not linked to the contraband recovered on the spot- the prosecution case was not proved and the Trial Court had wrongly convicted the accused- appeal accepted and accused acquitted. (Para 9-15) Title: Rashid Mohammad Vs. State of H.P. Page-1487

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 500 grams charas - he was convicted by the Trial court- held in appeal that independent witness was not examined by the prosecution- accused was apprised of his right of being searched before a Gazetted Officer, Magistrate or police which is not in accordance with the Section 50 of the N.D.P.S. Act as no option to be searched before the police is to be given- Trial Court had wrongly convicted the accused- appeal dismissed. (Para- 9 to 12) Title: Anil Kumar Vs. State of H.P. Page-1369

N.D.P.S. Act, 1985- Section 20- Accused was found sitting on seat No. 17 of bus- he was having a packet in his lap, which was checked and 464 grams charas was found in the bag- accused was tried and convicted by the trial Court- held, in appeal that PW-8 to PW-10 have categorically stated that accused was carrying a bag, which was found to be containing 464 grams charas- search, seizure and sampling proceedings were completed at the spot strictly in accordance with law- charas was recovered from the bag- there was no requirement of complying with Section 50 of N.D.P.S. Act- prosecution had proved its case against the accused beyond reasonable doubt- accused was rightly convicted by the trial Court- appeal dismissed. (Para-13 and 14) Title: Pardeep Kumar vs. State of Himachal Pradesh Page-1982

N.D.P.S. Act, 1985- Section 20- An information was received that a person was coming for sale of charas and huge quantity could be recovered from him – information was received in writing and was sent to SDPO- accused was apprehended- his search was conducted during which 250 grams charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that PW-1 and PW-2 had turned hostile but they had admitted their signatures on various documents - consent memo was proved- all formalities were completed at the spot- case property was produced before SHO who had re-sealed the same- contraband was examined at FSL and was found to be charas- prosecution has proved its case beyond reasonable doubt that contraband was recovered from 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-16 to 19) Title: State of Himachal Pradesh Vs. Sunil Kumar (D.B.) Page-2204

N.D.P.S. Act, 1985- Section 20- Car was intercepted and searched by the police- 3.5 kgs. Charas was recovered from the Car- accused were present in the car- they were tried and acquitted by the trial Court- held, in appeal that testimonies of official witnesses are bereft of intra se contradictions- independent witness had not supported the prosecution version but he had admitted his signature upon the seizure memo- hence, he is estopped from denying its contents in view of Section 91 and 92 of Indian Evidence Act- however, prosecution had failed to connect contraband recovered at the spot with the charas analyzed in the laboratory as malkhana register was not produced before the Court- there was variation in the weight of the case property as recorded in the FIR and as produced before the Magistrate- all these circumstances, create doubt regarding the prosecution version and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para-12 to 18) Title: State of H.P. Vs. Vinod Kumar and others (D.B.) Page-2123

N.D.P.S. Act, 1985- Section 20- Car was stopped and searched- 1.4 kgs. charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that testimonies of prosecution witnesses are contradicting each other- no independent witness was associated at the time of investigation, although, investigation was completed in the police post- there were discrepancies regarding the number of seals –samples sent for analysis were also not tallying – trial Court had considered all these factors to record acquittal- view taken by trial Court was reasonable one- appeal dismissed. (Para-23 to 36) Title: State of Himachal Pradesh Vs. Jugal Kishore & others (D.B.) Page-1946

N.D.P.S. Act, 1985- Section 20- Police had set up a nakka- driver of the vehicle stopped the vehicle at some distance on seeing the police and tried to run away- he was apprehended- search of the vehicle was conducted during which 4.5 kg. charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that it was a case of chance recovery- police had no prior information- accused was apprehended when he had tried to run away on seeing the police- mere suspicion even if it is a positive suspicion cannot be equated with reason to believe or prior information- trial Court had wrongly held that police was required to comply with Sections 41, 42 and 50 of N.D.P.S. Act- however, testimonies of the prosecution witnesses were contradictory- defence version was probable- independent witnesses were not associated despite availability –

trial Court had taken a reasonable view– appeal dismissed. (Para-16 to 29) Title: State of Himachal Pradesh Vs. Sunder Singh Page-2130

N.D.P.S. Act, 1985- Section 20- Police was on patrolling duty- accused alighted from the vehicle and on seeing the police ran away- he was apprehended- he was apprised of his right under Section 50 of the N.D.P.S. Act- accused consented to be searched by the police- one bag containing 1 kg charas was recovered from the accused- car was searched and 1 kg charas was recovered from the Car- accused was tried and acquitted by the trial Court- held, in appeal that accused was apprehended at 3:30 a.m.- search, seizure and sampling proceedings were completed at the spot in accordance with the law - accused was apprised of his right to be searched before Magistrate or Gazetted Officer- trial Court had wrongly held that there was no compliance of Section 50 of the Act- there was no habitation and no possibility of joining independent witnesses- judgment passed by the Trial Court set aside- accused convicted of the commission of offence punishable under Section 20 of the N.D.P.S. Act. (Para- 14 to 17) Title: State of Himachal Pradesh Vs. Sunil Kumar (D.B.) Page-1491

N.D.P.S. Act, 1985- Section 20- Two accused were seen exchanging the bags and the third one was helping them with a torch - accused were searched during which 4 kgs. charas was recovered - 56 currency notes in the denomination of Rs. 500/- and 200 currency notes in the denomination of Rs. 100/-, total Rs.48,000/- were also recovered- accused were acquitted by the trial Court- held, in appeal that police had not given option to the accused under Section 50 of the N.D.P.S. Act - no torch was recovered- trial Court had taken a view, which was reasonable while acquitting the accused- appeal dismissed. (Para-11 to 18) Title: State of Himachal Pradesh Vs. Neeraj Sharma & others (D.B.) Page-2013

N.D.P.S. Act, 1985- Section 21- **Indian Penal Code, 1860-** Section 419- Accused started running on seeing the police party- he was apprehended and searched- 100 strips containing 10 capsules each, total 800 capsules of Spasmocip plus were recovered- accused revealed his name as V on inquiry - subsequently, his name was found to be A- accused was tried and acquitted by the trial Court- held, in appeal that PW-2, an independent witness, had not supported the prosecution version- there are contradictions regarding the time which make the prosecution version doubtful- statements of prosecution witnesses are contradicting each other- ASI of Crime Branch with whom samples were deposited was not examined to complete link evidence- statements of official witnesses are not consistent to each other- specimen seal was not produced before the Court- independent witnesses were not associated despite availability – trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 16) Title: State of Himachal Pradesh Vs. Ajay Kumar (D.B.) Page-1789

N.D.P.S. Act, 1985- Section 58- Search of the bags being carried by the accused on a scooter was conducted during which 2.5 kg. Bhukki was recovered - the accused was tried and convicted by the Trial court- held, in appeal that one independent witness had not supported the prosecution version - other independent witness was not examined - conviction can be based on the testimonies of police official if they inspire confidence and are found to be trustworthy and reliable - however, in the present case the testimonies of police officials were contradictory – sample of 100 grams was taken on the spot- however, weight of the sample was found to be 73 grams in laboratory- this discrepancy was not explained - seal put on the samples was not proved- in these circumstances, the prosecution case was not proved beyond reasonable doubt- the accused was wrongly convicted by the Trial court- Appeal allowed. (Para-10 to 28) Title: Jaspal Singh s/o Sh. Kehar Singh Vs. State of Himachal Pradesh. Page-1661

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque which was returned with the memo 'Stop payment' – payment was not made despite issuance of notice of demand- a complaint was filed against the accused which was ordered to be returned for filing the same before appropriate Court having jurisdiction- aggrieved from the order, a revision was preferred –

held, in revision, that after enactment of Negotiable Instruments Act Amendment Second ordinance, 2015, complaint can be tried by a court within whose local jurisdiction, cheque is delivered for collection - the ordinance is deemed to have come into force with effect from 15.6.2015- thus, jurisdiction was to be determined in accordance with the provision of the Ordinance- cheque was issued by the accused from his account in State Bank of India Branch Transport Nagar Narwal, Jammu, J&K and the Magistrate had the jurisdiction- revision allowed. (Para-5 to 12) Title: Dharam Chand Vs. Inderjeet Singh Page-1523

Negotiable Instruments Act, 1881- Section 138- Complaint was filed pleading that complainant had supplied the building material to the accused worth Rs. 75,000/- for construction of the house- cheque was issued, which was dishonoured with an endorsement 'account closed'- accused was tried and acquitted by the trial Court- case remanded to trial Court with the direction to conduct further inquiry regarding the cheque from the official of the bank and thereafter to dispose of the complaint in accordance with the law. (Para-9 to 13) Title: Mulakh Raj Mehta son of Shri Manohar Lal Mehta Vs. Mehar Chand son of Shri D.S. Sharma Page-1871

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Persons with disabilities (equal opportunities) Protection of Rights and Full Participation Act, 1995- Section 33- Petitioner was appointed as a clerk against the vacancy reserved for physically handicapped persons- he filed a writ petition seeking direction to the State to grant reservation even while making promotions- the writ petition was dismissed by the Writ Court- held in appeal, that this question has already been decided by Rajasthan High Court in ***Arun Singhvi Vs. New India Assurance, Civil Special Appeal (W) No.628 of 2010, decided on 4.11.2015*** **-** every High Court must give due deference to the views expressed by other High Courts- writ court has taken a correct view- appeal dismissed. (Para 3-10) Title: Partap Singh Vs. State of HP & ors Page-1674

Prevention of Food Adulteration Act, 1954- Section 16 (1) (a) (i)- Food Inspector took sample of iodized salt against the payment of Rs. 21- the salt was found to be adulterated- notice of the accusation was put against the proprietor - an application for impleading the manufacturer was filed which was allowed and petitioner was impleaded- held, that the plea of the petitioner that company had made nomination is not sufficient as the nomination was made by a different company- the company was summoned but necessary steps were not taken to ensure its presence- the question whether the offence was committed with the consent or connivance of director, manager or Secretary or any other officer of the company cannot be decided at this stage- petition dismissed and the trial court directed to ensure the presence of the company and to dispose of the complaint in accordance with law. (Para-6 to 10) Title: P.B.Anadam then Managing Director of Jakhau Salt Company Private Limited. Vs. State of HP and others. Page-1775

Protection of Women from Domestic Violence Act, 2005 - Section 12- Marriage between petitioner and respondent was solemnized and two children were born- relations between the parties were not good and the respondent was compelled to leave her matrimonial home- respondent filed an application under Section 12, in which maintenance of Rs. 3,000/- per month was granted- an appeal was preferred, which was dismissed- held, that it is moral and legal duty of the husband to provide basic amenities of life like food, clothes and shelter and to maintain children – Section 12 has been enacted for amelioration of the financial, mental agony and anguish that woman suffers on leaving her matrimonial home – she is entitled to lead a life as she would have lived in the house of her husband- once the husband is an able-bodied man capable of earning sufficient money, he is under legal obligation to support his wife as well- maintenance @ Rs. 3,000/- per month had been awarded to wife and two children, which cannot be said to be excessive- husband has not paid maintenance awarded to the wife and has not complied with the

undertakings- direction issued to comply with undertaking failing which contempt proceedings will be initiated. (Para-5 to 24) Title: Chhaju Ram Vs. Asha Devi Page-2312

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of four bags of English liquor bearing mark 'Bagpiper'- accused was tried and acquitted by the trial Court- an appeal was preferred which was dismissed as not maintainable- held, in revision that only four bottles were sent for analysis; thus, it was only proved that the accused was found in possession of four bottles of liquor and it cannot be said that accused was in possession of 48 bottles- he was carrying two bottles beyond permissible limit, hence, offence would be bailable- appeal lies against the order of the acquittal, in an offence which is cognizable and non-bailable- accused had committed a bailable offence- therefore, appeal was not maintainable and was rightly dismissed by the Sessions Court- revision dismissed. (Para-5 to 17) Title: State of Himachal Pradesh Vs. Naresh Kumar Page-1385

Punjab Excise Act, 1914- Section 61(1)(a)- Accused were found in possession of 360 bottles of IMFL- they were tried and convicted by the trial Court- an appeal was preferred which was dismissed- held, in revision that testimonies of prosecution witnesses clearly proved that accused were found in the truck which was carrying 360 bottles of IMFL- accused failed to prove any valid permit to transport the liquor- minor discrepancies are not fatal to the prosecution version- report of chemical Examiner proved that samples taken from the confiscated bottles were of IMFL- Courts had taken a reasonable view on the basis of material on record- revisional jurisdiction cannot be exercised to substitute the view of revisional Court- however, keeping in view that samples of only 30 bottles were sent for analysis, sentence modified. (Para-17 to 27) Title: Jai Lal and another vs. State of Himachal Pradesh Page-1911

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Scheduled castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3 (i) (viii)- A civil suit was filed by accused, which was dismissed- an appeal was preferred, which was also dismissed- complainant claimed that he had no concern with the suit land but he was wrongly arrayed as co-defendant- he was harassed by the accused by initiating legal proceedings- accused was tried and acquitted by the trial Court- held, in appeal that mere institution of civil suit against the complainant by accused will not attract the penal provision of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, unless accused made derogatory aspersions qua his caste- no evidence was led to prove this fact- appeal dismissed. (Para-9 to 11) Title: State of H.P. Vs. Jai Chand Page-2146

Specific Relief Act, 1963- Section 5- Plaintiffs filed a suit for possession pleading that defendant started raising shed over the suit land- he also got himself recorded to be in possession of the suit land- possession of the defendant over the suit land is unlawful and illegal- hence, suit was filed for seeking possession- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that predecessor-in-interest of the plaintiffs acquired title by way of sale deed – possession was also delivered to him- defendant had failed to prove any title in himself – adverse possession pleaded by defendant was not proved- owner is entitled to take possession- suit was rightly decreed by the Courts- appeal dismissed. (Para-8 and 9) Title: Harish Kumar Vs. Manorama Devi & others Page-1943

Specific Relief Act, 1963- Section 6- Plaintiff filed a suit for possession on the ground that he was forcibly dispossessed by the defendant- the suit was dismissed by the Trial Court- held in revision, plaintiff had not only sought the possession but had also sought the injunction - suit was not tried summarily– the judgment and decree cannot be agitated by invoking the revisional jurisdiction of the High Court- petition dismissed. (Para 9-11) Title: Bihari Lal Vs. Dina Nath. Page-1470

Specific Relief Act, 1963- Section 34- Plaintiff claimed the property of his deceased uncle on the strength of a Will allegedly executed in his favour-defendants disputed the execution of the Will and termed the same as false and fabricated document-the plea of the plaintiff did not find favour with the trial Court and the suit was dismissed- first appeal was also dismissed – held, in second appeal, that no witness of the plaintiff had stated that the deceased was in sound disposing state of mind- one of the attesting witness was not cited as a witness and the other attesting witness was closely related to the plaintiff- the fact that the plaintiff also did not produce the Will for mutation for about one year despite various opportunities given by the Revenue authorities raises suspicion about the genuineness of the Will -plaintiff and his son had actively participated in the execution of the Will making the execution of Will highly doubtful-execution of the Will is surrounded by the suspicious circumstances - plaintiff has failed to dispel the same- suit and appeal were rightly dismissed - second appeal also dismissed. (Para 20 to 30) Title: Moola Vs. Kisso & Ors. Page-1378

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration and injunction pleading that he is owner in possession of the suit land- revenue entries showing the name of the defendant No. 1 as owner in possession are incorrect- land was previously owned by N who had executed a Will in favour of the plaintiff- defendant No. 1 taking advantage of minority of the plaintiff had filed a civil suit against the plaintiff, which was not properly defended by mother of the plaintiff- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal, that N was declared to be the non-occupancy tenant of the suit land- this judgment was upheld in appeal – proprietary rights were conferred upon N- dispute raised by the plaintiff had already been adjudicated in the earlier suit - appeal dismissed. (Para-8 and 9) Title: Sukh Dev Vs. Kishan Chand and others Page-2138

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that she had been enjoying her right in the suit land prior to regular settlement without any interruption and she had become owner by way of adverse possession- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that plea of adverse possession cannot be used as sword but can only be used as shield- appeal dismissed. (Para-5 and 6) Title: Niru Ram Vs. State of Himachal Pradesh & others Page-1963

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration that he has become owner by adverse possession- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal, that revenue record shows that entry in the column of possession was recorded as 'Kabja Malik Tbe Kahuk Bartandaran Mutabik Naksha Bartan'- a person pleading adverse possession has to prove continuous, open, peaceful, hostile and uninterrupted possession to the knowledge of true owner- proceedings were initiated against the plaintiff for encroaching upon the government land- mere statement that a person is in possession for more than 12 years is not sufficient to prove adverse possession- suit and appeal were rightly dismissed by the Courts- appeal dismissed. (Para-9 to 15) Title: Suresh Kumar and Ors. Vs. State of H.P. Page-1404

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they have been exercising their customary rights of collection of *Chilgoza,* grass, dead leaves, fuel wood, etc. over the suit land – defendants denied the claim of the plaintiffs- suit was decreed by the trial judge- an appeal was preferred, which was dismissed- held, in second appeal that defendants started exercising their rights as per the order passed by Settlement Collector- however, ample opportunity was not given to the plaintiffs before passing the order- plaintiffs were not permitted to cross examine the witnesses- plaintiffs have proved that they were exercising their customary rights over the suit land since time immemorial peacefully- Courts had correctly declared the order passed by the Settlement Collector and the mutation attested on the basis of the same as illegal and void- appeal dismissed. (Para-23 to 31) Title: Zumla Zamindaran of Village Shong

through their representatives Vs. Zumla Zamindaran of Village Chansu through their representatives Page-1447

Specific Relief Act, 1963- Section 34- Plaintiff filed a Civil suit pleading that his father was in exclusive possession of suit land - defendants never objected to the possession of the plaintiff- defendants raised a dispute in Oct., 1990 stating that the suit land was granted as Nautaur to their predecessor- they tried to forcibly plough the land but this attempt was defeated - the plaintiff is in adverse possession and has become owner on the expiry of period of limitation - the suit was decreed by the Trial Court- an appeal was preferred which was allowed and the judgment of trial court was set-aside- held, in second appeal, that onus to prove the adverse possession was upon the plaintiff- plaintiff asserted that he had become the owner by virtue of his possession in the year 2002- he had not asserted about the adverse possession of his father- in these circumstances, the plaintiff had failed to prove the adverse possession- moreover, the suit cannot be filed on the basis of adverse possession and the plea of adverse possession has to be taken in defence- Appeal dismissed. (Para-14 to 20) Title: Krishan Chand Vs. Amar Nath & others Page-1581

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit pleading that she was the only successor of the property left behind by the deceased who was eunuch (Kinner)- suit was dismissed by the trial Court- an appeal was preferred which was dismissed- held, that Courts had presumed that parties were governed by Hindu Succession Act, whereas, pleaded case of the parties was that they were governed by eunuch custom- Hindu law does not confer a right of inheritance upon eunuch - transgenders have been categorized as third gender only by the judgment of the Supreme Court- it was duly established by the plaintiff that deceased was her Chela - her statement was required to be accepted in absence of any contest - Court had wrongly held that Hindu Succession Act was applicable, whereas, custom was applicable- judgments passed by the Courts set aside- appeal allowed. (Para-6 to 14) Title: Sweety (Eunuch) Vs. General Public Page-2140

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking permanent prohibitory injunction for restraining the defendants from raising construction, taking forcible possession or interfering with the suit land- it was pleaded that plaintiff was owner in possession of the suit land - the defendants got their land increased and suit land decreased during settlement- an application for correction was filed, which was allowed- the defendants disputed the correctness of the site plan- suit was decreed by the trial court - an appeal was preferred, which was allowed- held, that the revenue record prepared during settlement was rectified by the Collector- the order was affirmed by Divisional Commissioner- no further appeal/revision was filed and the order of Divisional Commissioner has attained finality – the Settlement Collector has jurisdiction to entertain the application- the correctness of the order cannot be seen by the Civil Court - even if the order was incorrect, it cannot be assailed in collateral proceedings- Appellate Court could not have gone into the correctness of the order to reverse the decree passed by the trial court- appeal allowed - judgment passed by the Appellate Court set-aside and the judgment passed by Trial court restored. (Para 8-16). Title: Gurdev Singh Vs. Narain Singh & ors Page-1656

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendants from interfering in the suit land- it was pleaded that plaintiff is owner in possession of the suit land- civil suit was filed by S, which was decreed but right of the plaintiff was not affected by the civil suit- defendants threatened to interfere in possession of the plaintiff without any right- defendants pleaded that suit was filed by wife of the plaintiff, which was dismissed by the civil Judge- plaintiff was one of the defendants- suit is barred by res-judicata- suit was decreed by the trial Court- appeal was preferred, which was allowed- held, in second appeal that plaintiff had mentioned the value of the suit land in plaint as Rs.130/- -any exchange of immovable land valuing more than Rs. 100/- requires registration- no

registered deed was produced to prove exchange – mutation will not confer any right upon the person- predecessor-in-interest of the plaintiff was not proved to be in possession- no relief was sought against the present plaintiff in the previous suit- therefore, principal of res-judicata will not be applicable - appeal partly allowed. (Para-11 to 16) Title: Jania son of Shri Thebu Vs. Dharmi son of Budhu & others Page-1756

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking injunction for restraining the defendants from creating a passage over the land owned by him- defendant No.1 pleaded that defendants have been using maind (beer) of the land as per prevailing custom- suit was dismissed by the trial Court- appeal was preferred, which was also dismissed- held, in second appeal that plaintiff had admitted the existence of the custom of use of the beer for going to the fields in the village- PW-2 also admitted this fact- defendant stated that he was using the maind of the field of the plaintiff as per custom- right of using edges of the field by agriculturists has been recognized by the Courts- Courts had rightly dismissed the suit- appeal dismissed. (Para-15 to 37) Title: Sita Ram Vs. Nand Lal and others Page-2295

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking injunction pleading that he is owner in possession of the suit land- defendants started raising shuttering over the house of the plaintiff- they also constructed a shop over the land of the plaintiff- hence, suit was filed for seeking permanent prohibitory and mandatory injunction- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that demarcation report was not placed on record to prove the encroachment- Field Kanungo and patwari are not Revenue Officers - demarcation report does not attain finality unless it is affirmed by the Assistant Collector - no order can be passed by the Court on the basis of unconfirmed report of demarcation- there are material contradictions in the testimonies of Kanungo and Patwari regarding khasra number- appeal accepted - judgment and decree passed by the Appellate Court set aside- Judgment passed by trial Court affirmed. (Para-11 to 18) Title: Shiv Ram son of Shri Hari Singh & others Vs. Mahesh Prashad son of late Shri Jai Dev Page-2053

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit seeking injunction pleading that ground floor of the house of the plaintiff and other co-sharers is being used as entrance- wall of the houses of the plaintiff and defendant is joint- defendant intended to demolish her house to raise construction- it was agreed that in case of damage to joint wall, damaged portion will be reconstructed- wall fell down but was not reconstructed- defendant denied the claim of the plaintiff and filed a counter-claim pleading that plaintiff had demolished the portion of the joint wall- defendant was not permitted to carry out renovation due to which defendant suffered loss of Rs. 60,000/-- trial Court dismissed the suit and the counter claim- appeal and cross-objection were preferred, which were dismissed- held, in second appeal that written agreement was executed between the parties relating to re-construction of the joint wall- defendant had admitted the liability to reconstruct the wall- hence, she was not entitled for any amount- trial Court had rightly appreciated the evidence- appeal dismissed. (Para-11 to 13) Title: Anjana Mahindru D/o late Kundan Lal Vs. Suraj Parkash son of late Budhi Singh Page-2271

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are joint owners in possession of the suit land and in exclusive possession of the house - defendants started raising construction despite request not to do so till partition- suit was decreed by the trial Court and mandatory injunction to demolish the construction raised during the pendency of suit was issued - an appeal was preferred, which was allowed- held, in second appeal that plaintiff had not placed on record police report to show that any construction was noticed by the police during the pendency of the suit – in these circumstances, plaintiffs are not entitled for decree of mandatory injunction- appeal dismissed. (Para- 7 and 8) Title: Anita Sharma & others Vs. Dina Nath & others Page-2219

Specific Relief Act, 1963- Section 38- Suit filed by the plaintiff was decreed after conciliation - parties had agreed that they would not raise any construction over the suit land till partition – an application for violation of the decree was filed by the Decree Holder – Court ordered the Judgment Debtors to restore the nature of the suit land by demolishing the shed and to raise no other construction over the suit land- Judgment Debtors filed an application undertaking to remove the temporary structure/shed, but the construction was not removed - Court again ordered the Judgment Debtors to remove the construction- aggrieved from the order, revision was filed, which was dismissed- a special leave petition was filed, which was also dismissed- when the order was not complied, warrants of arrest were issued- held, that civil suit was instituted in the year 1992- Judgment Debtors had not removed the construction raised by them- orders passed by the Courts are in conformity with the law- there is no perversity or illegality in the orders- petition dismissed. (Para-7 to 10) Title: Raj Kumar Vs. Dev Raj and another Page-1445

'W'

Workmen Compensation Act, 1923- Section 5- Predecessor-in-interest of the claimants was electrocuted while working as labourer in construction of the house of the appellant- compensation of Rs. 3,03,269/- was awarded by Workmen Compensation Commissioner- held, in appeal, that respondent No. 1 was engaged as contractor for completion of the house- he was acting on behalf of the appellant- therefore, appellant was rightly held liable to pay the compensation- appeal dismissed. (Para-2 to 4) Title: Vinod Sharma Vs. Abdul Hassan & others Page-1414

Workmen Compensation Act, 1923- Section 22- Petitioners filed a claim petition for the death of R who had died in a motor vehicle accident- petition was dismissed, aggrieved from the award, present petition has been filed- held, that petition was dismissed on the ground that their predecessor-in-interest do not fall within the definition of workman as he was driving the vehicle owned by his father- father of the deceased had not stepped into witness box to prove that deceased was employed by him - there was no proof of payment of salary to the deceased- driving of the vehicle in a casual capacity will not make the deceased as workman- appeal dismissed. (Para-3 to 7) Title: Anu & another Vs. Santokh Singh & others Page- 2078

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'W'

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'Z'

Zuari Cement Ltd Vs. Regional Director, ESIC, Hyderabad & ors, AIR 2015, SC 2764;

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

Suresh Kumar .....Petitioner/Tenant.
Versus
Om Prakash .....Respondent/Landlord.

Civil Revision No. 227 of 2015.
Decided on: 12th May, 2016.

H.P. Urban Rent Control Act, 1987- Section 14- Eviction of the tenant was sought on the ground of bona fide requirement for reconstruction- it was contended that no sanctioned plan was placed on record- held, that there is no requirement of getting the plan sanctioned before seeking eviction- petition dismissed with the right of re-entry to the tenant. (Para- 1 to 7)

Case referred:
Hari Dass Sharma versus Vikas Sood & Others (2013) 5 SCC 243

For the petitioner : Mr. B.S. Thakur, Advocate.
For the respondent : Mr. R.K. Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Heard. Learned counsel on both sides are in agreement that this petition can be disposed of at this stage itself in view of the law laid down by the apex Court in ***Hari Dass Sharma*** versus ***Vikas Sood & Others (2013) 5 SCC 243***. In this judgment, the apex Court has held as under:

> "*13. In Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra), this Court had the occasion to consider the provisions of Section 14(3)(c) of the Act and R.C. Lahoti J. writing the judgment for the Court held that Section 14(3)(c) does not require that the building plans should have been duly sanctioned by the local authorities as a condition precedent to the entitlement of the landlord for eviction of the tenant. To quote from the judgment of this Court in Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra): (SCC p. 194, para 6)*
>
> > *"6.....The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the local authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However still, suffice it to observe, depending on the facts and circumstances of a given case, the court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the bona fides of the landlord. If a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction obviously his requirement would remain a mere wish and would not be bona fide."*
>
> *It will be clear from the aforesaid passage that this Court has held that availability of building plans duly sanctioned by the local authorities is not an ingredient of Section 14(3)(c) of the Act and, therefore, could not be a*

condition precedent to the entitlement of the landlord for eviction of the tenant, but depending on the facts and circumstances of each case, the Court may look into the availability of building plans duly sanctioned by the local authorities for the purpose of determining the bonafides of the landlord.

17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plan being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani & Anr.(2002) 5 SCC 229 and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.

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

2. In this petition, the order of eviction of the petitioner-tenant on the ground of reconstruction of the demised premises is under challenge. The demised premises is consisting of three rooms, one verandah in a building situate in Ward No.6, Municipal Council Area near Subzi Mandi, Up Mohal Hamirpur, Tehsil and District Hamirpur. In area, it is measuring 36.53 square meters. The challenge to the impugned judgment is on the grounds inter alia that there is no sanctioned plan qua reconstruction of the building and the same can be re-constructed without resorting to the eviction of the petitioner-tenant.

3. Learned counsel representing the petitioner-tenant has conceded such claims in view of the law laid down by the Hon'ble apex Court in the judgment cited supra and rightly so, because the Hon'ble apex Court has categorically held that the landlord is not required to

produce a sanctioned plan nor to disclose the funds required for reconstruction and the eviction of the tenant on the ground of rebuilding and reconstruction of the building can be sought without it. The Act itself provides re-induction of the tenant in that much area as was with him/her in the building before its demolition and reconstruction.

4. Mr. Thakur, learned counsel, on instructions, submits that the petitioner-tenant is ready and willing to hand over the vacant possession of the demised premises subject to the respondent-landlord agrees to re-induct him as tenant in that much area, which he presently is occupying in the building in question. According to Mr. Thakur, the rent on reinduction may be left open to be determined by the Rent Controller concerned. Mr. Thakur, on instructions, further submits that the possession of the demised premises will be handed over to the respondent- landlord by 30th October, 2016.

5. Mr. R.K. Sharma, learned Senior Advocate assisted by Ms. Anita Pramar, Advocate is not averse to the offer so made on behalf of the petitioner-tenant. It is stated at the Bar that construction work will be completed within one year from the date i.e. 30th October, 2016, when the possession of the demised premises is to be handed over to the respondent-landlord. Mr. Sharma further submits that the petitioner-tenant will be re-inducted in equal area in the newly constructed building within one month i.e. on or before 30th November, 2017 from the date of completion of the construction work i.e. 31.10.2017. Mr. Sharma also agreed to the fixation of rent on reinduction of the petitioner-tenant at the market rates prevalent in the area where the demised premises situate by the Rent Controller concerned.

6. In view of the above, nothing is left to be adjudicated upon in this petition on merits. The same, therefore, is disposed of with a direction to the petitioner-tenant to hand over the vacant possession of the demised premises to respondent-landlord on or before 31st October, 2016. He shall pay the use and occupation charges till 31st October, 2016 at the rates, he is paying at present. On his failure to hand over the vacant possession by the aforesaid date, the respondent-landlord shall have the right to execute the order of eviction and in that event the petitioner-tenant shall also have no right to claim his reinduction in the newly constructed building. There shall be a direction to the respondent-landlord to complete the construction on the spot on or before 31st October, 2017. He shall reinduct the petitioner-tenant in equal area i.e. 36.53 square meters, presently occupied by him in the demised premises within one month thereafter i.e. by 30th November, 2017. On the failure of the respondent-landlord to compete the construction within the stipulated period and reinduction of the petitioner-tenant in the newly constructed building, he shall be liable to pay the damages at the rate of Rs.1,000/- per day from 1.12.2017 onwards till he is reinducted as tenant.

7. As regards the rent on reinduction, the parties shall file a joint application for the purpose in the Court of learned Rent Controller at Hamirpur. The application so filed shall be decided by learned Rent Controller, in accordance with law and taking into consideration the rates prevalent in the area where the demised premises situate, after affording an opportunity of being heard to the parties on both sides. Pending application(s), if any, shall also stand disposed of.

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

Anil Kumar .....Appellant.

Versus

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

Cr. Appeal No. 405 of 2006.

Date of Decision: 16th May, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 500 grams charas - he was convicted by the Trial court- held in appeal that independent witness was not examined by the prosecution- accused was apprised of his right of being searched before a Gazetted Officer, Magistrate or police which is not in accordance with the Section 50 of the N.D.P.S. Act as no option to be searched before the police is to be given- Trial Court had wrongly convicted the accused- appeal dismissed. (Para- 9 to 12)

For the Appellant: Mr. Ajay Sharma, Advocate.
For the Respondents: 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/convict against the judgment of the learned Special Judge, Fast Track Court, Una rendered on 30.11.2006 in Sessions Case No. 3/2006/Sessions trial No. 18/2006, whereby, the latter returned findings of conviction against the accused/convict for his committing an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the NDPS Act). The learned trial Court proceeded to hence sentence him to undergo rigorous imprisonment for five years for commission of offence under Section 20 of the NDPS Act besides sentenced him to pay a fine of Rs.50,000/-, in default of payment of fine he was sentenced to undergo further simple imprisonment for one year.

2. The facts relevant to decide the instant case are that on 21.12.2003 at about 3.00 p.m. Nardev Singh, H.C., CIA Staff, Una was present near petrol pump Behlan along with other police officials in a private vehicle where he received an information from H.C. Rajinder Singh of CIA Staff, Una that the accused is illegally selling charas to his customers near a brick kiln at Behdala. On this information, Nardev Singh recorded the statement of Rajinder Singh, Ex.PW1/A under Section 154, Cr.P.C. and sent the same to P.S. Una for registration of a case and he himself proceeded towards brick kiln, Behdala after forming a raiding party. The accused was found present there. He after completion of Codel formalities conducted the search of the accused and on search one plastic envelope containing 500 grams of charas was recovered from the pocket of the pant of the accused. Thereafter, other formalities were completed and accused was arrested. Report of the FSL was procured. Statements of the witnesses were recorded.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, 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 an offences punishable under Section 20 of the NDPS Act. In proof of the prosecution case, the prosecution examined 10 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 in the case.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the accused/appellant 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 that 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. The accused/convict is alleged to be at the relevant time holding possession of charas, Ex.P-1 weighing 500 grams. The prosecution to succor its case against the accused/convict depended upon the testimonies of official witnesses. The official witnesses in their respective depositions on oath underscored a version qua the genesis of the prosecution case embodied in Ex.PW6/A bereft of any intra se contradictions besides, when their respective depositions on oath are bereft of any inter se contradictions vis-a-vis their testimonies comprised in their respective examinations-in-chief and their testimonies comprised in their respective cross-examinations. Consequently, with their testimonies on oath qua the genesis of the prosecution case embodied in Ex.PW6/A standing bereft of any intra se or inter se contradictions necessarily then when their testimonies inspire confidence reinforcingly render their testimonies being amenable to implicit reliance being placed thereupon by this Court for concluding qua the guilt of the accused.

10. Be that as it may, with unblemished testimonies of the official witnesses qua the factum of the accused at the relevant time holding conscious and exclusive possession of charas weighing 500 grams which item of contraband stood recovered under Ex.PW1/E from his right pocket, the learned Deputy Advocate General has with much vigour canvassed before this Court qua the findings of conviction recorded against the accused standing not open to face ouster qua their legal vigour. However, before accepting the aforesaid submission addressed by the learned Advocate General for hence tenacity standing imputed to the findings of conviction recorded against the accused/convict by the learned trial Court, it is imperative to advert to the factum of the Investigating Officer joining an independent witness named Avtar Singh in the relevant investigations held by him. The aforesaid independent witness to the relevant incident had signatured all the relevant memos prepared purportedly at the site of occurrence at the stage contemporaneous to the recovery of charas weighing 500 grams under memo Ex.PW1/E from the purported exclusive and conscious possession of the accused/convict in the manner espoused by the prosecution. True it is that the depositions of official witnesses when bereft of any vice of any intra se or inter se contradictions, non occurrence thereof for the reasons aforestated are sufficient to sway an inference of the prosecution succeeding in proving the guilt of the accused yet the vigour of the aforesaid inference would lose vigour when despite the Investigating Officer joining an independent witness in the apposite proceedings besides obtaining his signatures on all the relevant memos prepared purportedly at the relevant time, the learned APP omitting to examine him as its witness. The learned APP has merely for flimsy reason on his standing won over by the accused omitted to examine him as a prosecution witness. His stepping into the witness box was imperative. The immensity of frailty of the speciousness of the reason assigned by the learned APP to omit to examine him as a prosecution witness has a cascading effect upon the success of the prosecution case. The APP concerned though may have held the view of Avtar Singh standing won over by the accused yet the mere fact of the APP concerned holding a view of his standing won over by the accused/convict when may well have been concerted to be tested by him on Avtar Singh stepping into the witness box or when only on Avtar Singh stepping into the witness box would thereupon underscorings occur qua his supporting or omitting to support the prosecution case besides, even if, thereat by his turning hostile or reneging from his previous statement recorded in writing he omitted to lend succor to the prosecution case yet when it was open to the learned APP to hold him to cross-examination after obtaining the permission of the learned trial Court. The learned APP, however, has by his forming an opinion of Avtar Singh standing won over by the accused/convict abandoned further concerts to subject him to examination-in-chief whereafter in case he turned hostile, it was open to the learned APP to hold

him with the permission of the learned trial Court to cross-examination for his thereupon concerting to prove through him the validity or authenticity of his signatures occurring on various memos prepared purportedly at the site of occurrence by the Investigating Officer. With PW Avtar Singh not stepping into the witness box, the learned APP concerned has obviously foregone an opportunity to obtain apposite elicitations from Avtar Singh qua whether his signature borne on relevant memos purportedly prepared at the site of occurrence qua the purported recovery of charas from the purported exclusive and conscious possession of the accused belonging or not belonging to him. The lack of apposite elicitations from Avtar Singh does obviously constrain this Court to hold of the prosecution not proving to the hilt of Avtar Singh signaturing the relevant memos purportedly prepared at the site of occurrence by the Investigating Officer. In sequel, the recovery memos purportedly prepared at the site of occurrence by the Investigating Officer with a disclosure therein of charas weighing 500 grams standing recovered from the purported exclusive and conscious possession of the accused in the manner reflected therein stands not unflinchingly proved by the prosecution. Contrarily, when unflinching proof qua the factum recorded in the apposite recovery memos would have emanated on the examination of Avtar Singh as a prosecution witness, his non examination by the learned APP concerned has sequelled the prosecution omitting to prove the existence of his signatures borne on various memos. Even otherwise, if Avtar Singh on stepping into the witness box had denied his signatures occurring thereon yet it was open for the learned APP concerned to on his denying the signatures occurring on various memos to beseech the learned trial Court to elicit an opinion from the FSL concerned after its comparing his disputed purported signatures on the relevant memos with his admitted signatures, with an underscoring therein whether they do or do not belong to aforesaid Avtar Singh. However, when the learned APP concerned omitted to facilitate the stepping of Avtar Singh into the witness box, the making of the aforesaid endeavour by the learned APP on Avtar Singh denying his signatures on the apt memos stands frustrated. In aftermath, it is to be firmly held of the prosecution failing to prove the prime fact of the signatures of Avtar Singh existing on all the relevant documents. Consequently, it is to be held that the prosecution has failed to prove the factum of the recitals occurring in all the relevant memos carrying any probative worth, as corollary, it is to be held of the depositions of the official witnesses though for reasons aforestated standing bereft of any taint of intra se or inter se contradictions, nonetheless they are for omission of examination of Avtar Singh by the prosecution concluded to be holding no probative force rather it appears of their testimonies standing engendered by prior to theirs respectively stepping into the witness box theirs holding a consensual view to depose in harmony qua the prosecution case for ensuring its success. Also it appears of theirs conveniently with intra se collusion rendering a tutored version qua the prosecution case. Consequently, their depositions are unworthy of credence.

11. Be that as it may, the factum of recovery of charas weighing 500 grams under recovery memo Ex.PW1/E stood effectuated from the right pocket of the pant worn by the accused. Given the manner of its recovery from the right pocket of the pant of the accused rendered applicable besides attracted qua the aforesaid manner of its recovery, especially when it stood effectuated hence from his personal search, the provisions of sub section 5 of Section 50 of the NDPS Act carrying an explicit mandate therein of the Investigating Officer communicating to the accused under an apposite consent memo of his having a primary vested legal right of his personal search standing carried by a Gazetted Officer or a Magistrate. Only on an express intimation standing embodied in an unambiguous phraseology constituted in the apt consent memo in display of the facet aforesaid of the accused holding a valid statutory right of his initial personal search being held by a Gazetted Officer or Magistrate, besides the said intimation standing distinctively succeeded by an apt phraseology conveying to the accused of in case he foregoes his statutory right of his personal search being initially held by a gazetted officer or a Magistrate, his thereupon having an option to be searched by the police officer concerned, would foist tenability to the consent memo. For gauging whether consent memo Ex.PW1/B begets compliance of the mandatory statutory provisions engrafted in sub section 5 to Section 50 of the NDPS Act, an advertence thereto of its phraseology unveils of the Investigating Officer therein

communicating to the accused qua the factum whether he intends qua his jama-talashi standing carried out by a Gazetted Officer or a Magistrate or only by a Police Officer. The sentence embodying the aforesaid manifestations halts there. It stands succeeded by a communication by the IO to the accused of his having a legal right qua all the facets aforesaid. The implication thereof is of vivid upsurging manifestive of each of authorities occurring in the sentence, standing successively displayed in the apposite sentence to concurrently hold or theirs respectively holding authority to carry out his personal search and of the accused having a right to be searched by each of them, whereas, with the express mandate of law for a consent memo begetting conformity with it diktat, would occur only on the Investigating Officer unequivocally making a vivid communication to the accused/convict of his having a statutory right qua his standing initially searched only by a Gazetted Officer or a Magistrate which option on standing refused to be availed by him, his thereupon having a right to be searched by the Investigating Officer. Reiteratedly, when the intimation purveyed to the accused/convict under memo Ex.PW1/B by the Investigating Officer apprises him or awakens him of his jama-talashi standing carried out by a Gazetted Officer or a Magistrate and the police. Hence, with the IO making a communication under consent memo Ex.PW1/B to the accused qua his having a right to be searched by a Gazetted Officer or a Magistrate concerned also his therein incorporating of in the alternative the Police Officer also holding leverage to carry his personal search besides enjoying the apposite authority concurrently with the Gazetted Officer or Magistrate concerned palpably appears to be a communication to the accused of the police also holding a concurrent authority along with the Gazetted Officer or a Magistrate concerned to hold his personal search. Contrarily when the initial right of the accused qua the carrying of his personal search stood statutorily vested alone in the Gazetted Officer or a Magistrate, however, for the reasons aforesaid, the Investigating Officer in the apposite consent memo has not communicated in clear and umambiguous terms to the accused of his holding the initial statutory right for his personal search standing held only by a gazetted officer or a magistrate nor is there an express communication therein of on his refusing to be subjected to personal search by a gazetted officer or a Magistrate his holding an option to be searched by a Police Officer whereas It was enjoined upon the Investigating Officer to communicate to him in a precise and unequivocal terms qua the aforesaid right. In sequel, any personal search carried inconsonance therewith besides any recovery of contraband under the relevant memos standing effectuated from the purported conscious and exclusive possession of the accused is neither efficacious nor has any tenacity in law.

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

13. Consequently, the instant appeal is allowed and the impugned judgment is set aside. The accused/appellant is acquitted of the offence charged. Fine amount, if any, deposited by the accused be refunded to him forthwith. Records be sent back forthwith.

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

Shri Kamal Sharma. .....Appellant.

Versus

Smt. Minakshi Sharma. .....Respondent.

FAO(HMA) No. 306 of 2006.
Date of decision: May 16, 2016.

Code of Civil Procedure, 1908- Order 32 Rule 15- Husband was deaf and dumb - he filed a petition for seeking divorce- it was contended that the petition is not maintainable as it was not filed through the next friend- held, that a deaf and dumb person is not incapable of filing a petition, if he is of a sound mind - an inquiry is to be conducted prior to granting permission to file the petition through next friend and the Court has to be satisfied that the person is not of sound mind and that he is incapable of protecting his interest. (Para-11 to 13).

Hindu Marriage Act, 1955- Section 13- Marriage between the petitioner/husband and respondent/wife was solemnized as per Hindu rites and customs- respondent started treating the petitioner with cruelty- respondent/wife denied the contents of the application and asserted that petitioner had treated her with cruelty- the petition was dismissed by the Trial Court- held, in appeal that the instances of cruelty highlighted in the petition do not constitute the cruelty but amount to normal wear and tear of married life- cruelty is a conduct of such a nature as to have caused danger to life, limb or health or to raise a reasonable apprehension of such danger- the wife is taking care of the children and is residing in the matrimonial home- the fact that wife is not accompanying the husband to social gathering , not sharing bed room, not preparing food for family or finding excuses not to have sexual relation with husband are not instances of cruelty- the trial Court had rightly held that cruelty was not proved - appeal dismissed.(Para-15 to 18)

Cases referred:

Raveendran V. Sobhana & anr. AIR 2008 Kerala 145
Kamaljit Bhullar Vs. Nimrat Preet Singh Bhullar, 1991 (1) Sim. L.C. 156
P.K. Vijayappan Nair Vs. J. Ammini Amma, AIR 1997 Kerala 170
Harjit Kaur Vs. Jaswant Singh, 1996(1) H.L.R. 217

For the appellant : Mr. Suneet Goel, Advocate,
For the respondent : Mr. J.R. Poswal, Advocate.

The following judgment of the Court was delivered:

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

Aggrieved by the judgment dated 8.8.2006 passed by learned District Judge, Shimla in a petition Under Section 13 of Hindu Marriage Act registered as Petition No. 46-S/3 of 2004, the petitioner-husband has approached this Court by filing the present appeal with a prayer to quash and set aside the same.

2. The petitioner has solemnized marriage with the respondent on 1.8.1991 as per Hindu rites and rituals. They lived together as husband and wife and there are three children, two females and one male, born to them out of this wedlock. The petitioner-husband was deaf and dumb by birth. The complaint is that after marriage the respondent has started treating him with cruelty. The instances of cruelty as highlighted in the petition were that the respondent not accompanying him to attend social gathering, not prepared to live with him in the same bedroom, do not look after the children, neglects his old ailing father, finds excuses not to have sexual relation with him, lodged false complaint against him in the police station, went to her mother's place during children's holidays and on return after three months, refused to share bedroom with him and that her relations visits her off and on and she do not inform either the petitioner or his father nor disclose their identity to them. The petitioner, therefore, have filed the petition in the trial Court for dissolution of his marriage with respondent by a decree of divorce on the grounds as aforementioned.

3. In reply, the respondent-wife has raised objections qua maintainability of the petition and that the same does not disclose an enforceable cause of action and also that the same suffers from delay and latches. On merits, while denying the instances of cruelty the petitioner referred to in the petition, it is submitted that she never neglected him nor any

question of her refusal to accompany him in social gathering arise. The children are living with her and also the petitioner. There is no question of not attending to the children. She submits that her relations with the petitioner are very cordial and she never harassed him mentally or physically. Also that, their relations as husband and wife still exists. The complaint she lodged was against the petitioner as he being persuaded by his father and sister Nain Tara used to treat her with cruelty. Also that, the petitioner usually comes to house late in the night and addicted to drinks. It is also submitted that she is in talking terms with the petitioner and residing in the matrimonial home. It is denied that she is not cohabiting with the petitioner. The petitioner has allegedly concocted a story just to get rid of his liabilities which he otherwise is duty bound to discharge.

4. The petitioner has also filed the rejoinder. On the pleadings of the parties, the trial Court has framed the following issues:-

1. Whether the respondent has treated the petitioner with cruelty? .....OPP
2. Whether the petition is not maintainable? .....OPR
3. Whether the petitioner has no cause of action? ...OPR
4. Whether the petition suffers from delay and latches? .....OPR
5. Relief.

5. Parties were put to trial on all the issues. The petitioner in turn has produced his own affidavit in evidence and also examined their domestic help Smt. Indira PW2, T.K. Sharma, his Uncle PW3, V.K. Sharma his father PW4 and their tenants S/Shri M.J. Amla and Naresh Thakur, PWs 5 and 6, respectively. On the other hand, the respondent has herself stepped into the witness box as RW1 and examined her mother Smt. Sudeva Devi RW2.

6. Learned trial Court has answered the question of maintainability of the petition in affirmative, while answering issue No. 2. However, while arriving at a conclusion that the instances quoted in the petition do not constitute the cruelty within the meaning of Section 13 of the Hindu Marriage Act has arrived at a conclusion that the petitioner failed to make out a case for dissolution of his marriage with respondent by a decree of divorce, the petition, as such, was dismissed.

7. The legality and validity of the judgment under challenge has been questioned on the grounds, inter-alia, that issue No. 2 could have not been answered in-affirmative for the reasons that the petitioner though is deaf and dumb by birth, however, besides getting educated in a special school meant for the students like the petitioner he also did diploma in photography from All India Federation of the Deaf multipurpose training Centre for the deaf, New Delhi. He is running a STD booth and Photostat machine. He is deaf and dumb but not of unsound mind. The findings on issue No. 2 rather are stated to be not legally sustainable.

8. As regard the findings on merit, the same are stated to be contrary to the evidence available on record. The evidence as has come on record by way of testimonies of PW2, PW3, PW5 and Pw6 is stated to be misinterpreted and misconstrued. The marriage of the parties is stated to be irretrievably broken down. As such, the impugned judgment has resulted in miscarriage of justice to the petitioner.

9. On hearing learned Counsel representing the parties at length and on appreciation of the pleadings of the parties as well as the evidence available on record, in the considered opinion of this Court findings on issue No. 2 are neither legally nor factually sustainable.

10. In order to substantiate the view of the matter so taken by this Court, reference can be made to the reply filed by respondent to the petition in the trial Court. Only an objection qua maintainability of the petition has been raised without specifying as to how the petition is not maintainable. Even issue No. 2 as framed is also simplicitor that the petition is not maintainable. Now if looking to the statement of respondent-wife while in the witness box as RW1 she has not

even uttered a single word that on account of the petitioner a deaf and dumb person is not of sound mind and as such, the petition should have been filed by him through his next friend. Nothing to this effect is there in the statement of her mother RW2 also.

11. The findings recorded on issue No. 2 reveal that learned Counsel representing the respondent-wife has raised the question of maintainability of the petition on the ground that the petitioner being a deaf and dumb person should have filed the petition through his next friend or guardian for the first time during the course of arguments. Learned trial Judge while accepting the submission, so made, has concluded that the provision contained in Rule 15 of Order 32 and Rules 1 to 14 applies to a person of unsound mind which includes deaf and dumb person also. It has, therefore, been held that the petitioner who is deaf and dumb person could have not represent his own case and rather represented by his next friend or guardian. The petition, therefore, was held to be not maintainable.

12. It is surprising to note that without any pleading qua this aspect of the matter nor there being anything in the evidence, the trial Court by recording such findings has taken the petitioner-husband in surprise. True it is, that the mental infirmity within the meaning of Order 32 Rule 15 is not mental disorder, insanity or mental illness but infirmity caused by physical defects like deafness or dumbness also constitute weakness of mind and renders a person incapable of protecting his interests. In such a case where the person having such infirmity is not represented through the next friend or a guardian and an objection that such person is not of sound mind is raised, the enquiry as envisaged under Order 32 Rule 15 is required to be conducted. Support in this regard can be drawn from the judgment of a Division Bench of the High Court of Kerala in ***AIR 2008 Kerala 145, Raveendran*** *V.* ***Sobhana & anr.*** The relevant text of this judgment reads as follows:

> *"11. Thus, the legal position is that mental infirmity in the context of Order 32 Rule 15 is not mental disorder, insanity or mental illness. Weakness of mind due to any reason, making a person incapable or protecting his interests, is sufficient to unfold the protective umbrella under Order 32 Rule 15. Such infirmity can also be caused by physical defects like deafness or dumbness, whereby a person is made incapable of communicating his wishes, views or thoughts to others who are not acquainted with him. If such a person is before the Court in a suit or proceedings either as plaintiff or defendant, the Court has a jurisdictional obligation to conduct an enquiry as to whether the person is capable of protecting his own interests. If in the judicial enquiry, if necessary and if required, conducted with the assistance of an expert, it is found that such person is incapable of protecting his interests in the suit or proceedings before the Court, the Court has an obligation to appoint a next friend for such person, and if the Court on the other hand finds that the person is otherwise capable of protecting his interests without a next friend, the Court shall remove the next friend if already available and permit the person, who is alleged to be of unsound mind or suffering from mental infirmity to conduct the litigation himself."*

13. In the case in hand the trial Court has not conducted any enquiry and rightly so as no specific objection to this effect was raised by the respondent in reply to the petition. Otherwise also, without holding any enquiry into the question of soundness/unsoundness of mind of the petitioner, no findings that he was of unsound mind and he has not filed the petition through his next friend or guardian, the same is not maintainable, should have not been recorded. Therefore, the findings on Issue No. 2 being legally and factually unsustainable are ordered to be reversed.

14. Now if coming to the findings recorded on issue No.1, while concurring with the same in the considered opinion of this Court the instances of cruelty as highlighted in the divorce petition not constitute the cruelty within the meaning of Section 13 of the Hindu Marriage Act

and at the most amount to bear and tears of normal married life. Learned trial Judge has not committed any illegality and irregularity while holding that the degree of cruelty for seeking the decree of divorce should be over and above the mere bear and tears of routine married life. This Court in ***Kamaljit Bhullar*** *Vs.* ***Nimrat Preet Singh Bhullar, 1991 (1) Sim. L.C. 156*** though has held that it is difficult to define the exact legal meaning of the expression "cruelty", however, as per the ratio of this judgment, it is conduct of such character so as to have caused danger to life, limb or health or as to give rise to a reasonable apprehension of such danger constitute cruelty in a matter of this nature. Similar is the ratio of the judgment in ***P.K. Vijayappan Nair*** *Vs.* ***J. Ammini Amma, AIR 1997 Kerala 170.*** The High Court of Punjab and Haryana in ***Harjit Kaur*** *Vs.* ***Jaswant Singh, 1996(1) H.L.R. 217*** has held that behaviour of one of spouse if so cruel that it becomes impossible for the other spouse to live harmoniously with the first spouse in the matrimonial home, it is only then it can be said that the first spouse has acted with cruelty and on that ground the spouse is entitled to the decree of divorce. It is also held in this judgment that the bear and tears of married life do not constitute cruelty.

15. If the evidence is scrutinized in the light of the legal background, admittedly the respondent is residing in the matrimonial home. No doubt, as per her own admission she is residing in a room in the third floor of the house, whereas the petitioner-husband resides in the forth floor of the house with his father and children. She also admit that the food for the petitioner and the children is being cooked some time by her father-in-law and some time by the maid PW2. She prepares food for herself. Not only this, but she is residing alone in the room. However, she is looking after the children. The close scrutiny of the evidence produced by the petitioner reveals that the children takes their breakfast with her. She had been accompanying them to school. She was also bringing them back to the home. The petitioner has admitted while in the witness box that on one occasion she decided not to attend the marriage of her brother as the children were undergoing their annual exams. She is very categoric and specific while stating in her examination-in-chief that except for the petitioner there is no one upon whom she can depend and that she is living in the matrimonial home and also intend to reside in the matrimonial home. She admit that the complaint was lodged by her against the petitioner in the police station when she was not allowed to visit her parents' house and it is after that complaint she is now being allowed to go there.

16. The evidence as discussed hereinabove lead to the only conclusion that the present is not a case where it can be said that the marriage of the petitioner with respondent irretrievably broken down. There may be some other and further reason of her not sharing bedroom with the petitioner or preparing food for herself separately. May be the petitioner or his father PW4 and for that matter his sister Nain Tara are not allowing her to cook food for the family and the petitioner-husband himself has withdrawn from her company in order to get rid of her cannot be ruled out.

17. Otherwise also, the instances that the respondent is not accompanying him to attend social gathering/functions, not sharing bedroom with him, not preparing food for the family or finding excuses not to maintain sexual relations with him are not the instances of cruelty in legal parlance and rather the bear and tears of normal married life. The instances such as visiting the parent's house with children during their vacation or her relations visiting her in the matrimonial home are not at all the instances of cruelty towards the petitioner and rather it is the petitioner who seems to be treating her with cruelty by not allowing her to visit her parents' house and even objecting to the visits of her relations to the matrimonial home.

18. The appraisal of the facts of this case and also the evidence available on record, therefore, amply demonstrate that the Court below has not committed any illegality or irregularity while answering issue No. 1 against the petitioner. Therefore, though this Court has quashed and set aside the findings on issue No. 2, however, maintained the findings on issue No. 1. The result, therefore, would be the same i.e. dismissal of the petition.

19. In view f the above, the impugned judgment though is modified and appeal partly allowed, however, the petitioner is not entitled to the decree of divorce. No order as to costs.

20. The appeal is accordingly disposed of.

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

Moola ....Appellant-Plaintiff

Versus

Kisso & Ors. ..Respondents-Defendants

Regular Second Appeal No.65 of 2005.
Date of decision: 16.05.2016

Specific Relief Act, 1963- Section 34- Plaintiff claimed the property of his deceased uncle on the strength of a Will allegedly executed in his favour-defendants disputed the execution of the Will and termed the same as false and fabricated document-the plea of the plaintiff did not find favour with the trial Court and the suit was dismissed- first appeal was also dismissed – held, in second appeal, that no witness of the plaintiff had stated that the deceased was in sound disposing state of mind- one of the attesting witness was not cited as a witness and the other attesting witness was closely related to the plaintiff- the fact that the plaintiff also did not produce the Will for mutation for about one year despite various opportunities given by the Revenue authorities raises suspicion about the genuineness of the Will -plaintiff and his son had actively participated in the execution of the Will making the execution of Will highly doubtful-execution of the Will is surrounded by the suspicious circumstances - plaintiff has failed to dispel the same- suit and appeal were rightly dismissed - second appeal also dismissed. (Para 20 to 30)

Cases referred:

H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443.

Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529

Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40

For the Appellant: Mr.N.K. Thakur, Senior Advocate with Ms.Jamuna, Advocate.
For the Respondents: Mr.Anand Sharma, 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 22.11.2004 passed by the learned Additional District Judge, Fast Track Court, Chamba, District Chamba, H.P., affirming the judgment and decree dated 06.07.2002 passed by the learned Senior Sub Judge, Chamba, District Chamba, whereby the suit for declaration filed by the appellant-plaintiff was dismissed.

2. For brevity sake, hereinafter, the parties are to be referred to as in the trial Court.

3. The brief facts emerges from the record are that the plaintiff filed a suit for declaration and permanent prohibitory injunction against the defendants-respondents alleging that the testator deceased Chet Ram was his real uncle, who used to live with him and he used to look after and maintain deceased Chet Ram during his life. It is alleged that deceased Chet Ram was owner of land bearing Khata –Khatauni No.20/22, measuring 6-6 bighas, comprised in

Khasra Nos.282, 290, 295, 297, 306 and 314, Kitta 6, situated in Mohal Ghundera Pargana Manjeer, Tehsil Salooni, Distrixct Chamba *(hereinafter referred to as the suit land),* to the extent of 2/3rd share and had executed the valid will in favour of the plaintiff on 8.4.1984 bequeathing his entire moveable and immoveable property in favour of the plaintiff but the revenue officer did not take into consideration the impugned will and mutation No.145 of inheritance of property of deceased Chet Ram after his death was attested in favour of the plaintiff and present defendants in equal share, which mutation order is illegal, null and void. It is alleged that he requested the defendants to get the revenue entries corrected in his favour but they did not pay any heed to his request. It is further alleged by the plaintiff that he was also not offered reasonable opportunity by the Revenue Officer to produce the impugned will at the time of attestation of mutation of inheritance of property of deceased Chet Ram. As such, this suit for declaration and permanent prohibitory injunction has been filed by the plaintiff Mulla against the defendants.

4. The suit was contested by the defendants and by way of filing written statement took preliminary objections regarding non-joinder of necessary parties, estoppel, cause of action and maintainability of the suit in the present form etc. On merits, the defendants refuted the allegations contained in the plaint. It is alleged by the contesting defendants that deceased Chet Ram was real uncle of plaintiff as well as of the defendants, Mali, Madho, Kisso and Porkhi. They emphatically denied that will dated 8.4.1984 was executed by deceased Chet Ram in favour of the plaintiff. It is alleged that the impugned will is forged and fabricated document and that mutation No.145 qua the property of deceased Chet Ram was validly entered and attested by the revenue officer after affording several opportunities to the plaintiff to produce the impugned will and when he failed to produce the same, mutation was attested qua the property of deceased Chet Ram, which is valid and legal. Hence, the defendants denied the claim of the plaintiff and prayed for dismissal of the suit.

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

"1. Whether deceased Chet Ram had executed a valid and legal will dated 8.4.84 in favour of the plaintiff as alleged? OPP.

2. Whether the plaintiff is entitled to a decree for permanent prohibitory injunction? OPP.

3. Whether the plaintiff is estopped from filing the suit by his act and conduct as alleged? OPD.

4. Whether the plaintiff has no cause of action? OPD.

4-A. Whether mutation No.145 qua the estate of deceased Chet Ram attested in favour of the parties is wrong, illegal and incorrect as alleged? OPP.

5. Relief."

6. The learned trial Court, except issue No.4, decided all the aforesaid issues against the plaintiff and accordingly dismissed the suit. An appeal preferred before the learned Appellate Court was also dismissed.

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

"(1) Whether the impugned judgments are vitiated on account of misreading and misconstruction of the oral as well as documentary evidence?

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

9. Controversy involved in the present case is with regard to genuineness of Will Ex.PW-2/A, allegedly executed by deceased Chet Ram in favour of the plaintiff, namely, Mulla.

10. On the strength of will Ex.PW-2/A, allegedly executed in favour of plaintiff by testator deceased Chet Ram, plaintiff filed a suit, description of which has already been given above, in the Court of learned Senior Sub Judge, Chamba, District Chamba, seeking declaration to the effect that will Ex.PW-2/A was duly executed by deceased Chet Ram in his favour pertaining to the suit land and mutation No.145, qua the suit land attested in favour of parties, may be declared wrong, incorrect, illegal, not binding upon the plaintiff and further to restrain the defendants permanently from interfering in the suit land. Both the Courts below held that execution of will Ex.PW-2/A is shrouded by suspicious circumstances and, as such, cannot be held to be valid and genuine will of deceased Chet Ram. As is evident from the substantial question reproduced hereinabove, on which present appeal was admitted; the sole question which is required to be considered by this Court, is, "whether the judgment passed by the Courts below can be termed to be vitiated on account of misreading and mis-construction of the oral as well as documentary evidence", meaning thereby, to answer the aforesaid substantial question of law, this Court needs to examine the evidence, be it oral or documentary on record, adduced by the parties to the lis.

11. As has been discussed hereinabove, the plaintiff approached the trial Court on the ground that deceased Chet Ram had executed a valid will in his favour bequeathing his property on 8.4.1984, admittedly, onus was upon him to prove that will in question was duly executed in his favour by the testator deceased Chet Ram in accordance with law.

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

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

> ***"4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and***

the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested. (Page-531)

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

15. Shri N.K. Thakur, learned Senior Counsel appearing on behalf of the appellant, vehemently argued that the judgment passed by both the Courts below deserves to be quashed and set aside as the same are not based on the correct appreciation of evidence on record as well as law. He contended that the material available on record was sufficient to hold that will Ex.PW-2/A is a valid and genuine document executed by testator deceased Chet Ram bequeathing his property in favour of the plaintiff. He strenuously argued that in the present case defendants miserably failed to prove that will in question was not genuine and was shrouded by suspicious circumstances. With a view to substantiate his arguments he invited the attention of this Court towards various grounds taken in this appeal as well as statements recorded by the trial Court below at the time of trial, which are not being reproduced for the sake of brevity.

16. Per contra Shri Anand Sharma, learned counsel appearing on behalf of the respondents, supported the judgment passed by both the Courts below and submitted that bare perusal of the impugned judgments suggest that the same are based on correct appreciation of evidence adduced by the parties on record. He pleaded that will Ex.PW-2/A was never executed by deceased Chet Ram and same is a forged and frivolous document got prepared by the plaintiff solely with a view to grab the property of deceased Chet Ram.

17. Mr.Sharma forcefully contended that there is ample evidence, be it ocular or documentary, on record which indicates that will Ex.PW-2/A is forged and frivolous document shrouded by suspicious circumstances. He specifically argued that despite several opportunities of being heard afforded by the Assistant Collector-II Class, plaintiff failed to produce will to substantiate his claim that deceased Chet Ram had actually executed will in his favour with the sound disposing state of mind. Mr.Sharma, during his argument, while inviting the attention of this Court towards the statement made by the plaintiff's witnesses as well as documents placed on record, contended that the plaintiff has miserably failed to place on record any document, be it ocular or documentary, to suggest that testator deceased Chet Ram was in sound disposing state of mind at the time of execution of the alleged will. Mr.Sharma while referring to the statements made by the plaintiff witnesses stated that there is no consistency in their statements, rather there are major contradictions and as such both the Courts below have rightly concluded that their versions cannot be believed in the given facts and circumstances of the case.

18. In the present case, plaintiff, with a view to prove valid execution of the will, examined himself as PW-1 and stated that deceased Chet Ram executed a will in his favour which was written in the house of deceased Chet Ram at about 2.00 to 2.30 P.M. by PW-2, namely, Shri Chamaru Ram. He also stated that he was very much present at the time of execution of will and he also signed the will. It also emerges from his statement that he did not state anything from which it could be inferred that deceased Chet Ram executed the alleged will in presence of two attesting witnesses, who actually saw deceased Chet Ram affixing thumb impression upon the will. Rather, PW-1 very candidly stated that at the time of scribing of will at the house of deceased Chet Ram, he was present and he signed the will Ex.PW-2/A in the presence of testator. There is nothing in the statement of PW-1 which suggets that at the time of affixing thumb impression, if any, by deceased Chet Ram, other two attesting witnesses were also present. PW-1 also stated that marginal witnesses and Shri Chamaru who scribe the will were called by his son

in the house of Shri Chamaru, which definitely indicates that the plaintiff himself actively participated in the execution of will.

19. PW-2 Shri Chamaru Ram, who allegedly scribed the will, deposed that Ex.PW-2/A was written by him on the instructions of deceased Chet Ram in the presence of witnesses, namely, Bhillo and Sher Singh. He further stated that the contents of the will were read over to Chet Ram, who, after ascertaining the contents of the will to be correct, affixed his thumb impression upon the will. However, in cross-examination he stated that will was written in the house of Chet Ram and he was called by the son of the plaintiff to the house of Chet Ram. He also stated that even witnesses were called by son of the plaintiff. PW-2 also stated that the impugned will also bears the signatures of the plaintiff, meaning thereby the deposition by PW-1 that he also signed the will as well as his version with regard to calling of marginal witnesses and scribe to the house of Chet Ram by his son are correct. Though, from the perusal of the statement made by PW-2, it can be inferred that after scribing the will, PW-2 had read over the contents of the same to deceased Chet Ram, who in lieu of admission of its correctness affixed his thumb impression on the same but there is nothing in the statement of PW-2 to suggest that the testator deceased Chet Ram had actually affixed his thumb impressions upon the impugned will in the presence of the witnesses and further that the witnesses had actually signed the will in the presence of the testator Chet Ram.

20. From combined reading of the statements made by PW-1 and PW-2, it clearly emerges that PW-1 and his family member i.e. his son, actively participated in the execution of the alleged will because it has come in the statements of both these witnesses that scribe as well as marginal witnesses had come to the house of the testator Chet Ram at the behest of PW-1 i.e. propounder of the alleged will. Though, the aforesaid plaintiff witnesses have mentioned with regard to the attesting witnesses, who allegedly affixed their signatures on the impugned will, but as such, there is nothing in their statements from where it can be concluded that at the time of the execution of that alleged will or at the time of affixing thumb impression by testator deceased Chet Ram these attesting witnesses were actually present at the house of Chet Ram.

21. PW-3 Sher Singh, one of the attesting witness of the will, stated that Ex.PW-2/A was written by Chamaru on the instruction of Chet Ram and same were read over to Chet Ram by the scribe Chamaru Ram and then only deceased Chet Ram affixed his thumb impression upon the will. He also stated that he also signed the will alongwith one Bhillo, who was also present there. It emerges from the statement of PW-3 that testator signed the will in presence of two witnesses who also signed the will in the presence of the testator. In his cross-examination PW-3 as well as in the statement of PW-1 it has come that PW-3 is related to the plaintiff. Moreover, the contents of the statement given by PW-3 have not been corroborated by depositions made by PW-1 and PW-2, as has been discussed above, PW-1 and PW-2 have nowhere stated anything with regard to presence of the witnesses at the time of alleged execution of the will by deceased Chet Ram.

22. Since it stands proved on the record that PW-3 is related to plaintiff, in the present facts and circumstances, he has been rightly termed as an interested witness by the Courts below. Moreover, in the present case as per statement of PW-3 he had signed the will as an witness alongwith one Bhillo, but admittedly in the present case plaintiff has not examined Bhillo Ram, who could be another material witness to substantiate the claim of the plaintiff that the will was duly executed by deceased Chet Ram and he had actually affixed thumb impressions upon the will Ex.PW2/A in the presence of the marginal witnesses. As has been observed above, that statement of PW-3 cannot be relied upon because depositions made by PW-1 and PW-2 nowhere corroborate the deposition made by PW-3. Had Bhillo Ram, who was allegedly another witness, who had actually signed the will as a witness, was examined by the plaintiff, version of PW-3 could be believed. Omission of Bhillo Ram from the list of plaintiff witnesses indicates towards suspicious circumstances and there is no explanation on record either in the shape of statement of witnesses or in the shape of documentary evidence with regard to absence of Bhillo, who as per the version of the plaintiff had signed on the will at the time of execution of the will of

deceased Chet Ram. Moreover, in the present case none of the plaintiff witnesses have stated with regard to the fact that at the time of execution of the will testator namely Shri Chet Ram was in sound state of mind and he had actually executed a will after fully understanding its contents. None of the plaintiff witnesses except PW-1 i.e. plaintiff himself, stated this fact that alleged will was executed by deceased Chet Ram in his favour with sound disposing state of mind and there was no pressure upon him to execute the will Ex.PW2/A.

23. From the collective reading of the statements rendered by the plaintiff witnesses during trial of the case, it can be safely concluded that the plaintiff has not been able to prove due execution of will in accordance with Section 63 of the Indian Succession Act, 1925, which reads as :

> ***"63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—***
>
> ***(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.***
>
> ***(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.***
>
> ***(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."***

24. As per Section 63 of the Indian Succession Act plaintiff was required to prove that at the time of execution of will testator was in sound disposing state of mind to understand the contents of will testament as well as its acquiescence. As has imparted from the records, there is no evidence at all in this regard brought on record by the plaintiff to substantiate that deceased Chet Ram was in sound state of mind at the time of execution of the alleged will Ex.PW2/A.

25. In the present case, where the defendants had taken specific objection with regard to the genuineness and correctness of the alleged will and had alleged that will Ex.PW-2/A is fictitious and forged document, onus was upon the plaintiff to dispel the notion that the alleged will has been executed by the testator in sound disposing state of mind and the same was signed by the testator after understanding the contents of the will. But in the present case where the court had occasion to go through the statements of each and every plaintiff witnesses, there is no whisper with regard to the assertion that testator was in sound disposing state of mind and he was capable of understanding the consequences of the execution of the will at the time of execution of the will. Critically noticing the statements made by the plaintiff witnesses as well as documentary evidence available on record, this Court has no hesitation to conclude that the plaintiff has miserably failed to prove the valid execution of the will by deceased Chet Ram in his favour and, as such, both the Courts below have rightly held that the will Ex.PW-2/A is not a genuine will.

26. Now, coming to the statement made by DW-1 Kisso, where he categorically stated that the impugned will is a forged document, as testator Chet Ram never executed a will in favour of the plaintiff. Perusal of the written statement clearly suggests that a specific objection regarding the genuineness of the will has been taken and same has been termed to be a forged

one. In his statement, he categorically denied that deceased Chet Ram had ever executed any will, rather he stated that the plaintiff had applied for mutation on the basis of alleged will executed in his favour, but despite 7-8 opportunities he failed to submit the same as such mutation was entered in their favour. Even, perusal of the cross-examination conducted by the plaintiff has nowhere suggests that he ever conflicted from his statement, which he made in the examination-in-chief. Rather, perusal of the same suggests that he stuck to statement he made during the examination-in-chief.

27. As has been noticed above, that though normally onus to prove the execution and validity of the will lies upon the propounder but in case when it is alleged by the opposite party that will is not genuine document, onus shifts on the person who alleges the will as being forged to prove the same.

28. In ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40,*** the Hon'ble Apex Court held:

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

29. In the present case by way of written statement defendants took specific objection with regard to the genuineness of the alleged will. DW-1 categorically stated in his statement that deceased Chet Ram never executed any will in favour of the plaintiff and will Ex.PW-2/A is forged and fictitious document got executed by the plaintiff after the death of deceased Chet Ram. To substantiate his aforesaid statement, he indicated that strongest suspicious circumstance surrounding the execution of the will in the present case is that the propounder i.e. the plaintiff has failed to produce the impugned will before the AC-II Grade, Salooni, at the time of attestation of mutation qua the estate of deceased Chet Ram, who also tendered in evidence Ex.D-1, which stands duly proved on record and suggests that number of opportunities were given to the plaintiff by the revenue authorities for placing on record the will, if any, in his favour by deceased Chet Ram, so that mutation is entered accordingly. It is evident from Ex.D-1 that revenue authorities entered the mutation in favour of the plaintiff at first instance qua the suit land on the basis of some will, thereafter on 29.2.1996 when AC-II grade came to attest the said mutation, the plaintiff failed to produce the will before the AC-II Grade. Thereafter, another opportunity was given to him to produce the will on 4.6.1996, he again failed to produce the will. Records suggest that despite several opportunities plaintiff failed to produce the will and finally on 25.7.1997 i.e. almost after one year when the plaintiff did not appear before the AC-II Grade on 6.8.1997 AC-II Grade. Several opportunities were given to him to produce the

will i.e. on 4.6.1996, 31.8.1996, 25.9.1996, 27.11.1996, 30.4.1997, 16.5.1997, 12.6.1997, 16.7.1997, 25.7.1997 and finally on 6.8.1997 AC-II Grade, in the absence of production of original will attested the mutation qua the estate of deceased Chet Ram in accordance with the provisions of the Hindu Successions Act. Perusal of Ex.D-1 leaves no doubt that despite having afforded sufficient opportunities, plaintiff failed to place on record any will till 6th August, 1997 before the AC-II Grade. Though PW-1 in his statement stated that he had produced the impugned will before the AC-II Grade but this statement is not substantiated by any documentary evidence, rather perusal of Ex.D-1 as has been referred above, suggests that at the behest of plaintiff revenue authorities entered mutation but thereafter despite several opportunities, he failed to place on record will, hence, mutation was not attested accordingly. Thus, aforesaid circumstance, where plaintiff failed to produce will for almost one year after being called upon by the revenue authorities indicates towards strongest suspicious circumstances surrounding the execution of the will, rather it strengthen the allegations of the defendants that actually this will was got executed by the plaintiff after the death of testator, namely Chet Ram.

30. If the evidence, be it ocular or documentary, available on record adduced by both the parties are seen in its entirety and read conjointly, it can be safely concluded that the will Ex.PW-2/A is shrouded by strong suspicious circumstances, as has been discussed hereinabove. Moreover, the plaintiff has not led any evidence to dispel the cogent, reliable, convincing evidence led on record by defendants to dispel the notion that the will in question is not surrounded by suspicious circumstances. To the contrary, if the assertion made by DW-1, is read with documentary evidence Ex.DW-1, it leaves no doubt in the mind of the Court that the defendants have discharged their onus by proving that will Ex.PW-2/A is shrouded by suspicious circumstances.

31. 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 question of law framed above is answered accordingly. Hence, present appeal fails and the same is, accordingly dismissed.

32. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

State of Himachal Pradesh .....Petitioner.
Versus
Naresh Kumar .....Respondent.

Cr. Revision No. 45 of 2009.
Date of Decision: 16.5.2016.

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of four bags of English liquor bearing mark 'Bagpiper'- accused was tried and acquitted by the trial Court- an appeal was preferred which was dismissed as not maintainable- held, in revision that only four bottles were sent for analysis; thus, it was only proved that the accused was found in possession of four bottles of liquor and it cannot be said that accused was in possession of 48 bottles- he was carrying two bottles beyond permissible limit, hence, offence would be bailable- appeal lies against the order of the acquittal, in an offence which is cognizable and non-bailable- accused had committed a bailable offence- therefore, appeal was not maintainable and was rightly dismissed by the Sessions Court- revision dismissed. (Para-5 to 17)

Cases referred:
State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
State of Rajasthan v. Gopal, 1998 (8) SCC 499
Nanha v. State of H.P., Latest HLJ 2011 (HP) 1195

For the petitioner: Mr. Rupinder Singh Thakur, Additional Advocate General.
For the respondent: Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral).*

The present criminal revision petition filed under Section 397 Cr.PC read with Sections 401 & 482 Cr.PC, is directed against the order dated 31.12.2008, passed by the learned Additional Sessions Judge, Shimla, HP, in case No. 40-S/10 of 2007, titled *"State of Himachal Pradesh v. Naresh Kumar"*, affirming the judgment of acquittal dated 21.7.2007, passed by the learned Judicial Magistrate, Ist Class, Theog, District, Shimla, HP, in case No. 107-3 of 2006 titled "*State of Himachal Pradesh v. Naresh Kumar*," whereby accused-respondent herein, has been acquitted of the charges for the offence punishable under Section 61 (1) (a) of the Punjab Excise Act, 1914, (In short "the Act"), as applicable to the State of Himachal Pradesh.

2. In nutshell, case of the prosecution is that on 4.3.2006, HC Balbir Singh, PW-7, Constable Mahinder Singh PW-1, and other police officials, had laid Naka at Gumma-Baghi bifurcation road and at around 12:45am (midnight), Maruti Car bearing No. HP-09A-1283 came from Chhaila to Kotkhai side. On checking of the aforesaid car, four boxes of English liquor mark 'Bagpiper' containing twelve bottles in each box were recovered. As per prosecution story, out of the bulk, one bottle from each box was withdrawn as sample and thereafter sealed with seal having impression 'K' and the bulk and the samples were taken into possession vide memo Ext.PW.1/A. The sample of the seal was also taken on white cloth Ext.PW-1/E. Thereafter, Ruka Ext.PW-7/B, was sent to the Police Station, on the basis of the same, FIR Ext.PW-5/A was lodged/registered against the respondent-accused. Spot map Ext.PW-7/C was prepared during the course of the investigation and vehicle was taken into possession, vide memo Ext.PW-2/A, alongwith its documents. Vide Memo Ext.PW-6/A, documents were handed over to Balibir Singh on sapurdari. The samples were sent to CTL, Kandaghat for obtaining the opinion of Chemical Examiner and the opinion Ext.PZ was obtained. Police also recorded the versions of witnesses under Section 161 Cr.PC. After completion of investigation, challan was put up in the competent court of law recommending the trial of the respondent-accused. The court of learned Judicial Magistrate, Ist Class, Theog, charged the accused under Section 61 (1) (a) of the Act to which the accused pleaded not guilty and claimed trial.

3. In the present case, prosecution with a view to prove its case examined as many as seven witnesses. Statement of accused under Section 313 Cr.PC was also recorded, wherein he stated that he has been falsely implicated. However, he did not lead any evidence in his defence. Learned trial Court after appreciating the material on record vide judgment dated 21.7.2007, acquitted the accused for the offence committed under Section 61 (1) (a) of the Act.

4. Feeling aggrieved and dissatisfied with the judgment of acquittal of learned trial Court, petitioner herein- State, filed an appeal under Section 378 Cr.PC, before the learned Additional Sessions Judge, FTC, Shimla, HP, whereby the same was dismissed being non-maintainable. Hence, the present criminal revision petition.

5. Since the appeal filed by the petitioner-Sate was dismissed being not maintainable before the appellate Court, it would be proper to deal with the question of maintainability at the first instance before adverting to the merits of the impugned order. In

para-3 of the order dated 31.12.2008, learned Additional Sessions Judge, has noted that *"Learned PP fairly conceded at bar that if a person is carrying/transporting 10 bottles of Indian made Foreign Liquor of 750 ml. each i.e. beyond the permissible limit of two bottles, the said offence is bailable."* In the present case, as per prosecution story, though they had recovered four foxes of Indian Liquor mark Bagpiper containing twelve bottles in each box but admittedly, as per case of the prosecution, out of bulk, one bottle from each box was withdrawn as sample, meaning thereby, only four samples of four bottles out of four boxes were withdrawn and sent for medical examination. The learned Additional Sessions Judge, has taken note of the judgment passed by this Court in ***State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919*** wherein this Court has observed in paras 6 and 7 as under:-

> *"6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.*
>
> *7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."*

6. Careful reading of the judgment (supra) suggests that before convicting the accused for the offences in which, he has been charged, it was incumbent upon the prosecution to prove that respondent-accused, was in actual and conscious possession of the licit liquor in excess of the prescribed limited. Since in that case (supra), 71 pouches were alleged to have been recovered from the accused but only one pouch was retained as sample and sent for opinion of Chemical Analyst, the Hon'ble Court came to the conclusion that prosecution could only prove that the respondent-accused was in possession of one pouch of 180 ml. of country liquor in his possession, which is not an offence.

7. The learned Additional Sessions Judge, applying the ratio of the judgment (supra) came to the conclusion that only four bottles out of four boxes were sent for chemical analysis, meaning thereby that accused was carrying liquor beyond permissible limit. if the story of prosecution is taken to be correct on its face value, recovery of four bottles is required to be taken into consideration not forty eight. Admittedly, in view of the recovery of four bottles, accused may be considered carrying two bottles beyond permissible limit. Hence, present offence is bailable. In bailable offence, no appeal is maintainable under Section 378 (1) (a), which section provides as under:-

> ***378. Appeal in case of acquittal****-[(1) Save as otherwise provided in Sub-Section (2), and subject to the provisions of Sub-Sections (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 non-bailable offence;*
>
> *(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 the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government may, subject to the provisions of Sub-Section (3), also direct the Public Prosecutor to present an 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].*

8. Careful reading of clause 1(a) indicates that appeal, if any, to the Court of Sessions, would lie against the order of acquittal passed by magistrate in respect of cognizable and non-bailable offence. In the present case, as has been discussed above, where recovery of four bottles has been proved; which fact has been rather conceded by learned PP before the court of learned Additional Sessions Judge and as such, it has been rightly concluded that appeal is not maintainable before that Court in view of the facts and circumstances as narrated herein above.

9. Mr. Rupinder Singh Thakur, learned Additional Advocate General, stated that finding of the learned Additional Sessions Judge as far as on maintainability is concerned, is not sustainable, especially, in view of the fact that admittedly, in the present case, four boxes of liquor (total 48 bottles out of four boxes) were recovered from the car of the accused and out of each box, one bottle each was sent for sample purposes. As per him, sending of one bottle from each box was sufficient to ascertain the contents of other bottles recovered from the four boxes. Hence, finding of the learned appellate Court to the effect that appeal is not maintainable, is not sustainable and same deserves to be quashed and set-aside. Though, it clearly emerges from the records available that four bottles one from each of four recovered boxes were sent for chemical analysis, which fact was fairly conceded by learned PP before the learned appellate Court but solely with a view to examine the submissions made by Mr. Thakur, learned Additional Advocate General that the samples withdrawn by the police at the time of recovery, one each from four boxes, was sufficient to ascertain the quantity of liquor, this Court undertook an exercise to examine the entire case on merit also.

10 While exercising its revisionary jurisdiction, this Court has very limited powers under Section 397 Cr.PC to re-appreciate the evidence available on record to look into the entire matter, as has been observed above but in the interest of justice, this Court critically examined the statements of the prosecution witnesses with a sole view to ascertain that the judgments passed by learned courts below are not perverse and the same are based on correct appreciation of the evidence on record. 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. I have heard learned counsel for the parties as well carefully gone through the record.

12. In the present case, where, as per prosecution story, four boxes of English Liquor mark Bagpiper containing 48 bottles, were recovered from the Car of the accused. One bottle from each boxes (i.e. four bottles) were withdrawn as samples and thereafter, sealed with seal having impression 'K'. Bulk and the samples were also taken into possession vide recovery memo Ext.PW-1/A. Sample of the seal was also taken on white paper as Ex.PW-1/E but careful reading of the statements given by the prosecution witnesses, especially, PW-1 and PW-2, who are the eye witnesses of recovery memo Ext.PW-1/A at the time of recovery stated that on 4.3.2006, they had proceeded in Government vehicle at Gumma Baghi bifurcation road and laid Naka there. They also deposed in their cross-examination that vehicle was searched and four boxes of English liquor Mark 'Bagpiper' were recovered but in his cross-examination, he admitted that on the recovered boxes of liquor, there is no tag of FIR and these boxes were not sealed. It is also admitted that behind Gumma Baghi link road, there is a Gumma market, where there are many shops and residential area, however, there is no sufficient explanation rendered that why independent witnesses were not associated at the time of recovery. However, as per case of prosecution, since recovery was effected at 12:45am, it was not possible to associate independent witnesses at that juncture. PW-2 Ramesh Chand, HHC No. 239 also stated that on 4.3.2006 he alongwith Mahinder Singh and HC Balbir Singh laid a Naka at Gumma Baghi bifurcation at about 12:45 am (midnight), then a Maruti Car came from Chhaila side and on interception, four boxes of English liquor mark 'Bagpiper' were taken into possession by the police. He also stated that one bottle from each boxes was withdrawn as sample and thereafter sealed with seal having impression 'K'. He in his cross-examination stated that seal having impression 'K' after its use was handed over to him but he has not brought the seal, rather, he stated that he cannot produce the seal before the Court. He also admitted in his cross-examination that neither there is any seal on the box, nor on bottles Exts.P-1 to P-44. He also admitted that there is no tag of the FIR on the boxes.

13. PW-3 C. Surinder Singh, driver of the vehicle in which police officials had visited the spot also supported the story of the prosecution as well as alleged recovery of liquor concerned and stated that aforementioned car was taken into possession vide memoExt.PW-1/A. He also reiterated the story put forth by the aforesaid prosecution witnesses with regard to the withdrawing of sample from the each boxes and sending of the same with impression 'K. He also stated that seal after use was handed over to HC Ramesh Chand but in his cross-examination, he stated that seal having impression 'K' after its use was handed over to him but PW-2 stated before the court that he has not brought the seal, rather, he stated that he cannot produce the seal in the Court. PW-3 also stated that boxes of liquor are not sealed and there is no seal in the bottles Ext.P-1 to P-44. He also admitted that there is no tag of FIR on the boxes allegedly recovered from the Car of the accused. Even PW-7 Investigating Officer also admitted in the cross-examination that there is no seal nor any tag of FIR on the case property i.e. four boxes of liquor. It has also come in his statement that there is seal Mark 'K' in Exts.P-1 to P-44. Combined reading of all the prosecution witnesses, as has been observed herein above, suggest that no number of FIR was put/tagged on the four boxes allegedly recovered from the car, which fact clearly makes the story of recovery doubtful, moreover, it also emerges from the statement of prosecution witnesses as has been discussed above that boxes of the liquor were not sealed and admittedly, there is no seal on the bottles of liquor allegedly recovered from the conscious possession of the accused. Story of prosecution with regard to sealing of the sample is also doubtful, especially, in view of the statements of PW-2 and PW-3. PW-2 though stated that seal having impression 'K' after its use was handed over to him but he has not brought the seal, rather, he cannot produce the same before the Court. This very admission on the part of PW-2 has rendered the story of prosecution unreliable and untrustworthy. This aforesaid omission on

the part of the police not to seal case property at the time of alleged recovery is not a minor discrepancy, rather, it has vitiated the entire recovery, if any. In the present case, as has been mentioned earlier, that police had withdrawn four bottles (one each from every box for sample) which were sent for chemical analysis but as has emerged from the statement of PWs-2 and 3 that no seal, whatsoever, was produced in the Court; aforesaid glaring discrepancy has rendered the story of withdrawing samples by police after recovery unreliable and cannot be relied upon in the totality of the facts and circumstances. It clearly emerges that prosecution in the present case has miserably failed to prove the recovery of the liquor from the conscious possession of the accused. All the material prosecution witnesses have unequivocally admitted the fact that there is no seal on the case property nor there is any tag of FIR coupled with the fact that the "seal" with which allegedly case property was sealed, was not produced in the Court. Non-production of seal in the Court has rendered the story of prosecution doubtful and untrustworthy.

14. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in ***State of Rajasthan v. Gopal, 1998 (8) SCC 499,*** relevant paras of the aforesaid judgments is reproduced herein below:

> *"2. In passing the order of acquittal, the High Court has noted that the seizure of the narcotic substance was doubtful because the seal on the sample sent for chemical analysis could not be compared with the seal on the seized article kept in the Police Malkhana because the seal on the sample sent to analyst could not be produced in the Court for verification. Even the seal which was put on the seized article kept in the Police Malkhana could not be ascertained excepting the word "Ajmer". It may be stated here that since the said article had been seized on the railway platform according to the prosecution case, the seal of the Stationmaster had been used, but the Stationmaster was not examined to prove whether the seal put on the sized article and kept in the Police Malkhana really contained the seal of the Stationmaster."*

15. Reliance is also placed on judgment passed by our own High Court in ***Nanha v. State of H.P., Latest HLJ 2011 (HP) 1195.*** Paras No. 7 to 9 are extracted herein below:-

> *"7. Adverting to the points urged by learned counsel appearing for the appellant that the seal used has not been produced in court, we note that this Court in Criminal Appeal No. 308 of 1996, decided on October 21, 2009, State of H.P V. Tek Chand, reported in Latest HLJ 2010(HP)497,Holds-*
>
> > *"9 PW1 Hukam Chand , MHC, with whom the case property was deposited by PW 4 Ravinder Singh, also did not say that any specimen seal impression has been deposited along with parcel containing the samples and the bulk Charas. It is only PW2 HC Raj Sigh , who took over the charge of MHC from PW1 Hukam Chand, who stated that he sent one of the two samples along with sample seals to the Chemical Examiner, through Constable Mani Ram. Mani Ram who was examined as PW3, did not say that any specimen seal impressions were also carried by him along with the sample. He simply stated that he carried one sealed parcel which was handed over to him PW2 HC Raj Singh. On the docket with which the sample was sent to the Chemical Examiner i.e. Ext.PC, facsimiles of the seals used in sealing the parcels are not there. That means specimen impressions of the seals used in sealing the sample parcels, which was sent to the laboratory, were not available with the Chemical Examiner, for comparison with the seal impressions on the parcel containing sample . Therefore , the report Ext. PC cannot be said to have been sufficiently linked with the samples allegedly separated from the recovered stuff.*

8. Adverting to the facts on record, we find from Ext. PW-8 /A that the facsimile of the seal not having been affixed on this document. Further we also note that PW-5 Constable Yoginder Singh states;

".....All the parcels were sealed with seal 'D' initially. The seal 'S' was made of some metal. The seal has not been brought by me today as the same has been lost. No report qua missing of the seal was lodged by me with anyone .

9. The seal was in possession of the prosecution as established form the evidence of PW-7 Constable Ramesh Kumar, who says that he had deposited this in the Kandaghat Laboratory. What happened to the seal after that is not clear neither it is clear as to why the facsimile is not affixed on the NCB form."

16. Consequently in view of the aforesaid discussion, this Court does not see any reason to interfere with the judgment of acquittal passed by the learned trial Court, which was correctly affirmed / upheld by learned Additional Sessions Judge. Apart from above, finding of the appellate Court is also correct that appeal to the court of sessions could only lie from an order of acquittal passed by magistrate in respect of cognizable and non-bailable offences.

17. In the present case, admittedly, four bottles, one each from the four boxes were sent for chemical examination, meaning thereby, there was only effective recovery of four bottles out of 48 bottles and accused could be considered carrying two bottles beyond permissible limit, which was admittedly bailable offence. Hence, judgments passed by the courts below are upheld as they are based upon correct appreciation of evidence available on record and the appeal stands dismissed. Pending applications are disposed of, if any.

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

Taru alias Ude Ram .....Petitioner.
Versus
State of H.P. ....Respondent.

Cr. Revision No. 8 of 2008.
Date of Decision: 16th May, 2016.

Indian Penal Code, 1860- Section 341, 354 and 506– Prosecutrix was going to her house - accused intercepted her and caught her by arm – he outraged her modesty- her sweater and shirt were torn - accused was tried and convicted by the Trial Court - an appeal was preferred, which was partly allowed and accused was acquitted of the commission of offence punishable under Section 506 of IPC- held in revision, the testimony of the prosecutrix was not corroborated by PWs 2 and 3 - they had not noticed that sweater and shirt of the prosecutrix were torn - the Courts had wrongly relied upon the evidence to convict the accused- revision accepted - accused acquitted. (Para 9-11)

For the Petitioner: Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.
For the Respondent: Mr. R.S. Thakur, Addl. A.G. and Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The learned trial Court convicted the accused/revisionist for his committing offences punishable under Sections 341, 354 and 506 of the Indian Penal Code. It also imposed upon the accused/convict consequent sentences for his committing the afore referred penal

misdemeanors. The learned trial Court proceeded to hence sentence him to pay fine of Rs.500 for commission of offence under Section 341 of the IPC. In default of payment of fine amount, he was sentenced to undergo simple imprisonment for a period of 7 days. He was further sentenced to undergo simple imprisonment for a period of six months and to pay fine of Rs.2,000/- for commission of offence under Section 354 of the IPC. In default of payment of fine he was sentenced to undergo simple imprisonment for a period of one month. He was further sentenced to undergo simple imprisonment for a period of six months and to pay fine of Rs.1,000/- for commission of offence punishable under Section 506 and in default of payment of fine he was sentenced to undergo further imprisonment for one month. All the sentences were directed to run concurrently. The accused/convict preferred an appeal before the learned Additional Sessions Judge, Fast Track Court, Kullu, H.P. against the judgment of conviction and sentences recorded against him by the learned trial Court. The Appellate Court rendered a judgment in affirmation to the conviction and sentences as stood recorded against him by the learned trial Court for his committing offences punishable under Sections 341 and 354 of the IPC. However, it set aside the conviction and sentence as stood recorded against him by the learned trial Court for his committing an offence punishable under Section 506 of the IPC. The accused/convict has been led to institute the instant revision petition therefrom before this Court seeking therein the setting aside of findings of convictions and consequent sentences concurrently imposed upon him by both the learned Courts below.

2. The facts relevant to decide the instant case are that on 14.7.2006 at about 9.30 a.m., the complainant/prosecutrix was going to her shop at Haripur. Near her house, accused had parked his scooter. When she was proceeding towards her shop, accused intercepted her on the way with his scooter. She tried to go ahead ignoring the presence of the accused. After covering some distance, scooter was parked by the side of the road by the accused. She was caught from her arm by accused. He stated to her that he wanted to talk to her in nearby forest. She told him that she would talk to him at Haripur. The accused again insisted upon the prosecutrix to talk with her in the forest and stated that he would show her as to how rape was committed. She was caught by the accused and her sweater and shirt were torn. He tried to outrage her modesty. She raised alarm. It was secluded place. Nobody came on the place of occurrence. She managed to wriggle out of the clutches of the accused. She went to nearby house to make telephonic call, but phone was found out of order. Thereafter she reached near Haripur Post Office through field. Accused was found standing there. He chased her upto STD-booth. She wanted to make a telephonic call from STD booth, but she was not having telephone number with her. She boarded bus. Accused threatened to teach her lesson. Accused chased the bus on his scooter upto Jagatsukh. Near Jagatsukh scooter of accused overtook the bus. Complainant availed the opportunity to return back to Haripur by boarding another bus in order to avoid the wrath of accused. She came to Police Station, Manali via 15 Mile. The incident was reported to Police at Police Station, Manali on the basis of which FIR was registered. The police completed all the codel formalities.

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 before the learned trial Court.

4. The accused was charged by the learned trial Court for his committing offences under Sections 341, 354 and 506 of the IPC. In proof of the prosecution case, the prosecution examined 5 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused/convict under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/convict. In an appeal preferred by the accused/revisionist before the learned Addl. Sessions Judge, Fast Track Court, Kullu, the latter affirmed the conviction and consequent sentences recorded by the learned trial Court against the

accused/convict for his committing the offences punishable under Section 341 and 354 of the IPC. However, the learned Appellate Court set aside the conviction and sentence recorded by the learned trial Court for his committing the offence punishable under Section 506 of the IPC.

6. The accused/convict is aggrieved by the judgments of conviction recorded by both the learned courts below. The learned counsel for the accused/convict has concertedly and vigorously contended qua the findings of conviction recorded by both the learned Courts below 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 that the findings of conviction be reversed by this Court in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended that the findings of conviction recorded by both the Courts below are based on a mature and balanced appreciation of evidence on record and do not necessitate 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 sole testimony of the prosecutrix is sufficient to sustain findings of conviction against the accused/convict only when it inspires confidence besides is trustworthy. It would be bereft of credence in case her testimony qua the ill-fated occurrence stands connoted by the depositions of PW-2 and PW-3, premises whereof of both stood visited by the complainant/prosecutrix to therefrom purvey a telephonic information to the police station concerned qua the occurrence to suffer a vice of falsity. Both PW-2 and PW-3 are not eye witnesses to the occurrence. Their testimonies assume significance as the prosecutrix has unequivocally communicated in her testimony of the accused tearing both her shirt as well as her sweater during the span of the accused perpetrating penal misdemeanors upon her, especially when she in quick spontaneity to the occurrence visited the premises of PW-2 and PW-3 to therefrom purvey the apposite information to the police station concerned. Consequently, the echoing by each of them in unison of their noticing thereat the torn shirt as well as the sweater of the prosecutrix was imperative. However, both in their respective depositions omit to unfold the prime fact of on the prosecutrix visiting their respective premises theirs noticing hers wearing a torn shirt besides a torn sweater. The absence of voicing by each of them in their respective testimonies qua the aforesaid prime factum negates the testimony of the prosecutrix of the accused/convict during the spell of his perpetrating the alleged offences on her person, his tearing both her shirt as well as her sweater. When the aforesaid attribution by the prosecutrix to the accused stands repulsed arising from theirs not attaining corroborative succor from the testimonies of PW-2 and PW-3, premises whereof, she visited in quick spontaneity to the illfated occurrence besides when the tearing of both her shirt as well as her sweater were palpably noticeable, obviously, constrains this Court to hold of hers testimony being neither truthful nor trustworthy. As a corollary, when her testimony loses its creditworthiness qua the aforesaid prime factum, the ensuing deduction therefrom is of the prosecutrix hence contriving or rearing a false story against the accused/convict whereupon no reliance is imputable.

10. On the previous date of hearing, the learned Additional Advocate General contended of the tearings of the shirt as well as of the sweater of the prosecutrix by the accused during the course of his subjecting her to penal misdemeanors were minimal, as such, rendered incapacitated both PW-2 and PW-3 to voice the aforesaid factum in their respective previous statements recorded in writing as also precluded them to communicate the aforesaid prime factum in their respective testimonies recorded on oath in Court. In sequel, he contended of any lack of communication of the aforesaid factum in their respective depositions by PW-2 and PW-3 of the aforesaid prime factum would not render the prosecution case to acquire any stain of inveracity. For testing the strength of the submission of the learned Additional Advocate General an order stood recorded by this Court qua the clothes of the prosecution held in the apposite

malkhana being produced before this Court for enabling this Court to visualize the extent of tearings begotten upon the shirt and on the sweater of the prosecutrix. Today, both the shirt as well as the sweater of the prosecutrix stand produced before this Court. On inspection thereof , the shirt on its side holds tearings. Since, thereupon the prosecutrix was donning a sweater the palpable tearings of the shirt beneath it may obviously were unnoticeable. However, when the sweater as worn by the prosecutrix stands also noticed by this Court to be heavily torn naturally hence tearings thereof when were palpably noticeable to both PW-2 and PW-3 whereas both omitted to disclose in their respective testimonies of the prosecutrix on visiting their premises theirs noticing the tearings occurring on the sweater of the prosecutrix. Consequently, the aforesaid noticeable tearings occurring on the sweater of the complainant standing not narrated by PW-2 and PW-3 in their respective previous statements recorded in writing as also in their respective testimonies recorded on oath before the learned trial Court belies the version of the prosecutrix of during the course of perpetration of penal misdemeanors by the accused on her person, her sweater as well as shirt stood torn. Obviously, naturally she is then not to be construable either a trustworthy witness or a credible witness nor hence her version qua the prosecution case is to be construable to be inspiring confidence.

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

12. Consequently, the instant revision petition is allowed and the judgments of conviction and sentences recorded by both the learned Courts below against the accused/appellant are set aside. The accused/revisionist is acquitted of the offences charged. Fine amount, if any, deposited by him be refunded to him. Records be sent back forthwith.

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

Civil Revision No. 106 of 2005 a/w Civil Revision No. 120 of 2005.
Decided on : 17.5.2016

Civil Revision No. 106 of 2005
Shri Atul Soodan & others. .....Petitioners.
Versus
Ajit Kumar & another ....Respondents.

Civil Revision No. 120 of 2005
Mohinder Kumar .....Petitioner.
Versus
Ajit Kumar and others ......Respondents.

H.P. Urban Rent Control Act, 1987- Section 14- Petitioner filed a petition for eviction of the tenant on the ground of arrears of rent and sub-letting - petition was dismissed by the Rent Controller- an appeal was preferred which was allowed- it was contended in revision that the petitioner does not fall within the definition of landlord – held that the plea that petitioner is not a landlord and is not entitled to file the rent petition cannot be taken by the tenant as he is estopped from questioning the title of the landlord or to set up the title in third person - Appellate Court had wrongly allowed the appeal- revision accepted. (Para-8 to 16)

Cases referred:
Bansraj Laltaprasad Mishra versus Stanley Parker Jones, (2006)3 SCC 91

Rita Lal versus Raj Kumar Singh, 2002) 7 SCC 614
D. Satyanarayana versus P. Jagadish, (1987)4 SCC 424

Civil Revision No. 106 of 2005

For the Petitioners:	Mr. Satyan Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For the Respondents:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj Vashishta, Advocate for respondent No.1.
	Mr. Dhananjay Sharma and Mr. Ankit Aggarwal, Advocates vice Mr. Sanjeev Sood, Advocate, for respondent No.2.

Civil Revision No. 120 of 2005

For the petitioner:	Mr. Dhananjay Sharma and Mr. Ankit Aggarwal, Advocates vice Mr. Sanjeev Sood, Advocate.
For the respondents:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj Vashishta, Advocate, for respondent No.1.
	Mr. Satyan Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Since common questions of fact and law stand raised for consideration in both the petitions, hence they are taken up together for disposal.

2. Respondent No.1 Ajit Kumar (in both petitions) instituted a petition for eviction from the demised premises of the petitioners herein (in both petitions) before the learned Rent Controller (2) Nurpur, District Kangra, H.P., on grounds as embodied therein. The learned Rent Controller had dismissed the petition for eviction as constituted before him by aforesaid Ajit Kumar, respondent No.1. Respondent No.1 standing aggrieved by the rendition of the learned Rent Controller whereby the latter dismissed his petition for eviction constrained him to institute an appeal therefrom before the learned Appellate Authority-II, Kangra District at Dharamshala. The learned Appellate Authority on a consideration of the material as constituted before him reversed the findings and conclusions arrived at by the learned Rent Controller. The purported tenants under respondent No.1 Ajit Kumar standing aggrieved by the rendition of the learned Appellate Authority hence have come to assail the same before this Court.

3. The brief facts of the case are that the respondent No.1 Ajit Kumar is landlord of the premises as shown in the site plan ABCD in red colour abutted on the South/West : Wakf Board vacant Land. East/West : Shop of Ajit Kumar, North/West : Sita House Medicos (shop) and East/North : Chamba Road & Civil Hospital, situated in Ward No.3, Nurpur Town, Tehsil Nurpur, District Kangra, H.P (for short "the demised premises") . The demised premises is averred to be non-residential. It is also pleaded that the shop was given to Mohinder Kumar (petitioner in CR No. 120 of 2005). Petitioners namely Jagdish (since died) Amit and Atul have been arrayed as parties on the allegations that Mohinder Kumar has further sub-letted the demised premises to them. The rent of the demises premises is settled at Rs.800/- per month since 24.5.1990. As per respondent No.1 Ajit Kumar the rent deed/agreement in this respect was also drawn. According to Ajit Kumar at the time of agreement Rs.15000/-as rent advance stands also received from Mohinder Kumar. The eviction was sought by the applicant on the ground of Mohinder Kumar being in arrears of rent up to 13/14-12-1999 to the tune of Rs.76,600/-The eviction is also sought on the ground of Mohinder Kumar further subletting it to the aforesaid namely persons. Legal notices were issued upon Mohinder Kumar, however, despite notice he neither handed over the vacant possession of the shop to respondent No.1 nor paid any rent.

4. The petitioners herein contested and resisted the application and filed reply(s) thereto. They have taken preliminary objections of maintainability, locus standi, estoppel, cause of action and non-joinder of necessary parties. On merits para-1 and 2 of the application were admitted to be correct while the contents of para-3 were denied. It is pleaded by the respondents/petitioners herein that Punjab Wakf Board is the landlord of the demised premises. It is admitted by them that initially Mohinder Kumar was inducted as tenant in the demised premises. It is denied by them that Mohinder Kumar further sub-letted the demised premises to other persons/petitioners. It is further pleaded that at present the demised premises is in possession of respondent No.2 therein as tenant under Punjab Wakf Board, Ambala Cantt. It is also denied that the demised premises remained closed for the last one year continuously. Accordingly to Mohinder Kumar he was in possession of the shop. He kept the shop upto March, 2000 and thereafter Jagdish Chand is in possession of the same from April, 2000. It is also admitted that Mohinder Kumar was inducted as tenant on payment of rent @800/- per month. It is pleaded that there is no relationship of tenant between respondent No.1 Ajit Kumar and Mohinder Kumar (petitioner in CR No. 120 of 2005) since October, 1991 as Punjab Wakf Bard has cancelled the lease of respondent No.1 Ajit Kumar. Thereafter Punjab Wakf Board issued notice to Mohinder Kumar to vacate the demised premises or to become a tenant of Punjab Wakf Board. As per the petitioner Mohinder Kumar herein, he became the tenant of Punjab Wakf Board and as such, he is not in any arrears of rent. It is also pleaded that Mohinder Kumar is not tenant of applicant but he was lessee to Punjab Wakf Board whereas Jagdish Chand is not sub-letee but he is lease-holder of Punjab Wakf Board and so far as petitioners namely Amit Sudan and Atul Soodan are concerned they have no concern with the demised premises. Therefore they prayed that eviction petition be dismissed with costs.

5. The respondent No.1 has filed re-joinder to the reply(s) wherein he denied the objections raised by them in their respective reply(s) and re-asserted the contents of the application.

6. On the pleadings of the parties, the following issues were framed by the learned trial Court:-

1) Whether the applicant/landlord is entitled for recovery of Rs.1,15,996/- as arrears of rent with interest as alleged ?OPA.

2) Whether the respondent No.1 has sub-let the demised premises to respondents No. 2 to 4, as alleged, if so, its effect? OPA.

3) Whether the applicant has no locus standi to file the present application ? OPR.

4) Whether the applicant is estopped by his act and conduct from filing the present application ? OPR.

5) Relief.

7. On an appraisal of the evidence, adduced before the learned Rent Controller, the learned Rent Controller dismissed the petition filed by the applicant therein/respondent No.1 herein. In an appeal preferred therefrom before the learned Appellate Authority by respondent No.1 herein, the learned Appellate Authority reversed the findings and conclusions recorded by the learned Rent Controller.

8. The learned Senior counsel for the petitioners has contended with force of the predominant or paramount owner of land whereupon subsequent to its allotment by it in favour of Ajit Kumar, the latter thereupon raised construction which he let out initially to one Mohinder Kumar who subsequently let out the same to one Jagdish Chand (since died) yet when allotment of land to one Ajit Kumar by the Predominant owner i.e. Punjab Wakf Board standing rescinded or revoked by the latter under letters of rescission comprised in RW-2/A of 14.8.1999 which rescission thereunder of allotment of land to Ajit Kumar stood succeeded by its making an allotment of the same land Under Ex. RW-2/B in favour of Mohinder Kumar whereafter the

Punjab Wakf Board proceeded to make its allotment to Sh. Jagdish Chand under a lease deed constituted in Ex.RA rendered the espousal of the aforesaid Ajit Kumar to claim eviction of both Mohinder Kumar and Jagdish Chand from the structure built by him on the land allotted to him to face ouster as tenably done by the learned Rent Controller. The learned counsel for the petitioners herein have proceeded to canvass of in sequel to allotments by the Punjab Wakf Board of the land whereupon the demised premises exist to Mohinder Kumar and thereafter to Jagdish Chand allotments whereof stood preceded by the predominant owner cancelling its allotment to Ajit Kumar besides when on its allotments respectively to Mohinder Kumar and thereafter to Jagdish Chand both the latter attorning to the predominant owner in as much as to the Punjab Wakf Board as displayed in Ex. R-1 to R-20, Ex.RW-3/B and Ex. RA is a stark and apparent display of Ajit Kumar holding no title in any capacity nor holding any locus standi to institute a petition for eviction of both Mohinder and Jagdish Chand from the structure raised by him on the land as stood allotted to him by Punjab Wakf Board. Before proceeding to test the strength of the submission addressed before this Court by the learned counsel for the petitioners on anvil of the aforesaid allotments by Punjab Wakf Board in favour of Mohinder Kumar and subsequently in favour of Jagdish Chand preceding whereto the predominant owner had cancelled the allotment of land made by it to Ajit Kumar, it is of utmost significance to garner from the apposite record qua its initial allotment in favour of Ajit Kumar by the Punjab Wakf Board interdicting him from raising any structure thereupon or prohibiting him from inducting therein Mohinder Kumar. For determining the aforesaid facet an advertence to the lease deed aforesaid executed inter-se the Punjab Wakf Board the predominant owner and Ajit Kumar is imperative. The Rent note inter-se both the aforesaid is comprised in Ex.RW-3/C. A perusal thereof underscores the factum of the predominant owner in as much as the Punjab Wakf Board making therein the allotment of land in favour of Ajit Kumar. A further incisive perusal thereof displays of the terms and conditions embodied therein unveiling the prime factum of the alottee of Punjab Wakf Board namely Ajeet Kumar standing interdicted to raise any construction thereupon except with the approval of the building plan by the authorities concerned, besides his standing prohibited to sublet the premises. Apparently the foisting of by RW-3/C of the afore-referred initial mandate upon Ajit Kumar whereby he stood restrained to raise any construction on the land depicted in the rent deed Ex. RW-3/C has sequelled infraction at the instance of the alottee namely Ajit Kumar by his omitting to display by cogent material comprised in sanction standing accorded by the competent authorities preceding to his raising a structure thereupon, of hence the structure as stands raised on the land adumbrated in the rent deed executed inter-se him and the predominant owner being wholly illegal besides unauthorized. Also with the mandate foisted in the rent deed aforesaid executed inter-se Ajit Kumar and the predominant owner against his subletting the premises or his transferring tenancy qua the land referred therein in favour of any other person also as manifested by the apposite averments cast in the apposite application for eviction preferred by him before the learned Rent Controller wherein by his seeking the eviction of the petitioners herein, his hence acquiesceing qua theirs occupying the premises as his tenants to hence its standing infracted at his instance or its standing contravened at his instance. Consequently, with the aforesaid interdiction standing cast upon Ajit Kumar under the rent note against his subletting of construction if any of as stood unauthorizedly raised upon the land allotted to him when also stands contravened at his instance would not give him any leverage to oust the subsequent alottees of the land hitherto allotted to him especially when the apposite subsequent allotments of land hitherto allotted by the Punjab Wakf Board to Ajit Kumar, stood preceded by the predominant owner rescinding the allotment of land made by it to Ajit Kumar.

9. The learned Senior Advocate for respondent Ajit Kumar has contended of the apposite subsequent allotments by Punjab Wakf Board after cancellation under RW-2/A of allotment of land by it to Ajit Kumar to initially Mohinder Kumar under Ex. RW-3/B and subsequently to Jagdish Chand under Ex.RA holds no evidentiary vigor as both the aforesaid exhibits stand not proved hence are inadmissible besides irrelevant. However, the aforesaid contention addressed before this Court by the learned counsel for Ajit Kumar stands stripped of its efficacy for the simple reason of the apposite subsequent allotments made by the predominant

owner to Mohinder Kumar and subsequently to Jagdish Chand standing proved by RW-2 and RW-3 the officials of Punjab Wakf Board. Since proof from the apposite quarter stands adduced at the instance of Mohinder Kumar and Jagdish Chand for succoring besides fastening validity to the aforesaid exhibits whereunder the Punjab Wakf Board allotted land hitherto initially allotted to Ajit Kumar and its apposite subsequent allotments standing preceded by the predominant owner cancelling under Ex. RW-2/A its previous allotment to Ajit Kumar. Necessarily hence Exhibits RW-2/A, RW-2/B and Ex.RX hold probative vigor and sinew , in aftermath the recitals recorded therein hold formidable evidentiary clout. At this stage having dwelt upon the legal efficacy of Exhibits aforesaid whereunder the predominant owner proceeded to make apposite subsequent allotments after cancellation of the initial allotment of land to Ajit Kumar, to Mohinder Kumar and thereafter to Jagdish Chand enjoins this Court to adjudicate their effect vis-à-vis the espousal made before this Court by the learned counsel for Ajit Kumar of given the manifestations in Ex. AW-2/A of Mohinder Kumar accepting himself to be tenant under Ajit Kumar hence empowering him to seek his eviction from the structure raised by him upon the land allotted to him by Punjab Wakf Board besides also estopping the subsequent alottees of Punjab Wakf Board both Mohinder Kumar and Jagdish Chand to deny the title of Ajit Kumar also baulking them to repudiate his concert to seek their eviction on the anvil of the aforesaid subsequent allotments to them of land hitherto allotted to Ajit Kumar by the Punjab Wakf Board. Before proceeding to analyze the legal profundity of the aforesaid submission of the learned Senior counsel for Ajit Kumar the prime factum as already referred hereinabove of his standing interdicted to raise without permission of the competent authorities any building on the land allotted to him by the predominant owner also his standing interdicted to sublet the premises is not to be either slighted or overlooked especially when there exists palpable evidence in display of the structure raised by Ajit Kumar on the land allotted to him by Punjab Wakf Board standing raised at his instance with his obtaining a prior approval of the competent authority rendering the construction raised on the land allotted to him by Punjab Wakf Board to stand bereft of any legality. Also with the aforesaid Ajit Kumar transgressing the mandate foisted upon him by Punjab Wakf Board while allotting land to him embodied in his standing interdicted to induct tenants thereon transgression whereof has occurred on his subletting the structure raised on the land allotted to him by Punjab Wakf Board to Mohinder Kumar, is also a prime factum which throughout is entailed to be borne in mind qua the effect marshaled by Mohinder Kumar accepting the factum of his occupying the disputed premises as a tenant under Ajeet Kumar. Be that as it may the submission as addressed before this Court by the learned counsel for Ajit Kumar rests upon the factum of Mohinder accepting him to be his landlord, he contends of thereupon the latter standing estopped to deny his title, also obviously he contends of the rendition of Appellate Authority holding tenacity. However while making the aforesaid submission before this Court the learned counsel for respondent Ajit Kumar has remained oblivious to the factum of the predominant owner or the entity holding absolute title of the demised premises after lawfully cancelling the allotment of land made by it in favour of Ajit Kumar had proceeded to thereafter record allotments in favour of Mohinder Kumar and subsequently in favour of Jagdish Chand. His remaining oblivious to the impact of the aforesaid apposite subsequent allotments which allotments under the afore-referred exhibits stand construed hereinabove to stand proven in accordance with law is of his taking to depend upon Ex.AW-2/A for anchoring his claim of the petitioners herein standing liable to attorn to him also theirs standing estopped to deny his title whereas with probative sinew standing imputed to the exhibits aforesaid constituting allotments of land made in favour of Mohinder Kumar and thereafter to Jagdish Chand preceding whereof the predominant owner lawfully cancelled the allotment of land to Ajit Kumar would obviously extirpate the force of the aforesaid address made before this Court by the learned Senior counsel for respondent No.1 Ajit kumar. Further enfeeblement to the address made before this Court by the learned counsel for respondent Ajit Kumar stands gathered from the factum of Mohinder Kumar under R-1 to R-20 attorning to Punjab Wakf Board, factum whereof when coagulated with Ajit Kumar raising construction upon the land allotted to him by Punjab Wakf Board without prior thereto seeking approval from the competent authorities hence infracting the apposite condition as stood foisted upon him under

the apposite rent deed executed inter-se him and Punjab Wakf Board when obviously renders the construction to be wholly unauthorized also thereupon with the subsequent allotments to Mohinder Kumar and thereafter to Jagdish Chand by Punjab Wakf Board of land hitherto allotted to Ajit Kumar allotments whereof to the subsequent allottees occurred on the predominant owner lawfully rescinding the prior allotment made by it to Ajit Kumar would make the apposite subsequent allotments to take within their mandate also would facilitate theirs encompassing the structure raised thereupon by respondent No.1 Ajit Kumar unless there was a vivid display in the apposite allotments aforesaid made by Punjab Wakf Board in favour of Mohinder Kumar and thereafter in favour of Jagdish Chand of the structure as existing thereupon standing excluded from the clout of the apposite allotments made by Punjab Wakf Board in their favour. However when allotments of land made by Punjab Wakf Board in favour of Mohinder Kumar and thereafter in favour of Jagdish Chand omit to either enunciate or portray of the structure as raised on the land hitherto allotted to Ajit Kumar standing excluded from the allotment of land made by the predominant owner in their favour. In sequel the allotments of land made in favour of Mohinder Kumar and thereafter in favour of Jagdish Chand by the predominant owner preceding whereto allotments thereof to Ajit Kumar stood lawfully cancelled would efficaciously denude also would deprive Ajit Kumar to claim any title on the unlawful structure raised by him on the land allotted to him by Punjab Wakf Board. As a concomitant thereof the execution of any rent note inter-se Ajit Kumar respondent No.1 and Mohinder Kumar comprised in Ex.AW-2/A would in its entirety loose its probative strength or vigor also its efficacy would stand wholly effaced. In sequel, the learned senior Advocate for respondent No.1 Ajit Kumar cannot with any vigor contend before this Court on anvil thereof of his holding any right or locus standi to seek eviction therefrom of either Mohinder Kumar or Jagdish Chand especially when for reasons aforesaid both aforesaid were the allottees from the predominant owner in as much as the latter whereof recorded the apposite allotments in their favour only on its prior thereto lawfully rescinding the hitherto allotment recorded by it in favour of Ajit Kumar. At this stage the learned counsel for respondent No.1 Ajit Kumar contended with force while relying upon a judgment of Hon'ble Apex Court reported in (2006)3 SCC 91 Bansraj Laltaprasad Mishra versus Stanley Parker Jones, relevant paragraphs 11 to 16 whereof stand extracted hereinafter:-

> " 11. It is not in dispute that on 1-5-1971 an agreement was entered into. What the defendant tried to establish was that prior to the date of agreement one Shamsher khan had put the defendant in possession and therefore the subsequent agreement with the plaintiff-appellant was really of no consequence. This aspect was dealt by the learned single Judge in detail. It was held that the concept of constructive possession was clearly applicable even if the defendants' case of Shamsher Khan having put him in possession is accepted. Illustrations were given to buttress the interpretation given. The learned single Judge was of the view that the word "possession" in Section 116 also includes constructive possession. Unfortunately the Division Bench has not dealt with this aspect. It would be relevant at this point of time to take note of what is stated in Section 116 of the Evidence Act. The same reads as follows:"estoppel of tenant; and of licensee of person in possession - No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given. "
>
> **12.** The "possession" in the instant case relates to second limb of the Section. It is couched in negative terms and mandates that a person who comes upon any immoveable property by the license of the person in possession thereof, shall not be permitted to deny that such person had title to such possession at the time when such license was given.
>
> **13.** The underlying policy of Section 116 is that where a person has been brought into possession as a tenant by the landlord and if that tenant is permitted to question the title of the landlord at the time of the settlement then that will give rise to extreme confusion

in the matter of relationship of the landlord and tenant and so the equitable principle of estoppel has been incorporated by the legislature in the said section."

10. The learned counsel for respondent No.1 also relies upon a judgment reported in (2002) 7 SCC 614, Rita Lal versus Raj Kumar Singh, which propounds a view at par with the view propounded in the former judgment of Hon'ble Apex Court, relevant portion whereon stands extracted hereinafter:-

> "**[6]** There is a very clear admission made by the respondent of the title of the appellant in his deposition made on oath in judicial proceedings. Not a word he has stated in the pleadings showing how and under what circumstances the statement came to be made and how does the respondent wriggle out of a clear admission made in his deposition? So also the respondent does not furnish any explanation worth being considered, muchless accepted, as to how his signatures appear at more than one places, that is, on every page of the rent note dated 10th February, 1997 he cannot escape the consequences flowing from execution of rent note. The tenant having been inducted by the landlord so long as he remains in possession cannot deny the title of his landlord in view of the rule of estoppel contained in S. 116 of the Evidence Act. Recently in Vashu Deo v. Balkishan, (2002) 2 SCC 50, we had an occasion to sum up the law as to estoppel of tenant and as to eviction by title paramount and we have held :
>
> "The rule of estoppel between landlord and tenant enacted in S. 116 of the Evidence Act has three main features : (i) the tenant is estopped from disputing the title of his landlord over the tenancy premises at the beginning of the tenancy; (ii) such estoppel continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord; and (iii) S. 116 of the Evidence Act is not the whole law of estoppel between the landlord and tenant. The principles emerging from S. 116 can be extended in their application and also suitably adapted to suit the requirement of an individual case."
>
> "……..the rule of estoppel ceases to have applicability once the tenant has been evicted. His obligation to restore possession to his landlord is fulfilled either by actually fulfilling the obligation or by proving his landlord's title having been extinguished by a paramount title-holder."
>
> The trial Court rightly formed the opinion that no triable issue was raised."

11. An incisive reading of judgments supra does while expostulating the apposite legal principle on anvil whereof the learned Senior Advocate for respondent Ajit Kumar espouses of tenants standing estopped to deny the title of the land lord also theirs expounding the principle of occurrence of phrase "possession" in Section 116 of Indian Evidence Act debarring a tenant which the learned counsel for the respondent Ajit Kumar contends, is the capacity wherein Mohinder Kumar and Jagdish Chand hold possession of the apposite premises of both standing estopped to deny the title of Ajit Kumar or to negate his holding possession thereof as its landlord. The aforesaid renditions of the Hon'ble Apex Court relied upon by the learned counsel for respondent No.1 Ajit Kumar to on its anvil build an argument anchored upon Ex. AW-2/A of it communicative of Mohinder Kumar acquiescing to attorn to Ajit Kumar the latter holding a right to move an eviction petition against Mohinder Kumar besides against Jagdish Chand for hence ousting them from the shops raised by him on the land allotted by the predominant owner to him. However, the submission made at this stage by the learned counsel for respondent Ajit Kumar to on the anvil of judgments supra propounding the principle on the anchor of section 116 of the Indian Evidence Act of the tenant standing estopped to deny the title of the landlord is merely a frail attempt to oust the tenacity of the reasoning which occurs in the hereinabove apt portions of the judgment of this Court whereby this Court has proceeded to oust the claim by Ajit Kumar of his holding title to the demised premises as its landlord. Consequently, with Ajeet Kumar not holding the capacity as a predominant owner qua the premises at contest rather when he stands de-facilitated by the apposite conditions of the rent note to induct sub-lettees whereas in infraction thereof he proceeded to induct Mohinder Kumar and Jagdish as tenants therein

negates besides nullifies his claim of his extantly holding tenancy to the demised premises moreso when the infraction in the manner aforesaid of the apposite mandate foisted upon him under the apposite rent deed executed inter-se him and Punjab Wakf Board has a nullificatory effect of his rights as a tenant therein preeminently the predominant owner after cancelling the allotment of land made by it in his favour, proceeded to make the apposite subsequent allotments in favour of Mohinder Kumar and Jagdish Chand. Even otherwise dehors the factum of the vigor, if any, the principle of estoppel holds yet for it to give empowerment to the espousal of the learned counsel for Ajit Kumar of its offering him leverage to canvass before this Court of Mohinder Kumar and Jagdish Chand standing estopped to deny his title, the sine qua non for its attraction would occur only on a palpable display of Ajit Kumar holding title as a predominant owner of the demised premises whereas when title thereof stands uncontrovertedly foisted in the Punjab Wakf Board also when Ajit Kumar for reasons aforesaid infracting the apposite terms and conditions of the apposite rent deed executed inter-se him and Punjab Wakf Board wherein he stood interdicting to induct sub-lettees has proceeded to do so also besides the occurrence of his thereby infracting the aforesaid mandate of apposite rent deed there occurring an infraction on his part of its mandate of his without seeking an approval of the authorities concerned raising construction on the land allotted to him, as a natural corollary when construed in entwinement with the indispensable canon for attracting qua Ajit Kumar the principle of estoppel enshrined in Section 116 of the Indian Evidence Act also the compatible principle constituted therein of both Mohinder and Jagdish standing estopped to deny the title of respondent No.1 Ajit Kumar qua the demised premises, for the reasons aforestated standing un-satiated saps the strength of his contention to seek its attraction qua him besides its compatible attraction qua Mohinder and Jagdish nor also hence both Mohinder and Jagdish stand baulked on its anvil to counter the eviction petition instituted qua the demised premises against them by Ajit Kumar.

12. The learned counsel for the petitioner has placed reliance upon the judgment of Hon'ble Apex Court reported in (1987)4 SCC 424, D. Satyanarayana versus P. Jagadish, relevant paragraph 4 stands extracted hereinafter:-

> **"[4]** The rule of estoppel embodied under S. 116 of the Evidence Act is that, a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. During the continuance of the tenancy, the tenant cannot acquire by prescription a permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord. See : Bilas Kunwar v. Desraj Ranjit Singh, ILR (1915) 37 All 557 : (AIR 1915 PC 96) and Atyam Veerraju v. Pechetti Venkanna (1966) 1 SCR 831 : (AIR 1966 SC 629). The general rule is however subject to certain exceptions. Thus a tenant is not precluded from denying the derivative title of the persons claiming through the landlord. See : Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern Ltd. AIR 1937 PC 251. Similarly, the estoppel under S. 116 of the Evidence Act is restricted to the, denial of the title at the commencement of the tenancy. From this, the exception follows, that it is open to the tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder. In order to constitute eviction by title paramount, it has been established by decisions in England and in India, that it is not necessary that the tenant should be dispossessed or even that there should be a suit in ejectment against him. It will be sufficient if there was threat of eviction and if the tenant as a result of such threat attorns to the real owner, he can set up such eviction by way of defence either to an action for rent or to a suit in ejectment. If the tenant however gives up possession voluntarily to the title-holder, he cannot claim the benefit of this rule. When the tenancy has been determined by eviction by title paramount, no question of estoppel arises under S. 116 of the Evidence Act. See : Adyanath Ghatak v. Krishna Prasad Singh AIR 1949 PC 124. The principle must equally apply when the tenant has attorned under a threat of

eviction by the title paramount and there comes into existence anew jural relationship of landlord and tenant as between them. The law is stated in 27 Halsbury's Laws of England, 4th Edn., Para 238 :

"238. Eviction under title paramount. - In order to constitute an eviction by a person claiming under title paramount, it is not necessary that the tenant should be put out of possession, or that proceedings should be brought. A threat of eviction is sufficient, and if the tenant, in consequence of that threat, attorns to the claimant, he may set this up as an eviction by way of defence to an action for rent, subject to his proving the evictor's title. There is no eviction, however, if the tenant gives up possession voluntarily."

Quite recently, this Court in Mangat Ram v. Sardar Meharban Singh, (1987) 1 Scale 964 : (AIR 1987 SC 1656 at 1), 1660), to which one of us was a party, observed :

"The estoppel contemplated by S. 116 is restricted to the denial of title at the commencement of the tenancy and by implication it follows that a tenant is not estopped from contending that the title of the lessor has since come to an end."

13. The relevant portion of the judgment which stands extracted hereinabove embodies therein a alike principle of the tenants standing estopped by the principle ingrained in Section 116 of the Indian Evidence Act from denying the title of the landlord qua the premises which he/they occupy/occupies as a tenant/tenants even when the landlord holds even a defective title thereto. However, an exception to the attraction of the principle of estoppel encapsulated in Section 116 of the Indian Evidence Act is carved therein of inapplicability or unworkability of the rule of estoppel on a tenable invocation whereof any tenant standing debarred to deny the title of his land lord, in as much as tenant holding the capacity to deny the title of his land lord when his tenancy is under threat of eviction by title paramount whereupon he as a corollary for reiteration holds leverage to foist a contention of the landlord whereunder he occupies the demised premises as a tenant holding no legally worthwhile title qua it hence defacilitated him to seek his eviction therefrom even without surrendering its possession to its hitherto purported landlord. However perse the afore-referred extracted portion of the judgment of Hon'ble Apex Court for their attraction qua the espousal before this Court by the learned counsel for respondent No.1 Ajit Kumar warranted display on record of the indispensable sine qua non of the latter holding title as landlord qua the demised premises wherein contrarily both Mohinder Kumar and Jagdish under respective subsequent allotments made in their favour by the paramount owner hold it in the capacity of theirs being the lawful lessees under the paramount owner. Conversely when respondent No.1 Ajit Kumar was incapacitated by the apposite provisions enshrined in the apposite lease deed recorded in his favour by the paramount owner to sublet it, his infracting the said condition when weighed with the paramount owner to cancel the allotment of land recorded in his favour by it besides obviously when he at the time of institution of eviction petition was obviously neither its paramount owner nor a lessee under the latter besides was interdicted by the apposite condition to sub lease it in favour of either Mohinder Kumar or of Jagdish Chand, as a corollary his begetting infraction of the afore-referred mandate constituted in the apposite rent deed executed inter-se him and Punjab Wakf Board while causing a nullificatory effect upon his capacity of his holding the land allotted to him by the predominant owner has a seqeulling effect of his not holding any legal capacity or any locus standi qua it nor hence he can stake a claim for ouster of Mohinder Kumar and Jagdish Chand from the demised premises. The attraction at his instance of the rule of estoppel against the petitioners for hence baulking them from denying his title qua it is wholly rudderless rather the exceptions carved out in the judgment relied upon by the petitioners is workable besides swings in favour of the petitioners for recording a firm inference of respondent Ajit Kumar holding no capacity to institute an eviction petition against the petitioners herein for seeking their eviction from the demised premises. In aftermath with a sine qua non embodied in the hereinabove afore-referred apt judgments for hence the espousal made before this Court by the learned counsel for respondent No.1 warranting acceptance or its standing countenanced would occur only when Ajit Kumar holding title as its paramount owner of the contentious premises whereas with his undisputedly not holding it as paramount owner rather the paramount owner thereof being

Punjab Wakf Board which however has lawfully rescinded the apposite allotment to him even prior to the eviction petition standing instituted at his instance whereafter it recorded its apposite subsequent allotments in favour of Mohinder Kumar and Jagdish Chand hence when obviously indispensable sine qua non for its attraction qua the petitioner besides its compatible attraction qua the respondents stands un-satiated he holds no legal leverage to succor any espousal of the principle of estoppel enshrined in Section 116 of the Indian Evidence Act operating against the petitioners herein his purported tenants in the contentious premises for hence their standing precluded to deny his title he stands foisted with a title to claim their ouster therefrom.

14. Further more even though the learned counsel for the respondent Ajit Kumar has proceeded to canvass before this Court of prior to the paramount owner recording allotments of the demised premises its cancelling the hitherto lease deed recorded in favour of respondent No.1 Ajit Kumar warranted its receiving possession of the demised premises from Ajit Kumar whereupon alone it could proceed to record allotments under the apposite conveyances in favour of Mohinder Kumar and thereafter in favour of Jagdish Chand. However the aforesaid submission holds no vigor in face of construction if any raised by Ajit Kumar upon the land allotted to him standing raised at his instance without his prior thereto as enjoined upon him under the apposite conveyance of the demised land in his favour of his obtaining permission from the competent authority rendering it to be wholly unauthorized besides when he extantly does not hold possession thereof rather possession thereof is held by the petitioners herein under lawful conveyances recorded in their respective favour by the paramount owner incapacitates the respondent Ajit Kumar to stake a claim for delivery of possession to him by the petitioners herein of the construction raised upon the demised land conveyed in his favour by the paramount owner nor can he entail upon the Punjab Wakf Board the predominant owner of the demised premises to before recording apposite subsequent allotments in favour of Mohinder Kumar and Jagdish Chand for hence purportedly validating the subsequent apposite allotments besides for empowering them to deny his title of his being on the anvil of his being not its predominant owner ensure retrieval its possession from him especially when it stands mandated in the aforesaid extracted paragraphs of the judgments of the Hon'ble Apex Court of the purported tenants in the demised premises even if theirs withholding delivery of its possession to the purported landlord theirs yet holding leverage to deny his title as its purported landlord especially when they received its title from the paramount owner moreso when the effect if any of AW-2/A stands hence wholly effaced. Also the learned counsel for respondent Ajit Kumar cannot contend thereupon of the apposite subsequent allotments of land by the predominant owner whereupon a structure stands raised standing deprived of their legal efficacy besides of theirs being a mere paper transaction especially when for the reasons aforesaid letters of allotments of land by the predominant owner to Ajit Kumar has been concluded to be lawfully rescinded under Ex. RW-2/A whereupon three shops stand raised by the respondent Ajit Kumar besides the apposite subsequent allotments all stood concluded to stand proved in accordance with law hence when each of the exhibits aforesaid are relevant as well admissible in evidence their probative tenacity gets enhanced.

15. Even on the anvil of the judgment reported in (2006)3 SCC supra, the relevant paragraphs whereof stand extracted hereinabove the counsel has yet contended of the principle enshrined therein yet remaining workable in favour of respondent Ajit Kumar, nonetheless the afore-referred discussion anvilled upon the judgment to Hon'ble Apex Court report in (2002)7 SCC supra carving an exception therein of the operation of rule of estoppel against the tenant denying the title of his landlord on upsurgings emanating on the hitherto landlord of the contesting parties loosing title qua it at the commencement of the tenancy or during its currency under a lawful conveyance thereof to some other owner. Necessarily when the said exception carved therein qua the tenants standing estopped to deny the title of the landlord is workable only on satiation of Ajit Kumar holding title as paramount owner to the contentious premises whereas the apposite capacity qua the contentious premises stands held by the Punjab Wakf Board necessarily when the apposite predominant owner alone stood bestowed with a right to invoke the rule of estoppel against any of the contesting parties denying its title to the demised

premises whereas the predominant owner effacing the capacity of Ajit Kumar as a tenant by its after cancelling allotment of land made by it in favour of Ajit Kumar its proceeding to subsequently make lawful conveyances in favour of Mohinder Kumar and Jagdish Chand. For reiteration there occurring a palpable by the evidence on record of rule of estoppel as stands invoked by the learned Appellate Authority for securing findings in favour of respondent Ajit Kumar standing aroused from sheer mis-appreciation of facts besides by sheer mismaneuvering of law, necessarily it warrants interference.

16. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned Appellate Authority suffers from a gross perversity and absurdity or it can be said that the learned Appellate authority in allowing the appeal filed thereat by the respondent No.1 Ajit Kumar has committed a legal misdemeanor. In view of above, the petitions are allowed and the impugned order stands quashed and set aside. All pending applications stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Suresh Kumar and Ors. .....Appellants.

Versus

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

RSA No. 455 of 2005.
Date of Decision: 17.5.2016.

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration that he has become owner by adverse possession- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal, that revenue record shows that entry in the column of possession was recorded as 'Kabja Malik Tbe Kahuk Bartandaran Mutabik Naksha Bartan'- a person pleading adverse possession has to prove continuous, open, peaceful, hostile and uninterrupted possession to the knowledge of true owner- proceedings were initiated against the plaintiff for encroaching upon the government land- mere statement that a person is in possession for more than 12 years is not sufficient to prove adverse possession- suit and appeal were rightly dismissed by the Courts- appeal dismissed. (Para-9 to 15)

Cases referred:

Chati Konati Rao and Ors. V. Pale Venkata Subba Rao, (2010) 14 SCC

P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 59

For the appellants: Mr. Vikas Rathore, Advocate.

For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General with Mr. Rajat Chauhan, Law Officer, for the respondent-State.

The following judgment of the court was delivered:

Sandeep Sharma, J. (Oral)

Present second appeal filed under Section 100 CPC is directed against the judgment and decree dated 1.6.2005, passed by the learned District Judge, Mandi, HP, in Civil Appeal No. 120 of 2003, titled *" Suresh Kumar and Ors. v. State of HP.,"* affirming the judgment and decree dated 29.8.2003, passed by learned Sub Judge, Ist Class, Jogindernagar, District Mandi, H.P. in CS No. 59 of 2000, titled *" Sher Singh v. State of HP.,"* whereby suit filed by the plaintiff was dismissed.

2. The briefly stated facts necessary for adjudication of this case are that plaintiff Shri Sher Singh filed suit for declaration to the effect that he has become owner by way of adverse possession of land measuring 4-18-17 bighas in Khasra No. 1520/1363 entered in Khata Khatauni No. 265 min/48 min situate in Mohal Passal, Pargana Ahju, Tehsil Jogindernagar, District, Mandi, HP. He further averred that as per Jamabandi, 1993, suit land is recorded in ownership of State of Himachal Pradesh but he is in the continuous, open, peaceful and hostile possession of the same since 26.1.1950. Entry in the revenue record is contrary to the factual position because he developed the suit land and made it cultivable by spending huge sum of money. It is also averred in the plaint that he has grown seasonal crops over the major portion of the suit land and there are number of fruit giving trees also. It is specifically averred that possession of the plaintiff over the suit land is quite old which is within the knowledge of the respondent-defendant, who never interfered with the possession of the plaintiff. Plaintiff has fenced the suit land since its inception and has perfected his title by way of adverse possession. The cause of action accrued to him for the first time on 6.9.1999, when respondent-defendant refused to admit the lawful claim of the plaintiff qua the suit land, though, he had served notice on the State under Section 80 CPC but that remained un-replied. On the other hand, respondent-defendant by way of filing written statement refuted all the averments contained in the plaint and specific objections with regard to the jurisdiction, valuation, locus-standi, cause of action were taken. On merit, respondent-defendant denied the averments made by the plaintiff regarding possession over the suit land, in toto. Defendant specifically stated that land in question is within the exclusive ownership and possession of the State, rather, it has been stated that suit land has been recorded as 'Makbuja Malik Tabe Hakuk Bartandaran'. Respondent-defendant in written statement specifically stated that plaintiff has recently encroached upon the suit land, as a result thereof, State has already initiated proceedings under Section 163 of the HP Land Revenue Act. Claim of the plaintiff that he is in exclusive, continuous, open, peaceful and hostile possession of the suit land for the last more than 50 years, has been specifically denied by the defendants. Learned trial Court, Mandi on the basis of pleadings on the record framed six issues, which were decided against the plaintiff and on the basis of material on record dismissed the suit filed by the plaintiff.

3. Feeling aggrieved and dissatisfied with the judgment dated 29.8.2003 passed by the learned Sub Judge, plaintiff filed appeal under Section 96 CPC in the court of learned District Judge, Mandi, HP, however, the same was also dismissed and the judgment of learned Sub Judge Jogindernagar, HP, was upheld. Hence, this regular second appeal before this Court.

4. This Court vide order dated 2nd September, 2005, admitted the present appeal on the following substantial questions of law:-

> *1. "Whether non-consideration of oral as well as documentary evidence, which goes to the root of the matter has vitiated the findings of the learned court below?*
>
> *2. Whether the learned Courts below have correctly applied the law pertaining to adverse possession in the facts and circumstances of the matter and have thus arrived at a wrong conclusion not warranted in the eyes of law?*
>
> *5. Whether the learned courts were right in dismissing the suit and the relief of injunction as prayed for?"*

5. Perusal of the substantial questions of law formulated herein above suggests that finding/conclusion recorded by the courts below to the effect that *"plaintiff has not become owner by way of adverse possession over the suit land",* which required to be tested in the light of material available on record. Apart from the material question as has been referred above, there is another question of law with regard to non consideration of oral as well as documentary evidence by the courts below while deciding the issue with regard to the adverse possession as was claim of the plaintiff. This question of law would automatically be considered while

examining the evidence available on record to ascertain first substantial question of law as referred in above.

6. Mr. Vikas Rathore, Advocate, appearing for the appellants herein, vehemently argued that the judgment passed by the courts below are not sustainable as the same are not based upon the correct appreciation of the evidence available on record. He contended that both the courts below have failed to appreciate the evidence in its right perspective and has wrongly arrived to the conclusion that plaintiff has not been able to prove its case of adverse possession. Mr. Rathore, forcefully contended that perusal of the evidence on record clearly suggests that plaintiff has been in continuous, open, peaceful and hostile possession of the suit land since January, 1950. He also contended that the courts below have failed to acknowledge the fact that plaintiff has been cultivating the suit land since 1950 and there was ample evidence, be it ocular or documentary, on record to substantiate the aforesaid claim of the plaintiff. Mr. Rathore vigoursly contended that the courts below while passing judgments have not rightly appreciated the evidence of PW-1, who is son of the plaintiff. Since plaintiff was not keeping good health, he had given general power of attorney to his son namely Shri Suresh Kumar (Appellant No. 1 herein) and , as such, he was competent to depose on behalf of his father Sher Singh. Merely that Sher Singh i.e. plaintiff did not appear in witness box could not be ground for the courts below to draw adverse inference, as has been done in the present case.

7. On the other hand, Mr. Rupinder Singh Thakur, learned Additional Advocate General, appearing for defendant-respondent herein-State supported the judgment of courts below. He vehemently argued that no interference of this Court is warranted in the present facts and circumstances of the case, as the impugned judgments are based upon the correct appreciation of evidence available on record. He forcefully contended that this Court may not exercise its jurisdiction, especially, in view of the fact that courts below have very meticulously dealt with evidence be it ocular or documentary available on record. Mr. Thakur, contended that record reveals that plaintiff is an encroacher and in that regard, proceedings under Section 163 of HP Land Revenue Act has been already initiated and pending before the competent court of law.

8. I have gone through the material available on record as well as heard the learned counsel for the parties at length.

9. Sole question which requires determination in the present case is whether appellants have been able to prove their ownership by way of adverse possession of the suit land or not? In the present case, appellants have claimed that they are in settled possession of the suit land since 26th January, 1950 and courts below have not properly appreciated the oral evidence as led by the appellants to that effect. Plaintiff who had filed the suit for declaration for injunction in respect of land measuring 4-18-17 bighas Khasra No. 1520/1363 has been recorded as 'Charagah Bila Drakhtan' i.e. grazing land without any tree. Jamabandi Ext.PW1/D suggests that in the possessory column, there is an entry "Kabja Malik Tbe Kahuk Bartandaran Mutabik Naksha Bartan', meaning thereby, proprietors of the village, who are holder of Bartandari rights, are in possession of the land.

10. Plaintiff with a view to prove his case of adverse possession over the suit land examined as many as three witnesses namely Suresh Kumar PW1, Kishori Lal as PW-2 and PW-3 Finu Ram. PW-1 Suresh Kumar (appellant No. 1) who is holding power of attorney on behalf of the plaintiff in his statement stated that he has been authorized by the plaintiff (father) by way of special power of attorney to conduct this case. He stated that entry of State in the revenue record in column of ownership is incorrect since Suit land is in their possession since 26.1.1950. He also stated that during this period, defendant never raised any objection, rather, they have been sowing wheat/seasonal crop on the suit land. However, this fact has been not incorporated in crop inspection register. It has come in his statement that when they occupied this land, it was 'Banjar' and they by spending huge amount of money made it cultivable but no evidence was made available on record to substantiate plaintiff's claim with regard to cultivation of land as well as spending of money for making it cultivable.

11. PW-2 Kishori Lal and PW-3 Finu Ram also supported the version of PW-1 and stated that there were trees of Khirak, Lemon on the suit land but at this stage, it would be pertinent to mention here that though, these witnesses have stated with regard to trees of khirak, lemon on the suit land but if the statement of PW-1 is read in its entirety, there is no whisper with regard to any tree standing on the suit land, rather, perusal of the reply Ext.PW-1/B filed by the plaintiff in proceedings under Section 163 of HP Land Revenue Act, no such detail with regard to number/type of trees has been mentioned. Even the careful reading of the plaint filed by the plaintiff, nowhere suggests, that it has been specific case of the plaintiff that in the suit land, there are trees, which have been grown by him. On the other hand, with a view to prove its case, respondent-defendant examined one witness as DW-1 Atama Singh, Patwari, he in his statement stated that he had visited the spot where plaintiff has encroached upon the Government land, measuring 4 bighas and 17 biswas, which was fenced by plaintiff. He stated that he had prepared the inspection report with regard to encroachment done by the plaintiff on the suit land. He also stated that he had initiated proceedings for encroachment of land measuring 2 bighas 15 biswa and 16 biswana because he was told by villagers that on the remaining land, plaintiff has removed his encroachment. He also stated that proceedings for ejectment under Section 163 CPC are pending against the plaintiff before the learned Tehsildar, Jogindernagar, HP. If the statements of all the prosecution witnesses as well as defendant witnesses are read in conjunction, the fact with regard to the illegal encroachment on the suit land by the plaintiff is established. Though, plaintiff by way of present suit has set up case that he is in adverse possession over the suit land since 1950 but there is no sufficient evidence on record to prove his claim. All the plaintiff witnesses only stated that plaintiff is in the possession of the suit land since 1950, rather, PWs No.2 and 3 stated in their statements that there are the trees which are sown by plaintiff on the suit land but however PW-1 (son of the plaintiff) did not make such claim in his statement. None of the plaintiff witness has specifically stated that when the possession of the plaintiff became adverse qua the suit land, rather, the statements of PWs 2 and 3 clearly suggest that suit land was never demarcated in their presence. Though, in the plaint, plaintiff has set-up a case that land in question was 'Banjar', which he made cultivable by spending huge money but admittedly, there is nothing in the statement of the plaintiff witnesses to suggest that actually some amount was spent by the plaintiff for making the fields cultivable. Moreover, no document has been made available on record by the plaintiff to substantiate aforesaid plea.

12. It is well settled law that to acquire title by adverse possession, one needs to prove that he is in hostile possession over the suit land which is known to the true owner. Whosoever claims adverse possession, he/she needs to prove that he/she is in continuous, open, peaceful and hostile possession, uninterrupted possession of the same without any hindrance that too to the knowledge of original owner. There must be overt act to suggest that he is in continuous possession of the suit land. While claiming the adverse possession, it is incumbent upon the party so claiming, to adequately plead the constituents of adverse possession. The hostile character of the possession is gauzed by the animus of the person setting up adverse possession but as has been observed above in the present case, there is nothing on record which suggests that plaintiff is in the adverse possession of the suit land since 1950. To prove adverse possession, it is necessary to prove that possession is peaceful, uninterrupted and hostile to the title of the actually true owner. But in the present case, all the aforesaid ingredients are missing, rather, there is ample evidence available on record that defendant is encroacher upon the suit land, which is admittedly entered in the Jamabandi Ext.1/D as 'Charagah Bila Drakhatan and moreover in possessory column there is entry "Kabja Malik Tabe Hakuk Bartandaran Mutabik Naksha Bartan' which clearly suggests that the proprietors of the villager, who are the holder of Bartandari rights are in possession of the suit land. Hence, it could be safely concluded that plaintiff has not been having adverse possession of the suit land as has been claimed by him. DW-1 Atama Singh, Patwari in his cross-examination stated that plaintiff has never been in the adverse possession of the suit land, rather, he encroached upon the suit land and for which, proceedings have also been initiated against him. It has also come in the statement of DW-1 that on some part of the land, plaintiff has already removed encroachment, meaning thereby, he was never in the possession of the suit land, rather, both the courts below have rightly drawn the

adverse inference with regard to the absence of original plaintiff, who did not enter into the witness box and gave power of attorney to his son. Record further reveals that PW-1 was only of 38 years of age at the time of making statement in the Court; admittedly, in the present case, plaintiff has claimed that he is in the possession of the suit land since 1950 but keeping in view his age, it can be seen that at that time, he was not even born and as such courts below have rightly concluded that his testimony regarding the possession over the suit land since 1950, cannot be taken into consideration. Moreover, no plausible explanation has been rendered on record to justify the absence of the original plaintiff, who did not opt to come in the witness box.

13. The reliance is placed on the judgments rendered by the Hon'ble Apex Court in **Chati Konati Rao and Ors. V. Pale Venkata Subba Rao, (2010) 14 SCC** 316 (Para-14), which is as under:-

> *"14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within 12 years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of 12 years thereafter.*
>
> *15. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights. Plea of adverse possession is not a pure question of law but a blended one of fact and law."*

14. The Hon'ble Apex Court, while reiterating the above ingredients, has further held in ***P.T. Munichikkanna Reddy*** *v.* ***Revamma (2007) 6 SCC 59*** as under:-

> "5. *Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile.* ***[See Downing v. Bird, 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock, 227 Ark. 1085, 303 S.W.2d 569 (1957); Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]***
>
> *6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as*

against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess cannot be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim."

15. Admittedly, in the instant case, present appellant has been not able to prove necessary ingredients as has been discussed above, to claim title by way of adverse possession and mere statement that he was in continuous possession for a period of more than 12 years is not sufficient to claim title by way of adverse possession. Animus-possidendi as is well known ingredient of adverse possession. It is now well settled that mere possession of the land would not automatically convert into possessory title until possessor holds property adverse to the title of the true owner.

16. Consequently, in view of the aforesaid discussion, this court sees no reason to interfere with the judgments passed by the courts below which appear to be based upon the correct appreciation of material available on record. Hence, this appeal fails and dismissed accordingly.

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

Shippi Devi .....Petitioner.

Versus

Laja Devi ....Respondent.

CMPMO No. 337 of 2015.

Date of Decision: 18th May, 2016.

Code of Civil Procedure, 1908- Order 21 Rule 35**-** A decree for specific performance was put to execution - objections were filed, which were dismissed- held, that the decree was affirmed up to the High Court- pleas raised in the execution had already been adjudicated by the court, which had passed the decree- the executing court is bound by the decree and cannot go behind the same- the objections were rightly dismissed- petition dismissed. (Para 2-3)

For the Petitioner: Mr. Anup Rattan, Advocate.

For the Respondent: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The plaintiff/decree holder/respondent herein holds a decree for specific performance qua the suit property. The decree aforesaid as held extantly by the decree holder as put to execution at her instance before the learned Executing Court has secured affirmation in concurrence from the First Appellate Court besides from this Court in a Regular Second Appeal instituted at the instance of the defendant/judgment debtor. Given the conclusivity of the decree of specific performance held by the plaintiff/decree holder it warranted its begetting satisfaction by the learned Executing Court in the manner as mandated in its order as stands impugned before this Court.

2. The learned counsel appearing for the judgment debtor/defendant/petitioner herein has strived to contend of the decree put to execution at the instance of the plaintiff/decree holder before the Executing Court suffering from an infirmity arising form its standing anvilled upon a purported agreement to sell which stood obtained by the plaintiff/decree holder by hers perpetrating fraud upon the defendant/judgment debtor/petitioner herein. He contends of hence the decree as put in execution being a nullity. Also he obviously makes a vociferous address before this Court of the order of the learned Executing Court impugned before this Court whereby it dismissed the objection embodying the factum of the decree as put to execution by the decree holder before the learned Executing Court arising from the conclusive concurrently recorded decrees upto the High Court standing anchored upon an agreement to sell purportedly executed inter se the decree holder and the judgment debtors, the apposite agreement when stands stained with a vice of its purported execution arising from a fraud practiced upon the judgment debtor by the decree holder renders it to acquire no force besides hence it being unexecutable. The judgment debtor had put an efficacious contest upto the High Court qua the factum of the decree holder standing not entitled to secure a decree for specific performance qua land enunciated in the agreement to sell. However, her endeavours upto the High Court to stain the agreement to sell executed qua the suit land inter se the decree holder and the judgment debtor were unyielding. Even before the High Court, the judgment debtor had by belatedly instituting before it an application under Order 41, Rule 27 of the CPC concerted to with the leave of this Court adduce evidence in portrayal of the agreement to sell executed inter se the judgment debtor and the decree holder standing begotten by the decree holder practicing fraud upon her also she had strived of hence the conclusive concurrently recorded judgments and decrees of both the learned Courts below being liable for reversal. However, her endeavours in the aforesaid regard stood frustrated. Consequently, with the judgment debtor suffering conclusive concurrently recorded decrees by two Courts which stood affirmed in a Regular Second Appeal by this Court she hence stood forestalled to raise any objection before the learned Executing Court anvilled upon the factum which as aforestated stood not countenanced by the High Court while dismissing the Regular Second Appeal preferred before it by her.

3. In aftermath, the learned Executing Court was enjoined to execute the decree laid for execution by the decree holder before it. Since, the aforesaid objections impinging upon the validity of the decree put to execution before the Executing Court stood tacitly concerted earlier before this Court by the judgment debtor whereat they yielded no fruitful consequences, hers reinvented endeavour before the learned Executing Court warrants as aptly done by the learned Executing Court to suffer rejection. The learned Executing Court rather would have fallen in gross error in case it accepted the objections constituted before it by the judgment debtor besides it would thereupon have proceeded to untenably go behind the decree which endeavour on its part would have obviously sequelled its overriding the mandate of Section 47 of the CPC whereby it stood enjoined to put to execution the conclusive concurrently recorded decrees upto to the High Court in favour of the plaintiff/decree holder. Contrarily, the mandate of Section 47 of the CPC when stands complied with by the learned Executing Court obviously, the impugned order does not suffer from any infirmity. Consequently, the instant petition is dismissed and the impugned order is maintained and affirmed. All pending applications also stand disposed of.

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

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

Versus

Sharanjit ....Respondent.

Cr. Appeal No. 463 of 2007.

Date of Decision: 18th May, 2016.

Indian Penal Code, 1860- Section 279, 337 and 338**-** Accused while driving a vehicle, hit a bicycle- complainant and his brother sustained injuries – the accused was acquitted by the Trial Court- held, in appeal, it was admitted by the prosecution witnesses that the place of accident has a steep gradient and was extremely narrow- there were pot holes on the road – hence, the prosecution version that the accused was driving the vehicle with a high speed was not believable - the evidence was properly appreciated by the Trial Court - Appeal dismissed. (Para 9-10)

For the Appellant: Mr. R.S. Thakur, Addl. A.G.
For the Respondent: Mr. Avneesh Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of H.P. against the judgment of the learned Judicial Magistrate 1st Class, Court No. 2, Una, District Una, Himachal Pradesh, rendered on 18.06.2007 in Cr. Case No. 10-II-99 whereby, the learned trial Court acquitted the accused/respondent herein of the offences punishable under Sections 279, 337 and 338 of the Indian Panel Code.

2. The facts relevant to decide the instant case are that on 25.4.1999 at around 12.15 p.m. at Dhundla, accused was found driving a Meta-door vehicle bearing No. DL-08-2281 on a public road in a rash and negligent manner so as to endanger human life and personal safety of other and while driving as such accused struck his vehicle against a cyclist i.e. complainant Husain Ali and thereby caused him and his brother Anayat Ali simple and grievous injuries. On a statement made by complainant Husain Ali under Section 154 of the Cr.P.C. to the police, FIR was registered against the accused in the police station concerned. Thereafter, the police completed the investigation formalities.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, 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 279, 337 and 338 of the IPC. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording of the prosecution evidence, the statement 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.

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

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs being sequelled by gross mis-appreciation of the 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 accused/respondent while driving Meta-door bearing No. DL-08-2281 begot a collision with an bicycle whereon the complainant Husain Ali and his brother Anayat Ali were atop. In sequel to the collision which occurred inter se the Metadoor and bicycle whereon at the relvant time both the complainant and his brother were atop, both the complainant and his brother sustained simple and grievous injuries. PW-9 has therein proven the factum of the brother of the complainant alone sustaining simple as well as grievous injuries. He has communicated therein of injuries noticed by him to be occurring on the person of the brother of the complainant standing begotten by a fall from bicycle.

10. The prosecution to sustain its case against the accused depended apart from the testimony of PW-9 upon apposite communications occurring in the testimonies of eight witnesses. Eye witnesses to the occurrence are PW-1, PW-2 and PW-3. PW1 and PW-2 in their respective testimonies unequivocally voices the factum of the site whereat the collision occurred inter se the meta-door driven by the accused and the bicycle whereon both the complainant and his brother were atop being a road having a steep gradient. Also they have in their respective testimonies echoed the prime factum of pot holes occurring on the road. They have also deposed of at the apposite site the road holding an extremely narrow width. Given the manifestations aforesaid occurring in the testimonies of PW-1 and PW-2, the attribution to the accused by the prosecution of his driving vehicle meta-door bearing No.DL-08-2281 at a high speed hence negligently which sequelled the vehicle driven by him to collide with the bicycle whereon both the complainant and his brother were atop gets withered. Since the purported excessive speed at which the vehicle driven by the accused stands enunciated by PW-2 to beget its collision with the bicycle whereon the complainant and his brother were atop, hence the voicing by PW-1 and PW-2 of the gradient of the road whereat both vehicles collided being steep besides pot holes occurring thereat also its thereat holding a narrow width are preeminent factors which also dispel the attribution to the accused by the prosecution of his at the relevant time driving his vehicle at an excessive pace sequelling its colliding with the bicycle atop whereon were the complainant and his brother. An amplification to the inference of the afore-referred factors dispelling the propagation of the prosecution of the accused driving the Meta-door at an excessive pace and his being negligent stand succored by PW-1 and PW-2, who in their respective testimonies communicate therein of the road being zig-zag which curvaceous nature of the road at the site of occurrence can secure a conclusion from this Court of its acting as a deterrent for the accused to drive his vehicle at an excessive pace. The aforesaid inference as upsurge on a reading of the testimonies of PW-1 and PW-2 of hence the accused not at the relevant time driving his vehicle at an excessive pace whereupon no deduction can stand derived of his being negligent in driving it for its begetting its collision with the bicycle whereon both the complainant and his brother were atop. Since the collision occurred inter se both, the communication made by PW-2 in his testimony wherein he has acquiesced to the suggestion put to him by the learned defence counsel while holding him to cross-examination of the ill fated collision standing sprouted by the complainant who was atop the bicycle as its rider losing control owing to a steep gradient occurring at the site of occurrence besides his getting perplexed on sighting the Meta-door coming from the opposite direction obviously constrains this Court to conclude of when at the relevant time the vehicle driven by the accused was going upward whereas the bicycle whereon the complainant and his brother were atop was moving downward, when conjunctively construed with the factum of the road holding pot holes also it being curvaceous hence forestalling the accused to drive it at an excessive pace of hence with the complainant being atop, his bicycle while moving downwards rather his losing control of his bicycle also his getting perplexed on sighting the vehicle driven by the accused sequelling his bicycle rather colliding with the meta-door driven at the relevant time by the accused. The aforesaid inference negates any inculpatory role of the accused qua his being purportedly negligent in driving his vehicle or driving it at a rash pace, hence his sequelling a collision of the vehicle driven by him with the bicycle whereon the complainant and his brother were atop.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and

harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

12. Consequently, I find no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded in favour of the accused/respondent herein by the learned trial Court is affirmed. Records be sent back forthwith.

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

Vidya .....Petitioner.
Versus
Arvind ....Respondent.

CMPMO No. 3 of 2014.
Date of Decision: 18th May, 2016.

Hindu Marriage Act, 1955- Section 24- An application for interim maintenance was filed before Ld. District Judge, Shimla- the relief was denied by the Ld. District Judge on the basis that maintenance of Rs. 2,000/- has already been awarded in favour of the applicant under Section 125 Cr.P.C.- a revision was filed by the applicant against the order- held, that Ld. District Judge has not committed any illegality by taking in to account maintenance awarded by the Criminal Court- however, litigation expenses enhanced from Rs. 5,000/- to Rs. 15,000/-. (Para-3 to 5)

For the Petitioner: Mr. Naresh Sharma, Advocate.
For the Respondent: Mr. Jeevesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant petition stands directed by the petitioner herein against the impugned order rendered on 24.04.2013 by the learned District Judge, Shimla on an application preferred before him by the petitioner herein/applicant under Section 24 of the Hindu Marriage Act. The learned District Judge declined relief qua maintenance pendent lite to the applicant/petitioner herein. However, it assessed in her favour litigation expenses quantified in a sum of Rs.5000/-.

2. The applicant/petitioner herein stands aggrieved by the aforesaid rendition, hence, has preferred the instant petition before this Court. The learned counsel appearing on either side have been heard at length.

3. The order impugned before this Court while its declining assessment of maintenance pendent lite to the applicant/petitioner herein had borne in mind the factum of the petitioner herein/applicant standing assessed by the Magistrate concerned in a petition constituted before him by her under Section 125 of the Code of Criminal Procedure maintenance in a sum of Rs.2000/-. The learned District Judge, Shimla on an appreciation of the material placed before him had held of the petitioner herein/applicant not adducing any cogent evidence in display of the respondent herein holding any agricultural income in the quantum as averred in the application constituted before it. In sequel, he has assessed the respondent herein to be holding a meager per mensem income of Rs.4500/-. Since, the petitioner herein stood assessed by the Magistrate concerned in proceedings constituted before him under Section 125 of the Cr.P.C. maintenance allowance quantified in the sum of Rs.2000/- per month naturally

constrained the learned District Judge, Shimla to given the petitioner holding a minimal income of Rs.4500/- construed in conjunction with his standing fastened with a liability by the Magistrate concerned while allowing the application preferred before him by the petitioner herein/applicant to defray to the latter maintenance quantified in a sum of Rs.2000/- per month, his hence declining the claim of the petitioner/applicant to claim any relief in a petition under Section 24 of the Hindu Marriage Act, does palpably not suffer from any infirmity. Contrarily, in the learned District Judge, Shimla in affording the aforesaid reason for declining the assessment by him of maintenance pendent lite in favour of the petitioner herein/applicant in a petition constituted before him by her under Section 24 of the Hindu Marriage Act had revered both the apt evidence existing on record besides, the factum of the petitioner herein/applicant standing assessed monthly maintenance allowance in a sum of Rs.2000/- by the Magistrate concerned in proceedings constituted before him by the petitioner herein/applicant under Section 125 of the Cr.P.C.

4. Even though, it was open for the petitioner herein/applicant to constitute a petition under Section 24 of the Hindu Marriage Act before the learned District Judge, subsequent to hers obtaining an award of maintenance allowance from the Magistrate concerned in a petition constituted before him under Section 125 of the Cr.P.C., yet, even when the petitioner/applicant stood neither legally interdicted nor barred to after rendition in her favour of an adjudication by the Magistrate concerned in a petition constituted before him by her under Section 125 of the Cr.P.C., to institute a petition before the learned District Judge Shimla, under Section 24 of the Hindu Marriage Act nonetheless when she stood debarred to reap the benefit of reliefs secured by her from both the Courts, necessarily, the learned District Judge, Shimla in not discounting the factum of the petitioner herein receiving an award of maintenance quantified at Rs.2000/- per month from the Magistrate concerned in proceedings constituted before him by her under Section 125 of the Cr.P.C., has not committed any gross illegality or impropriety. Necessarily, the order of the learned District Judge, Shimla while declining the relief of maintenance to the petitioner herein/applicant in a petition constituted by her before him under Section 24 of the Hindu Marriage Act deserves to be affirmed and maintained. Accordingly, the impugned order to the extent hereinabove is affirmed and maintained.

5. However, the learned District Judge, Shimla had assessed litigation expenses comprised in a sum of Rs.5000/- in favour of the petitioner herein/applicant. The aforesaid quantification by the learned District Judge, Shimla, appears to be minimal. Consequently, the aforesaid part of the order rendered by the learned District Judge, Shimla, is modified to the extent of the respondent herein defraying to the petitioner herein/applicant litigation expenses quantified in a sum of Rs.15000/-. The said amount shall include the sum of Rs.5000/- as awarded by the learned District Judge, Shimla. Consequently, the instant petition is partly allowed and the impugned order is modified to the extent hereinabove. All pending applications stand disposed of.

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

Vinod Sharma .....Appellant.

Versus

Abdul Hassan & others. ....Respondents.

FAO No. 93 of 2010
Decided on : 19.5.2016

Workmen Compensation Act, 1923- Section 5- Predecessor-in-interest of the claimants was electrocuted while working as labourer in construction of the house of the appellant- compensation of Rs. 3,03,269/- was awarded by Workmen Compensation Commissioner- held, in appeal, that respondent No. 1 was engaged as contractor for completion of the house- he was

acting on behalf of the appellant- therefore, appellant was rightly held liable to pay the compensation- appeal dismissed. (Para-2 to 4)

For the appellant:	Mr. Sunil Mohan Goel, Advocate.
For the respondents:	Mr. Neel Kamal Sharma, Advocate, for respondent No.1. Mr. B.S Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Uncontrovertedly the predecessor-in-interest of respondents/claimants met his end on 21.8.2004 while standing deployed as a labourer for completing the house of the appellant herein. His demise on the aforesaid date at the afore-referred place occurred on account of his suffering an electric shock from an electric wire hanging over the site whereat he was performing work as a labourer for completing the construction of the house of the appellant herein. The learned Commissioner under Workmen's Compensation Act (for short "the Commissioner") under his impugned rendition while concluding from the evidence as stood adduced before him of the respondents No. 2 to 4 (for short "claimants") being dependent upon the income of their predecessor-in-interest, assessed compensation in their favour in a sum of Rs.303269/-. However the aforesaid amount as assessed by the learned Commissioner as compensation to the claimants was ordered to be defrayed to them in equal proportion by both the appellant and respondent No.1 herein.

2. Evidently the trite conundrum which is enjoined to be put at rest by this Court is whether the deceased Mohd. Hussain died during the course of his standing engaged by appellant or respondent No.1. Each of the aforesaid contrarily contend of the deceased standing engaged by other. Hence they concert to escape the liability as stands fastened upon them by the learned Commissioner in the manner aforestated. Since respondent No.1 herein has not filed any appeal impugning the rendition of the learned Commissioner hence omission in the aforesaid regard estops the learned counsel for respondent No.1 to contend of the fastening of liability upon him by the learned Commissioner in the aforesaid manner suffers from a legal fallibility. Only the appellant herein has contended of the impugned award of the learned Commissioner fastening liability upon him equal to the liability fastened upon respondent No.1 herein warranting interference on the anchor of imminent upsurgings occurring from evidence in display of the deceased/workman standing engaged by respondent No.1 herein through whom under an agreement executed inter-se him and the appellant herein, the respondent No.1 executed construction of his building. The learned counsel for the appellant has contended of the learned Commissioner unwarrantedly omitting to fasten tenacity to an agreement executed inter-se the appellant and respondent No.1 herein detailing therein the factum of respondent No.1 accepting the execution of work of construction of the building of the appellant herein. However the aforesaid submission addressed before this Court by the learned counsel for the appellant is bereft of any vigor as the appellant herein had abstained besides omitted to cast apposite pleadings in his reply to the claim petition preferred before the learned Commissioner in portrayal of no liability for compensation if any as may come to be assessed by the learned Commissioner being fasten-able upon him given the factum of execution of a valid agreement inter-se both whereunder respondent No.1 herein stood appointed as a contractor for execution of the work of construction of his house. The effect of the aforesaid omission is of the appellant abandoning and waiving at the outset the aforesaid defence also its import is of any reliance upon any agreement executed inter-se the appellant herein and respondent No.1 herein with recitals occurring therein of both executing a contract whereunder respondent No.1 was enjoined to complete the construction of the house of the appellant was unwarranted also even if the apposite agreement stood adduced into evidence it being beyond pleadings was unreadable in evidence. In

sequel, on anvil of agreement executed inter-se the appellant and respondent No.1 whereunder the former purportedly appointed respondent No. 1 as a contractor to complete the construction of his house, the counsel for the appellant cannot make any capitalization whereupon he strives for his standing exculpated from the liability fastened in the manner ordained in the impugned award to defray compensation to the claimants. The learned counsel for the appellant has adverted to certain elicitations unearthed by the learned counsel representing the appellant before the learned Commissioner during his subjecting respondent No.1 to cross-examination especially the ones manifesting the factum of his equivocating qua the factum of his in the capacity as a contractor executing the work of construction of houses of Hans Raj brother of Hem Raj. He also adverts to that portion of the cross-examination of respondent No.1 as held by the learned counsel for the appellant therein, wherein he concedes to the factum of his making payments to the labourers who carried out construction work of the house of the appellant herein. However even if respondent No.1 equivocated qua the factum of his standing engaged by Hans Raj brother of Hem Raj as a contractor to complete the construction of their respective houses, nonetheless even if the implication of his equivocating qua the aforesaid factum is of his hence impliedly acquiescing to his standing engaged by the aforesaid to complete the construction of his house however the acquiescences qua the aforesaid factum cannot ipso facto render an inference of respondent No.1 also standing engaged as a contractor by the appellant herein for completing the construction of his house also the factum of respondent No.1 conceding to his receiving payments for remitting them onwards to the labourers who carried out construction work for completing the house of the appellant herein cannot perse constitute potent or vigorous evidence for thereupon this Court holding with firmness of the appellant herein proving unflinchingly of his engaging respondent No.1 as a contractor for completing the construction of his house rather his receiving payments from the appellant herein for theirs being remitted onwards by him to the labourers constituting a method or a device evolved by the appellant himself for conveniently given his preoccupation as a businessman to through respondent No.1 remit wages of the labourers working at the site whereupon construction activity stood carried out. With this Court concluding of the purported agreement executed inter-se the appellant and respondent No.l whereupon the latter stood appointed as a contractor by the former for completing the construction of his house holding no evidentiary worth also its being unreadable in evidence whereas it constituting best evidence in display for succoring the contention of the learned counsel for the appellant of his appointing respondent No.1 as a contractor for completing the construction of his house whereupon he has proceeded to further espouse of the liability in the manner aforesaid fastened upon him by the learned Commissioner meriting interference also concomitantly renders the espousal aforesaid to stand benumbed. The effect of elicitations if any of admission if any from respondent No.1 herein by the learned counsel for the appellant herein during the course of his holding him to cross-examination qua which an allusion stands made hereinabove also hold no vigor or tenacity for this Court to thereupon conclude of respondent No.1 executing construction work of the house of the appellant herein in the capacity of a contractor nor also this Court can hold of the deceased standing not engaged by the appellant herein nor can this Court conclude of his at the apposite stage not holding any employment under the appellant herein. Necessarily when this Court hence holds of the deceased standing engaged by appellant herein, the fastening of liability upon the appellant by the learned Commissioner under the impugned award does not warrant any interference.

3. Be that as it may there is an unequivocal testimony of RW-3 of even respondent No.1 performing work in the capacity of a labourer for completing the construction of the house of the appellant herein. Also an advertence to the provisions of sub Section (1) of Section 12 of the Workmen's Compensation Act, 1923 (for short "the Act") which stands extracted hereinafter would unveil the factum of even if assumingly respondent No.1 is construed to be a contractor appointed by the appellant herein besides assumingly the purported agreement executed inter-se the appellant and respondent No.1 herein stands imbued with a virtue of validity nonetheless on anvil thereof the learned counsel for the appellant would yet not succeed as with sub section (1) of Section 12 of the Act encapsulating the sine qua non for on satiation whereof by potent

evidence would strengthen the submission of learned counsel for the appellant qua his hence standing exculpated qua the liability as stands fastened upon him by the learned Commissioner in as much as on its satiation occurring by invincible proof emanating or standing displayed of his carrying out construction activity as part of his trade or business. However when the appellant contrarily holding construction of his personal house necessarily when he also hence has not proved thereby his carrying construction of his personal house as part of his trade or business. In sequel, with the aforesaid sine qua non for attracting besides rendering it workable for succoring the espousal of the learned counsel for the appellant stands un-satiated, the vigor if any of even if assumingly the purported agreement entered inter-se him and respondent No.1 holds it hence standing sapped of its vigor and strength.

> "12. Contracting- (1) Where any person (hereinafter in this Section referred to as the Principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor for the execution by or under the contractor of the whole or any part of the work which is ordinary part of the trade or business of the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed."

4. In view of above, there is no merit in this appeal the same is accordingly dismissed as also pending applications if any. Since respondent No.1 has not filed any cross appeal assailing the impugned award hence observations, if any, recorded in this judgment qua the deceased standing engaged by the appellant herein would not constrain this Court to hence reverse the findings recorded by the learned Commissioner qua his sharing in equal proportion alongwith the appellant herein the liability to defray to the claimants the compensation amount as adjudged in the impugned award in their favour. The cross objections are allowed subject to an ascertainment qua the prime factum of the appellant and respondent No.1 herein not liquidating their liability towards the claimants as stands fastened upon them in the impugned award within 30 days of its rendition.

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

State of H.P. .....Petitioner.

Versus

Narottam Singh & others .....Respondents.

Cr.MMO No. 254 of 2015.
Decided on: 20th May, 2016.

Indian Penal Code, 1860- Section 307- Additional Sessions Judge found on committal that accused had prima facie committed the offence punishable under Section 324 and not under Section 307 of IPC - he remanded the case for trial to the Committing Magistrate- held, that the accused had repeatedly inflicted injuries by Kripan - the fact that injuries were inflicted repeatedly shows that the offence falls within Section 307 and not 324 of IPC - order set-aside. (Para 2-6)

Case referred:

Sajjan Kumar versus Central Bureau of Investigation, 2010(9) SCC 368

For the Petitioner: Mr. R.S. Thakur, Addl. A.G.
For the Respondents : Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The State of Himachal Pradesh stands aggrieved by the rendition of the learned Addl. Sessions Judge (1), Kangra at Dharamashala, Himachal Pradesh, Circuit Court at Nurpur whereunder on committal to him by the Committal Magistrate of the accused/respondents for theirs committing offences exclusive triable by the Court of Sessions Judge, the learned Addl. Sessions Judge on an analysis of the material placed before him by the prosecution concluded of the offences constituted by the prosecution against the accused not falling within the ambit of Section 307 of the Indian Penal Code rather theirs falling within the ambit of Section 324 of the IPC, hence, with the latter offence standing exclusively triable by the learned Magistrate, he remanded the case to the committal Court for trial of the accused by it.

2. The learned Additional Advocate General has with pain staking efforts contended on the strength of allegations constituted in the FIR recorded in the Police Station concerned with a portrayal therein of the accused wielding a 'Kripan' with user whereof he attempted to strike blows at the victim, blows whereof stood thwarted by the victim twice by putting his hands against the "kirpan' act whereof his to baulk its striking him sequelled his sustaining injuries on his right thumb whereupon the accused repeated his concert to strike a blow of 'kripan' at him which successive blow of 'Kripan' also stood thwarted by the victim projecting his hand sequelling his sustaining injuries on his index finger. The aforesaid echoing in the FIR by the victim of the genesis of the occurrence per se prima facie at this stage stands corroborated by the MLC of the victim prepared in quick spontaneity to the occurrence by the doctor concerned who in the apposite MLC has reflected of the victim sustaining injuries on his right thumb besides on his index finger. On anvill whereof, the learned Additional Advocate General contended of satisfaction standing begotten qua the ingredients of Section 307 of the IPC of the accused endangering the life of the victim constituted by his wielding a "Kripan' qua user whereof he struck two abortive blows on the person of the victim of hence the learned Additional Sessions Judge committing a gross error in concluding of the offences constituted against the accused respondent rather falling within the ambit of Section 324 of the IPC.

3. The learned counsel appearing for the accused has contended with vigour on the strength of a decision of the Hon'ble Apex Court reported in ***Sajjan Kumar versus Central Bureau of Investigation, 2010(9) SCC 368***, the relevant paragraph whereof extracted hereinafter, to contend of the sifting of evidence besides material by the learned Additonal Sessions Judge not suffering from any gross frailty nor his order impugned before this Court at the instance of the State of Himachal Pradesh stands ingrained with any vice of any legal impropriety, as the nature of the injuries ultimately suffered by the victim were aptly taken into consideration by the learned Additional Sessions Judge, while concluding of the offences constituted against the accused not falling within the ambit of Section 307 of the IPC rather hence rendering the penal misdemeanors, if any, committed by the accused/respondents to fall within the ambit of Section 324 of the IPC. He also contended thereupon of the learned Additional Sessions Judge in remanding the matter to the committal Magistrate for his proceeding to record charges against the accused for theirs committing offence punishable under Section 324 of the IPC is tenable.

> "17. Exercise of jurisdiction under Sections 227 and 228 of Criminal Procedure Code. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-
>
> (I) The judge while considering the question of framing the charges under Section 227 of the Criminal Procedure Code has the undoubted power to sift and weigh

the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Whether the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them give rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

4. Having considered the rival submissions addressed before this Court by the learned Additional Advocate General as also by the learned counsel appearing for the accused/respondents herein, this Court is of the considered view that the submissions addressed before this Court by the learned Additional Advocate General ought to merit theirs standing accepted by this Court. There is a palpable display in the FIR lodged qua the occurrence by the victim, of the accused at the relevant time wielding a kripan. With its user as aforestated he struck successive abortive blows on the victim, yet the factum of the victim thwarting the blows of kripan successively struck at him by the accused, begot his hence sustaining injuries initially on his right thumb and later on his right index finger when stands as referred aforestated corroborated by the apposite MLC prepared by the doctor concerned, who subjected the victim to medical examination in quick spontaneity to the occurrence, is of predominant significance. Moreover, since the recovery of the 'Kripan' wielded by the accused stands recovered under a recovery memo, as a corollary, at this stage it would be in-sagacious to accept the submission addressed before this Court by the learned counsel appearing for the accused of the factum of the injuries sustained by the victim being a preeminent factor as stood tenably borne in mind by the learned Additional Sessions Judge for concluding of the penal misdemeanors committed by the accused standing constituted within the ambit of Section 324 of the IPC and theirs not falling within the ambit of Section 307 of the IPC. The reason for discountenancing the submission of the learned counsel for the accused is of his having slighted the effect besides the import of the provisions of Section 307 of the IPC which mandate the preeminent factor relevant for concluding whether the offence as alleged to be committed by the accused stands constituted within its

ambit not being the nature of the injuries ultimately sustained by the victim in sequel to the assault perpetrated on her/his person by the accused rather the stark factor for concluding whether the offence stands constituted within its ambit is of the endangerment emanating or the imminent threat accruing to the life of the victim spurring from the nature of the weapon wielded by the accused dehors the fact that even on its user the victim ultimately sustains simple injuries . In aftermath, at this stage prima facie material when is connotative of the accused wielding a 'kripan' which per se meted on its standing used by the accused an imminent threat to the life of the victim hence aroused endangerment to his life besides when with its user he attempted to inflict fatal blows on the person of the victim which stood thwarted by the latter in the manner aforestated, naturally, the learned Additional Sessions Judge while remanding the case to the committal Magistrate has committed a grave legal fallacy while discarding the factum of the accused at the relevant time wielding a 'Kripan' and its user begetting endangerment to the life of the victim rather his contrarily and inaptly meteing reverence to the injuries meted to the victim by the accused while striking him with blows of kripan has gone off the mark in capturing the subtle nuance and spirit of the provisions of Section 307, IPC, ingredients whereof for reasons aforestated stood satiated. In aftermath, this Court is of the view that the learned Additional Sessions Judge, has committed a legal impropriety by remanding the matter to the Committal Magistrate for framing a charge against the accused for theirs committing an offence punishable under Section 324 of the IPC.

5. The learned counsel appearing for the accused/respondents has with much vigour on the anvil of the judgement of the Hon'ble Apex Court, the relevant paragraphs whereof stands extracted hereinabove, contended of the learned Additional Sessions Judge having rendered an apt order. However, with the relevant paragraph which stand extracted hereinabove foisting a jurisdiction upon the Court concerned to weigh and sift the evidence, nonetheless, when the manner of weighing or sifting besides appraising the probative worth of the material on record by the learned Additional Sessions Judge suffers from a perversity and absurdity, the contention of the learned counsel for the accused would not stand countenanced by this Court.

6. For the foregoing reasons, the instant petition is allowed and the order impugned before this Court is quashed and set aside. However, it is made clear that the findings rendered by this Court hereinabove shall have no bearing on the merits of the case. All pending applications stand disposed of.

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

Dass Ram .....Petitioner.
Versus
Daler Singh & others . ...Respondents.

CMPMO No. 420 of 2015.
Date of Decision: 23rd May, 2016.

Code of Civil Procedure, 1908- Order 41 Rule 27- Plaintiff laid a claim to the estate of 'M' on the basis of a Will- the suit was partly dismissed by the Trial Court- an appeal was preferred- an application for leading evidence was filed before appellate court, which was allowed - another application under order 6 Rule 17 CPC was filed which was also allowed- held, that the application for amendment was filed to correct the error in the date of execution of the Will which had arisen due to error in translation - such amendment will help the Appellate Court to arrive at a just decision- petition dismissed. (Para 5-6)

For the Petitioner: Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashisht, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The estate of Seetu, on his demise on 26.1.1971 thereat opened for succession. He died issueless besides on his demise, he left no surviving spouse. His estate stood mutated in favour of Rattani Devi, Kanshi Ram, Sarvan and Mukhitiar Singh. Mutation No.1782 qua the estate of deceased Seetu records therein the factum of the Revenue Officer sanctioning mutation qua the estate of deceased Seetu not in favour of Mukhitiar Singh rather in favour of Smt. Banti Devi widow of Kishan Chand despite the factum of Mukhitiar Singh being alive at the time when the estate of Seetu opened for succession and stood enjoined to devolve upon his heirs amongst whom Mukhitiar Singh was the one. Consequently, a prayer is made in the plaint of the said mutation recorded in favour of Banti by the Revenue Officer in derogation to the rights of Mukhitiar Singh being declared to be illegal, null and void. The plaintiffs also claimed right of succession to the estate of Mukhitiar Singh on the strength of a testamentary disposition of Mukhitiar Singh, averred in the original plaint, to be of 30.1.1974 on strength whereto mutation No. 1781 qua the estate of deceased Mukhitiar Singh, their predecessor-in-interest stood attested in favour of the plaintiffs on 18.05.1973.

2. The suit of the plaintiffs was partly dismissed by the learned trial Court. An appeal therefrom was preferred before the First Appellate Court. During the pendency of the appeal, before the learned first Appellate Court, an application was preferred thereat by the plaintiffs/respondents herein under Order 41, Rule 27 of the CPC for adducing evidence qua the mis-reflection occurring in the plaint qua the date of scribing in Urdu of the Will of Mukhitiar Singh, for underscoring the date of its scribing being 30.01.1969 and not 30.01.1974. The said application was allowed by the learned first Appellate Court. Feeling aggrieved against the allowing of the application aforesaid, the petitioner herein/defendant preferred therefrom a petition before this Court which stood also hereat allowed, on the score of this Court holding of in absence of an apposite averment with the leave of the Court concerned standing constituted in the plaint qua 30.01.1969 constituting the date of scribing of the Will of Mukhitiar Singh, rendered the application under Order 41, Rule 27 of the CPC preferred at the instance of the respondents herein for adducing with the leave of the Court material denotative of the date borne on the testamentary disposition in Urdu of deceased Mukhitiar Singh being not 1974 rather 1969 to beget adduction of evidence beyond pleadings rendering it to be discardable. In sequel, the respondents herein instituted an application under Order 6, Rule 17 of the CPC before the learned first Appellate Court. The application came to be decided in favour of the respondents herein/plaintiffs. The defendant/ petitioner herein stands aggrieved by the rendition of the learned first Appellate Court on the apposite application preferred before it by the respondents/plaintiffs/appellants. Palpably, the apposite averment constituted in the original plaint instituted by the plaintiffs qua the date of scribing of Will of deceased Mukhitiar Singh is reflective of Mukhitiar Singh executing his testamentary disposition qua his estate in favour of the plaintiffs on 30.01.1974. The aforesaid date of scribing of the Will of deceased Mukhitiar Singh is contended in the application under Order 6, Rule 17, CPC to stand begotten by a pure inadvertence of the translator concerned mistranslating from mutation No. 1781 the date of scribing of the Will of Mukhitiar Singh to be 30.01.1974 whereas it stood scribed by Mukhitiar Singh on 30.01.1969. Since, the counsel for the plaintiffs while drafting the plaint borrowed the date of scribing of the Will from the translation made by the translator of the mutation attested by the Revenue Officer concerned qua his estate hence sequelled an incorporation by pure inadvertence by him in the original plaint of Mukhitiar Singh scribing his testamentary disposition on 30.01.1974, in sequel, whereto, mutation stood attested on 18.05.1973. The testamentary disposition of Mukhitiar Singh is in Urdu. The date of its scribing borne thereon is also in Urdu. Necessarily a proficient translator could in his translated version thereof pronounce the exact date of its scribing by its testator. Even if, the apposite translation has suffered an infirmity or a flaw qua the exact date of its scribing borne on the testamentary disposition of deceased Mukhitiar Singh nonetheless the exact date of its scribing would still

stand unearthed on a proper motion made before the learned first Appellate Court succeeding thereat as stands occurred.

3. The counsel for the respondents herein with fervor contends of the amendment as proposed to be incorporated in the plaint is merely a typographical error or is clarificatory in nature and is merely a concert to enable the Court to on the anvil of the apposite documentary evidence embodying the exact date of scribing of the Will of deceased testator Mukhitiar Singh besides when the exact date of its scribing is not permitted to be reflected in the plaint would sequel the Appellate Court to yet proceed to on a mis-reflection in the original plaint of the date of scribing of the testamentary disposition of Mukhitiar Singh, to hence also erroneously decide the lis alike the learned trial Court. The learned counsel appearing for the petitioner herein has contended before this Court with force of the amendment as proposed to be carried out being a belated attempt to effect an amendment in the pleadings especially when there occurs no communication in the application at hand of the respondents herein earlier thereto holding no knowledge qua the exact date of scribing of the testamentary disposition of Mukhitiar Singh rather knowledge thereof erupting on theirs contacting a translator who on holding an authentic translation thereof communicated to them of the error previously made by the earlier translator of mutation attested in the year 1973 which reflects the purported date of execution of the testamentary disposition of deceased Mukhitiar Singh.

4. The counsel have been heard at length. This Court has considered their rival contentions.

5. The translation by the translator of the date of testamentary disposition of deceased testator Mukhitiar Singh palpably appears to emerge from his purportedly mis-translating it while holding a translation of mutation No.1781. However, even if the said erroneous translation of the date of scribing of the testamentary disposition of deceased Mukhitiar Singh sprouts from the order of mutation of his estate in consonance therewith standing recorded by the Revenue Officer concerned, nonetheless, the prime document wherefrom the exact/precise date of the scribing in Urdu of the testamentary disposition of the deceased testator would stand disinterred is the testamentary disposition in Urdu of Mukhitiar Singh. Since, the script of the testamentary disposition of Mukhitiar Singh is in Urdu, the precise date of its scribing is obviously also in urdu hence even if the application at hand stands belatedly instituted at the instance of the respondents herein before the Appellate Court, the permission to the respondents herein to incorporate in the plaint the exact date of its scribing as exists on the apposite testamentary disposition in Urdu of the deceased testator rather than the one occurring in the mutation attested in favour of the plaintiffs in consonance therewith obviously would enable the First Appellate Court to arrive at a just decision on the lis which engages the parties. The learned Appellate Court has recorded in its impugned order qua the date of its scribing being 30.01.1969 necessarily hence when the mis-pleading of the aforesaid factum in the plaint has occurred on account of a mis-translation by the translator concerned qua the date on its scribing, translation whereof, he made not from the testamentary disposition in Urdu of deceased Mukhitiar Singh rather from the mutation attested on its strength in favour of the plaintiffs, naturally when the exact date of its scribing stands borne on the testamentary disposition of the deceased testator and the impugned order reflects of its standing scribed on 30.01.1969, necessarily, the ends of justice warrant of the pronouncement occurring in the impugned order qua the exact date of its scribing when would undo the earlier mis-translation made by the translator concerned from the mutation attested on its anvill by the Revenue Officer concerned in favour of the plaintiffs of hence the leave as sought for in the apposite application for its incorporation in the plaint being tenably affordable to the respondents herein, especially when it would facilitate the first Appellate Court to render correct findings qua its scribing besides would empower it to render a just verdict upon the lis engaging the parties. In aftermath, the inaccurate/mis-precise date of its scribing when has spurred from a mis-translation made by the translator from the apposite mutation attested qua the estate of Mukhitiar Singh which prompted the counsel concerned to adopt it while bonafidely believing it

to be true to hence make an erroneous incorporation in the original plaint qua the date of its scribing warrants its being undone besides rectified. Also the cause of justice warrants, the application being accepted as tenably done by the learned Court below. There is no infirmity in the order impugned before this Court.

6. Before parting, it is imperative to contenance or discountenance the submission made by the learned counsel appearing for the petitioner herein of the belated institution of the application at hand before the Appellate Court warranting its facing rejection also it is deemed imperative to advert to his submission of the non communication by the respondents in their application of theirs prior thereto not holding knowledge qua the mis-reflection in the plaint qua the date of scribing of the testamentary disposition of deceased testator Mukhitiar Singh also of theirs not communicating in the apposite application of the manner or the precise date of theirs standing awakened qua the exact date of its scribing, entailing rejection of their application. However, the aforesaid submission stands subsumed in the face of the suit proceeding with an inaccurate reflection in disconcurrence qua the date of its scribing, precise date whereof occurs on the testamentary disposition in Urdu of deceased Mukhtiar Singh. If permission to the respondents herein to amend their pleadings in consonance therewith is afforded to them obviously mis-portrayals in the original plaint qua the date of scribing of the apposite Will would stand effaced also would constitute the best precise reflection qua the date of its scribing. Also if, the aforesaid apposite communication remained unarticulated by the respondents herein in their application, yet when the exact date of scribing in Urdu stands borne in the testamentary disposition of Mukhtiar Singh obviously warrants its finding reflection in the apposite averments qua it in the plaint. Consequently, the instant petition is dismissed and the impugned order is affirmed and maintained. However, it shall be yet incumbent upon the respondents herein to adduce cogent evidence qua the date of scribing of the testamentary disposition of deceased Mukhtiar Singh. Moreover, it shall be open to the petitioner herein to adduce evidence in rebuttal qua the date of scribing of the testamentary disposition of deceased Mukhtiar Singh. Records be sent back forthwith. The parties are directed to appear before the learned first Appellate Court on 15th June, 2016. All pending applications also stand disposed of.

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

Biri Singh .....Petitioner

Versus

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

CWP No. 2095 of 2008
Decided on: 24.05.2016

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged by respondent no. 3 as an Electric Coolie for repair and maintenance of electrical installation in Government building- he was disengaged- he made a representation stating that persons engaged after his termination were retained- reply was filed- petitioner sought a reference but reference was declined on the ground of delay - held, that petitioner had a right to be considered for re-employment in preference to others who were engaged in subsequent years- reference was declined on the ground that it was sought after 10 years- petitioner was continuously pursuing the matter and asking for his reinstatement - it cannot be said that there was delay in seeking reference- writ petition allowed and Labour Commissioner directed to make reference to the Labour Court.

(Para-11 to 20)

Cases referred:

Central Bank of India versus S. Satyam and Others, (1996) 5 Supreme Court Cases 419

Sapan Kumar Pandit versus U.P. State Electricity Board and others, (2001) 6 Supreme Court Cases 222

S.M. Nilajkar and others versus Telecom District Manager, Karnataka (2003) 4 Supreme Court Cases 27
Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301
Jasmer Singh versus State of Haryana and another (2015) 4 Supreme Court Cases 458
Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301

For the petitioner : Mr. Surinder K. Saklani, Advocate.
For the respondents : Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge:

Present petition has been filed assailing communication dated 8th August, 2007 (Annexure P-4) conveying refusal by Labour Commissioner to refer the dispute to Labour Court under provisions of Industrial Disputes Act, 1947 (hereinafter referred to the Act) stating therein that the dispute had faded away and there was no justification of making reference to Labour Court in view of the judgment of this Court passed in CWP No. 398 of 2001 titled as M.C. Poanta Sahib versus State of H.P. and others and also for reason that petitioner had not completed 240 days in a calendar year.

2. The factual matrix of this case is that petitioner was engaged by respondent No. 3 as electric Coolie in March, 1995 against work of repair and maintenance of electrical installation in government buildings under Electrical Sub Division, H.P.P.W.D., Mandi, on muster roll. Petitioner was disengaged after 30.04.1995.

3. Petitioner had submitted demand notice to the respondent No. 3 vide application dated 17.08.2005 giving reference of his representations dated 7.11.1995, 22.12.1997 and 8.01.2001, and name of 14 incumbents engaged during the years 1998-2000 i.e. after the engagement and termination of petitioner. Petitioner had requested for reinstatement of his services.

4. Respondent No. 3 had replied to this demand notice vide letter dated 13.10.2005 (Annexure P-2). Engagement of petitioner in March, 1995 and disengagement after 30.04.1995 was admitted but it was stated that petitioner had not completed 240 days in calendar preceding year and therefore, no notice was required to be served upon him and it was also stated that petitioner had left the job in his own will and had not approached respondent No. 3 for re-engagement. The fact engaging more than 20 Beldars during the year 1998-2000 in continuation of those persons has not been specifically denied. However, it has been raised after period of more than 10 years.

5. Petitioner had filed rejoinder (Annexure-P-3) to the reply of respondent department to demand notice. In rejoinder, it has been specifically stated that at the time of disengagement respondent No. 3 had assured to call him as and when work will be available. It was also pointed out in this rejoinder that respondent No. 3 had not responded to the fact of fresh engagement of persons without calling the applicant and those juniors are being continued in the Department.

6. Demand notice was rejected and refusal to make reference has been conveyed vide communication dated 8.08.2007 (Annexure-P-4). This order is under challenge in present petition.

7. Petitioner has reiterated his claim and besides impugned communication (Annexure P-4), has placed on record Demand Notice dated 17.08.2005 (Annexure P-1). Reply

and rejoinder thereto (Annexure P-2 and P-3) and representations dated 7.11.1995, 22.12.1997 and 8.01.2001 (Annexure P-5) and has sought direction to Labour Commissioner to make reference to Labour Court.

8. Petition has been resisted by respondents by filing replies. Reply to petition on behalf of respondents No. 1 and 2 has been filed purporting the said reply as reply on behalf of respondents No. 1 to 3. Another reply through respondent No. 3 has also been filed. Labour Court Commissioner in his reply has reiterated the stand taken in communication dated 8.08.2007 (Annexure P-4) and has justified refusal to make reference stating that appropriate government, acting under Section 12 (5) of the Act, did not find it proper to refer the case to Labour Court in view of the judgment of Division Bench of this Court in CWP No. 398 of 2001 titled as M.C. Paonta Sahib Versus State of H.P. and others.

9. In reply filed by respondent No. 3 it has been stated that petitioner had not approached the department for reengagement and had served only his demand notice in the year 2005 after more than 10 years and the claim of the petitioner is barred by limitation and further stated that respondent No. 2 has rightly refused to make the reference to Labour Court. It has been further stated that petitioner had worked only 47 days and had not completed 240 days in preceding calendar year and therefore no notice was given to him. Lastly, it has been prayed that petition being devoid of merits be dismissed.

10. In rejoinder averments made in petition has been reiterated by petitioner and it has been also stated that respondents were not responding to representation made by petitioner in 1997 and 2001 which have been placed on record as Annexure P-5 and have engaged and continuing favorites who are junior to petitioner.

11. Section 25-F of the Act, deals with condition precedent to retrenchment of workmen. Section 25-G deals with procedure for retrenchment. Section 25-H contains provision for Re-employment of retrenched workmen. As per Section 25 a workman, having continuous service for not less than one year under the employer, shall not be retrenched unless one month notice as prescribed in Section 25-F is given, workman has been paid and notice is served to the appropriate government or such authority as prescribed in the Section 25-F. Admittedly, petitioner had not served for one year and had also not completed 240 days in a calendar year. Section 25-G provides that employer shall ordinarily retrench the workman who was the last person employed in that category. Section 25-H provides that after retrenchment of workman if employer proposes to engage any persons later on then employer shall give opportunity to the retrenched workman for re-employment in preference to other persons. So far as provisions of Section 25-G and Section 25-H are concerned there is no condition precedent of continuous service of one year under an employer.

12. The Apex Court in case titled as **Central Bank of India versus S. Satyam and Others, (1996) 5 Supreme Court Cases 419** has held as under:-

> *"9. The plain language of Section 25-H speaks only of re-employment of retrenched workmen". The ordinary meaning of the expression "retrenched workmen" must relate to the wide meaning of 'retrenchment' given in Section 2 (oo). Section 25-F also uses the word 'retrenchment' but qualifies it by use of the further words "workman…who has been in continuous service for not less than one year". Thus, Section 25-F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of the further words " workman.. who has been in continuous service for not less than one year". It is clear that Section 25-F applies to the retrenchment of a workman who has been in continuous service for not less than one year and not to any workman who has been in continuous service for less than one year; and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less than one year. Chapter V-A deals with all retrenchments while Section 25-F is*

confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25-G prescribes the principle for retrenchment and applies ordinarily the principle of "last come first go" which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25-F".

10. The next provision is Section 25-H which is couched in wide language and is capable of application to all retrenched workmen, not merely those covered by Section 25-F. It does not require curtailment of the ordinarily meaning of the word 'retrenchment' used therein. The provision for re-employment of retrenched workmen merely gives preference to a retrenched workman in the matter of re-employment over other persons. It is enacted for the benefit of the retrenched workmen and there is no reason to restrict its ordinary meaning which promotes the object of the enactment without causing any prejudice to a better placed retrenched workman.

11. Chapter V-A providing for retrenchment is not enacted only for the benefit of the workmen to whom Section 25-F applies but for all cases of retrenchment and, therefore, there is no reason to restrict application of Section 25-H therein only to one category of retrenched workmen. We are, therefore, unable to accept the contention of Shri Pai that a restricted meaning should be given to the word retrenchment' in Section 25-H. This contention is, therefore, rejected".

13. In present case there is no specific denial to the fact that respondent No. 3 had engaged persons during the year 1998-2000, who are being continued, without giving opportunity and offering re-employment to petitioner. Petitioner had not completed 240 days, in a calendar year and was not in service of the respondent No. 3 for continuous one year. Therefore, protection of section 25-F may not be available to petitioner. However, petitioner has right to be considered for reemployment in preference to others who were engaged in subsequent years after retrenchment of petitioner. Therefore, there is violation of Section 25-H of Industrial Disputes Act, 1947 in present case.

14. Second ground for refusal to make reference to Labour Court by Labour Commissioner is 10 years delay in raising demand/dispute by petitioner.

15. The Apex Court in case titled as **Sapan Kumar Pandit versus U.P. State Electricity Board and others, (2001) 6 Supreme Court Cases 222,** has held as under:-

"10 In considering the factual position whether the dispute did exist on the date of reference the Government could take into account factors, inter alia, such as the subsistence of conciliation proceedings. It is of no consequence that conciliation proceedings were commenced after a long period. But such conciliation proceedings are evidence of the existence of the industrial dispute".

"15. There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons it does not cause the dispute to wane into total eclipse".

16. The Apex Court in case titled as **S.M. Nilajkar and others** versus **Telecom District Manager, Karnataka (2003) 4 Supreme Court Cases 27,** has held as under:-

"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in Shalimar works Ltd. v. Workmen that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute it does not mean that the dispute can be raised at

any time without regard to the delay and reasons therefore. There is no limitation prescribed for reference of disputes to an industrial tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even re-employment of the most of the old workmen was held to be fatal in Shalimar Works Ltd. v. Workmen. In Nedungadi Bank Ltd. v. K.P. Madhavankutty a delay of 7 years was held to be fatal and disentitled the workmen to any relief. In Ratan Chandra Sammanta v. Union of India it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in Daily Rated Casual Employees Under P & T Department v. Union of India the department was formulating a scheme to accommodate casual labourers and the appellants were justified din awaiting the outcome thereof. On 16.1.1990 they were refused to be accommodated in the scheme. On 28.12.1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay".

17. The Apex Court in case titled as **Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301** has held as under:-

"15. In the case on hand, no doubt there is a delay in raising the dispute by the appellant; the Labour Court nevertheless has the power to mould the relief accordingly. At the time of adjudication, if the dispute referred to the Labour Court is not adjudicated by it, it does not mean that the dispute ceases to exist. The appropriate government in exercise of its statutory power under Section 10(1)(c) of the Act can refer the industrial dispute, between the parties, at any time, to either the jurisdictional Labour Court/Industrial Tribunal as interpreted by this Court in the ***Avon Services*** *case referred to supra. Therefore, the State Government has rightly exercised its power under Section 10(1)(c) of the Act and referred the points of dispute to the Labour Court as the same are in accordance with the law laid down by this Court in* ***Avon Services & Sapan Kumar Pandit*** *cases referred to supra.*

16. Further, the workman cannot be denied to seek relief only on the ground of delay in raising the dispute as held in the case of ***S.M. Nilajkar & Ors. v. Telecom District Manager,*** *it was held by this Court as follows- (SCC pp. 39-40, para-17).*

"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree..... ***In Ratan Chandra Sammanta and Ors. v. Union of India and Ors.(supra)[JT 1993(3) SC 418], it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it***

has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief.....*"(Emphasis laid by the Court)*

17. In view of the legal principles laid down by this Court in the above judgment, the reference of the industrial dispute made in the case on hand by the State Government to the Labour Court to adjudicate the existing industrial dispute between the parties was made within a reasonable time, considering the circumstances in which the workman was placed, firstly, as there was a criminal case pending against him and secondly, the respondent had assured the workman that he would be reinstated after his acquittal from the criminal case. Moreover, it is reasonable to adjudicate the industrial dispute in spite of the delay in raising and referring the matter, since there is no mention of any loss or unavailability of material evidence due to the delay. Thus, we do not consider the delay in raising the industrial dispute and referring the same to the Labour Court for adjudication as gravely erroneous and it does not debar the workman from claiming rightful relief from his employer.

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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."*

18. Dealing with the limitation period to the proceedings in the Industrial Disputes Act, 1947, the Apex Court in case titled as **Jasmer Singh versus State of Haryana and another (2015) 4 Supreme Court Cases 458,** has held as under:-

"14. On issue No. 3, after adverting to the case of State of Punjab v. Kali Dass. wherein the High Court has observed that the workman cannot be allowed to approach the Labour Court after 3 years of termination of his services, upon which reliance placed by the respondent-employer with reference to the said plea the Labour Court has rightly placed reliance upon the judgment of this Court in Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd. in

which it is observed by this Court that there is no period of limitation to the proceedings in the Act.

15. Accordingly, Issue No. 3 is answered against the respondent-management. The relevant paragraph from Ajaib Singh's case is extracted herein below: (SCC p.90 para 10)

"10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay in shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/ termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages."

19. On the same issue in similar cases, Division Benches of this Court in CWP No. 6687 of 2014 decided on 24.09.2014, CWP No. 9467 of 2014 decided on 30.12.2014 and LPA No. 152 of 2015 decided on 28.09.2015 have relied upon ratio laid down by Hon'ble Supreme Court, in case titled as **Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301,** and allowing the petition have directed Labour Commissioner to make reference to the Labour Court.

20. In the instant case the respondent No. 3 had engaged workman after disengagement of petitioner without giving opportunity to the petitioner by offering re-engagement to him. Employment and continuation of juniors in employment without offering re-employment is also cause of action to petitioner to raise Industrial Disputes under the Act. Petitioner was continuously pursuing the matter and asking for his re-engagement by submitting representations. The respondents have not bothered to rebut allegation of the petitioner engaging and continuing juniors to the petitioner during years subsequent to disengagement of petitioner.

21 In given circumstances of the case, it cannot be considered that there was delay in raising the industrial disputes on the part of petitioner. Besides, as held by Apex Court, Labour Court can always mould the relief according to the facts and circumstances in each case.

22. In view of the facts and circumstances of the case and ratio laid down by the Apex Court, present petition is allowed and impugned refusal to refer the matter to Labour Court conveyed vide communication dated 8.08.2007 (Annexure P-4) is quashed and Labour Commissioner is directed to make reference to the Industrial Disputes-cum-Labour Court within eight weeks from today. Pending application(s) if any stand disposed of. No order as cost.

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

Gursewak Singh and others .....Petitioners.

Versus

State of HP and another ...Respondents

Cr.MMO No. 315 of 2015

Decided on: 24th May, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 406, 498-A and 506 of I.P.C. - matter was compromised between the parties- held, that parties may approach the High Court for quashing the proceedings on the basis of compromise in a non-compoundable offence- parties have mutually settled the matter and no useful purpose will be served by allowing the criminal proceedings to continue- petition allowed. (Para- 4 to 6)

Case referred:
Gian Singh v. State of Punjab and another, (2012) 10 SCC 30

For the petitioners:	Mr. Des Raj Thakur, Advocate. Petitioners No.1 and 2 are also present in person.
For respondent No.1:	Mr. D.S. Nainta, Additional Advocate General.
For respondent No.2:	Mr. Rahul Verma, Advocate. Respondent No.2 is also present in person.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Respondent No.2-complainant Paramjeet Kaur is present in person. As a matter of fact, she is complainant and the case under Sections 406, 498-A and 506 of the Indian Penal Code has been registered against the petitioners in Police Station, Paonta Sahib, District Sirmaur, vide FIR No.162 of 2011 on 22.5.2011 at her instance. The record reveals that after registration of the FIR she entered upon a compromise Annexure P-3 with the accused-petitioners. Not only this, but consequent upon the deed of settlement Annexure P-3 the marriage of petitioner No.1 and respondent No.2-complainant stands dissolved by a decree of divorce with mutual consent. The decree to this effect passed by the Principal Judge Family Court at Dehradun is Annexure P-4. The respondent-complainant has now solemnized the marriage with Salinder Kumar alias Surender Kumar son of Shri Molar Ram of village Fatehgarh, Tehsil Rador, District Yamuna Nagar, Haryana. Marriage certificate is Annexure P-5. The respondent-complainant is present in person. According to her, in view of the subsequent developments having taken place she is no more interested to prosecute the criminal case pending disposal in the Court of learned Additional Chief Judicial Magistrate, Paonta Sahib against the accused-petitioners. She, therefore, has no objection in case the pending criminal proceedings are ordered to be quashed. Her statement to this effect has been recorded separately.

2. On behalf of the accused-petitioners Gursewak Singh and Raghubir Singh are present in person and their joint statement has also been recorded separately.

3. Accused-petitioner Gursewak Singh and respondent-complainant Paramjeet Kaur, no doubt, had solemnized marriage on 5.12.2005, as per Sikh rites and rituals and lived together as husband and wife. However, accused-petitioner Gursewak Singh allegedly started maltreating respondent No.2-wife and as a result thereof she lodged the FIR against him. The investigation is complete and challan has also been filed in the Court of learned Additional Chief Judicial Magistrate, Court No.1, Paonta Sahib. The same has been registered as Case No.500/1 of 2011. Charge against the accused-petitioners stands framed and the case is at the stage of recording prosecution evidence. However, accused-petitioner Gursewak Singh and respondent No.2 Paramjeet Kaur have settled dispute amicably and even on a joint application they filed, their marriage stands dissolved by a decree of divorce. She has solemnized marriage with Salinder Kumar alias Surender Kumar and living with her husband in the matrimonial home. It is in this backdrop learned Counsel representing the parties on both sides submit that allowing the criminal proceedings to continue against the accused-petitioners is nothing but is the abuse of process of law.

4. The offence under Section 498-A of the Indian Penal Code is not compoundable. It is for this reason the parties could not resort to the machinery provided under Section 320 or 321 of the Code of Criminal Procedure. The accused-petitioners in the changed circumstances have thus invoked the inherent jurisdiction vested in this Court under Section 482 of the Code of Criminal Procedure.

5. As per legal position settled at this stage even in a case where the compounding of an offence is not possible the parties, viz the victim of an occurrence and the accused, if compromised the disputes between them in an amicable settlement may approach the High Court for quashing the FIR. The support in this regard can be drawn from the judgment of the Apex Court in ***Gian Singh*** v. ***State of Punjab and another, (2012) 10 SCC 30.*** The relevant text of this judgment reads as follows:

> "58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed."

6. It is thus held in the judgment supra that the High Court in exercise of inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash FIR in a case where the offence allegedly committed by an accused though is not compoundable; however, the victim and accused have settled the dispute amicably. The powers, however, can be exercised sparingly and only in appropriate cases, such as having arisen out of civil, mercantile, commercial, financial, partnership or such any other transactions of like nature including matrimonial or the cases relating to dowry etc. in which the wrong basically is done to the victim. The compounding of offence, however, is not permissible in the cases of serious nature like rape, dacoity and corruption cases having serious impact in the society as a whole.

7. If applying the ratio of the judgment supra in the given facts and circumstances of this case the respondent-complainant is now settled with her husband on solemnization of second marriage. She has received consolidated amount of Rs.1 lac towards her past, present and future maintenance. The dowry articles have also been returned to her. In view of her statement

recorded separately she is no more interested to prosecute the pending criminal case against the accused-petitioners, therefore, no useful purpose is likely to be served by allowing the criminal proceedings to continue against the accused-petitioners and rather to do so would amount the abuse of process of law because ultimately no findings of conviction is possible in view of the subsequent developments as discussed hereinabove having taken place after registration of the FIR. I, therefore, allow this petition and quash the criminal proceedings launched against the accused-petitioners in Criminal Case No.500/1 of 2011, titled State versus Gursewak Singh and others pending disposal in the Court of Additional Chief Judicial Magistrate, Court No.1, Paonta Sahib, District Sirmaur. The petition stands disposed of accordingly.

An authenticated of this judgment be sent to learned Additional Chief Judicial Magistrate, Court No.1, Paonta Sahib for compliance.

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

Smt. Mohinder Thaper and Ors. .....Petitioners.

Versus

State of Himachal Pradesh .....Respondent.

Civil Revision No. 96 of 2009
Date of Decision: 24.5.2016.

Code of Civil Procedure, 1908- Section 151 and 152- An application for correction of the award was filed, which was allowed- a subsequent application for correction of judgment was filed which was dismissed- aggrieved from the order, present revision petition has been filed- held, that petitioners were entitled to compulsory acquisition charges @ 30% - they filed an application, which was allowed as not opposed – award was modified but para-32 of the award remained un-amended- once petitioners were entitled to compulsory acquisition charges, they cannot be deprived of the interest on the same- application for correction of the award could not have been dismissed by taking hyper technical view- revision allowed and award modified. (Para-3 to 18)

Cases referred:

Devi Roop v. Smt. Devku and Ors., 2006 (2) Shimla Law Cases 158

Srihari (dead) through LR Ch. Niveditha Reddy v. Syed Maqdoom Shah and ors., 2015 (1) SCC 607

Patel Joitaram Kalidas and others v. Spl. Land Acquisition Officer and Another, 2007 (2) SCC 341

Panna Lal Ghosh and others v. Land Acquisition Collector and Ors., AIR 2004 (Vol.91) SC 1179

For the petitioners: Mr. K.D. Sood, Senior Advocate, with Mr. Rajnish K. Lall, Advocate.

For the respondent**:** Mr. Rupinder Singh Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral).*

Present civil revision petition is directed against the order dated 31.3.2009, rendered by the learned Additional District Judge (I), Kangra at Dharamshala, HP, dismissing the application of petitioners-applicants for review/modification of the order/award dated 26.11.1998 titled "Mahinder *Thaper v. State of H.P.*", or in the alternative for correction of award under Section 151 and 152 CPC .

2. The petitioners pleaded in the application that during execution of proceedings of award dated 26.11.1998, which were pending in the Court, it transpired that no solatium shall be payable on the amount of Sub Head (a) nor the interest shall be payable on the solatium indicated in Sub head (b) as per para 31 of the award. It is also averred that earlier application Civil Misc. Petition No. 7-P/2003 was moved in the Court of learned Additional District Judge, Kangra at Dharamshala, HP, seeking review of the Award dated 26.11.1998 passed in Reference No. 7/87 and learned Additional District Judge, vide order dated 18.4.2000 allowed the review and passed following order:-

> *"Heard. The ld. Counsel for the respondent/petitioner has no objection for the review of award dated 26.11.1998 as regards the para 31 (b) of the award, where instead of the figure "30%" in the lump sum on the awarded amount is sought to be substituted in place of (sic) 12% per annum and the award is sought to be reviewed, necessary entry be made in the relevant para of original award accordingly. In view of the no objection, the prayer is allowed. It be tagged with the main case file."*

3. It is also averred in the application that the subsequent application for correction filed by the petitioners was contested by the respondents on the ground that neither review of the application nor application under Section 151 CPC is maintainable and moreover, they are time barred and no application for condonation of delay has been moved, as such, application was dismissed vide impugned order dated 31.3.2009.

4. Feeling aggrieved with the passing of impugned order, petitioners preferred present petition seeking review/quashment of the said impugned order on the following grounds:-

> ***"a****.That it having been found that the order dated 26.11.1998 in reference No. 4 of 1987* ***Mohinder Thaper and others versus state of H.P****. had been reviewed by an order dated 18.4.2000 and solatium allowed at 30 per cent but in paras 31 and 32 of the judgment, the mistake had not been rectified as a result, the petitioner was deprived of the additional compensation and solatium at the enhanced rate which is statutory payable to the petitioner under the Land Acquisition Act. Since there was an error apparent on the face of the record and the mistake was purely clerical and accidental the said application under Sections 151 and 152 CPC apart from under Section 114 CPC was maintainable and accidental and clerical slip could be rectified at any time. The provisions of Sections 151 and 152 CPC have been misread and misconstrued and wrong inferences have been drawn from the facts proved on record which has vitiated the findings.*
>
> ***b****. That the petitioners have been deprived of the valuable land and once the mistake had been ordered to be corrected by an order dated 18.4.2000 and further giving effect to the order dated 18.4.2000 in the award dated 26.11.1998 had to be given effect and this being a clerical and accidental mistake in paras 31 and 32 of the judgment ought to have been corrected by the court below suo motu in any case on the application being moved by the petitioner. There was no limitation for the said purpose. The provisions of the Land Acquisition Act being mandatory and the Hon'ble Apex Court having declared the law that the petitioners were entitled to enhance compensation, enhanced solatium and interest the same could not be deprived in the facts and circumstances the clerical mistake in the judgment and order on account of accidental slip and omission could be corrected at any time. The provisions of Sections 151, 152 and 153 CPC did not place any time limit for the same and once it is evident that there was error apparent on the face of the record and the mistake was evident, the same ought to have been allowed to be corrected.*
>
> ***c****. That the well settled principles for the grant of compensation under Sections 151, 152 and 153 CPC have been ignored. It has been wrongly assumed that the application was barred by limitation and the same was not maintainable. No*

sufficient cause has been pleaded to seek condonation of delay. The facts were evident from the record and clear case for condonation of delay was made out which fact had been ignored and which has vitiated the findings.

***d**.That the court below has acted with serious illegality in construing the provisions of Section 114, 151, 152 and 153 CPC and after having found that there was an error apparent on the face of the record had acted illegally in not correcting the error apparent on the face of the record."*

5. However, learned Additional District Judge, Kangra at Dharamshala, vide order dated 31.3.2009 dismissed the application holding therein that there is no ground either to review the award sought to be reviewed as well as correction of the award. Learned Court below also held that present petition moved by the petitioners is time barred and no explanation worth the name has been rendered in the application by filing an affidavit in support of petition and as such petition is liable to be dismissed.

6. Pleadings available on record suggest that vide award dated 26.11.1998, learned court below has granted following reliefs:-

*"**31**. Judged in view of my findings on points No. 1 and 1 (a) above, the reference petition partly succeeds and the same is hereby partly allowed. The market value of the acquired site is assessed at Rs. 5,10,000/- and as such, the petitioners are entitled to the said amount of compensation in equal shares alongwith:-*

a) Additional Compulsory acquisition charges at the rate of 12% p.a. on the market value assessed above from 4.8.1984 to 31.12.1986 as per the provisions of Section (23-1-A), of the amended Act No. 68 of 1984;

b) Compulsory acquisition charges @12% p.a. on the market value of the acquired site assessed above under section 23(2) of the Amended Act;

c) An interest under Section 28 of the Amended Act on enhanced amount of compensation at the rate of 9% p.a. w.e.f. 4.8.1984 to 31.12.1986 and at the rate of 15% p.a. w.e.f 1.1.1987 till the payment of such excessive amount into the Court.

***32**. It is clarified that the compulsory acquisition charges and interest under Section 28 of the Amended Act already paid to the petitioners shall be adjusted while making payment under the above sub-heads (a) to (c). It is further clarified that in view of the law laid down by the Hon'ble Apex Court of the Country in **1996(2)SCC-71 Prem Nath Kapoor and another vs. National Fertilzer Corporation of India Ltd. and others**, no solatium shall be payable on the amount detailed in sub head(a) above nor interest shall be payable on the amount pertaining to sub- head(a) and further that no interest shall be payable on the solatium indicated in sub-head (b) above. The amount already paid including interest or solatium by the Acquiring Department/respondent shall be adjusted against the amount of award accordingly. The parties are left to bear their own costs."*

7. Since petitioners were entitled to compulsory acquisition charges @ 30 % p.a. under Section 23(2) of the Amended Act, they moved an application under Section 114 CPC seeking review of the award under Section 18 of the Land Acquisition Act dated 26.11.1998. Record suggests that aforesaid application was not contested/objected by the respondents and court below was pleased to pass order dated 18.4.2000, detail whereof has already been given. Perusal of the order dated 18.4.2000 suggests that since no objection was raised by the respondents for review of the award dated 26.11.1998, as far as para 31(b) of the award is concerned, court below substituted the rate mentioned as 12 % p.a. with 30 %. With the aforesaid corrections carried out vide order supra, the petitioners became entitled to the compulsory acquisition charges @ 30% p.a. on the market value of acquired site assessed under Section 23(a) of the Amended Act. However, it appears that during the pendency of the execution

proceedings of the aforesaid award, it came to the notice of the present petitioners that respondent has deposited a sum of Rs. 4,92,981/- towards the awarded amount, which was objected by the present petitioners-decree holders. Further order dated 15.6.2000 reveals that respondent-judgment debtor deposited amount of Rs. 69,000 however, execution petition was dismissed having been partly satisfied. At this stage, petitioners noticed that respondent has not deposited amount in terms of award dated 26.11.1998, which was further modified by the order dated 18.4.2000, wherein solatium was allowed @ 30 % p.a. It appears that though, vide order dated 18.4.2000, learned Court below had ordered for modification of order by substituting at the rate of 12% with 30 % but same correction was not carried out in the award, which was annexed with the execution petition pending before the Court below. Accordingly, petitioners moved an application before the executing Court under Section 114 CPC read with Section 151 and 152 CPC praying therein that paras 31 and 32 of the award dated 26.11.1998 may be reviewed in terms of order dated 18.4.2000, wherein Court below was pleased to review the award dated 26.11.1998 holding the petitioners entitled for compulsory acquisition charges @30% instead of 12 %. Paras 4 to 7 of the application are reproduced herein below:-

> "***4***. *That the para 31 of the Award originally indicated the following relief:-*
>
> > ***(a)*** *Addl. Compulsory acquisition charges at the rate of 12% p.a. on the market value assessed above from 4.8.1984 to 31.12.1986 as per the provisions of Section 23 (1-A) of the amended Act No. 68 of 1984;*
> >
> > ***(b)*** *Compulsory acquisition charges at the rate of 12 % p.a. on the market value of the acquired site assessed above under Section 23 (2) of the Amended Act;*
> >
> > ***(c)*** *An interest under Sec. 28 of the Amended Act on the enhanced amount of compensation at the rate of 9% p.a. w.e.f. 4.8.1984 to 31.12.1986 and at the rate of 15% p.a. w.e.f. 1.1.1987 till the payment of such excessive amount in the court.*
>
> ***5.****That sub-head (a) copped up wrongly by accidental slip or by oversight and the same was allowed to be reviewed by this Hon'ble Court to 30% solatium vide order dated 18.4.2000, but para 32 of the Award remained so due to oversight and came to be highlighted only on 2.1.03 as started above.*
>
> ***6.*** *That the error that the amount of solatium etc. will bear no interest is against the legal proposition of law as held by the Apex Court and the applicants have been insisting for the same, hence they never got their execution finally decided. But in view of the error/accidental slip in the award, which is altogether illegal, the execution proceedings pending have been held up.*
>
> ***7.*** *That the error is against the legal proposition and appears to be accidental and needs to be reviewed."*

8. Perusal of the averments contained in the application clearly suggests that while allowing review petition filed by the petitioners, learned court below vide order dated 18.4.2000, modified the award to the extent (supra) but para 32 of the award remained un-amended, which was also required to be modified in view of the modification carried out by the court below in Sub-head (b) of para-31 of the award. Necessary correction/modification was also required in sub head (c) of the Para 31 of the award because once petitioner was held entitled to the compulsory acquisition charges @30% p.a. on the market value assessed under Section 23(2) of the Amended Act, they were also to be held entitled for interest under Section 28 of the amended Act on the enhanced amount of compensation @9% p.a. but in the instant case, where the court below while allowing the review petition, modified sub-clause (b) of para 31 of the award by holding petitioners entitled for compulsory acquisition charges @30 % p.a. instead of 12 % but due to oversight/necessary corrections consequent upon the correction carried out in sub clause(b) of para 31 was not carried. Once para 31 of the award was ordered to be corrected by the learned court below by passing order dated 18.4.2000, it was incumbent upon the court to order for necessary correction in para 32 of the award so that actual effect could be given to the order

dated 18.4.2000, whereby petitioners were held entitled to compulsory acquisition charges @30% p.a. Once, the petitioners were held entitled to compulsory acquisition charges@30%, they cannot be deprived of interest as envisaged under Section 28 of the amended Act on the enhanced amount of compensation, which was required to be recalculated by the authorities in terms of necessary correction ordered to be carried out in the sub clause (b) of para 31 by the Court vide order dated 18.4.2000 but in the present case, perusal of the impugned order suggests that factum with regard to delay in filing the review petition weighed heavily with the court below while dismissing review petition filed under Section 114 CPC seeking review/modification of order dated 26.1.1998. Admittedly in the present case, present petition has been filed after lapse of more than 4 years and no application for condonation of delay was filed along with application. But as has been mentioned above that factum with regard to non-correction of sub clause (c) para 31 of the award came to the notice of the respondent only on 18.4.2000/15.6.2000 when the execution petition filed by the petitioners was dismissed having been satisfied . Perusal of the order dated 15.6.2000 suggests that the petitioners had claimed more amount than the amount deposited by the respondents pursuant to the award in question. But in the present case, the correction/ modification which was sought by the applicant was necessary fall out of the correction allowed to be carried out by the court below on 18.4.2000 in Sub-clause (a) of para 31, whereby the petitioners were held entitled to compulsory acquisition charges @30% p.a., instead of 12 %. Once petitioners were held entitled for compulsory acquisition charges @ 30% p.a., Sub-clause (c) of para 31 of award was also required to be modified/corrected so that fresh calculations could be made on the basis of the 30 % rate for compulsory acquisition charges as per their entitlement vide order dated 18.4.2000.

9. Admittedly, in the present case, application has been filed by the petitioners after a considerable delay and no application for condonation of delay was also filed. But in the instant case, as has been narrated above, application at hand could not be rejected by the court below by taking hyper technical view, especially, in view of the fact that modification/review of sub clause (b) of para 31 of the award have been already allowed by the court below while passing order dated 18.4.2000. But it appears that necessary corrections after passing of the order dated 18.4.2000 were not carried out and hence, no affect could be given to the corrections carried out in sub-para (b) of para 31 of the award, meaning thereby, order dated 18.4.2000 would be rendered meaningless. If any effect at all was to be given to the order passed by the court below vide order dated 18.4.2000, clause (c) of the para 31 & para 32 of the award were required to be amended accordingly.

10. In view of the aforesaid discussion, this Court is of the view that by way of application petitioners had only prayed for the amendment/modification of clause (c) of para 31 and Para 32 as a natural consequences of amendment, ordered to be carried out in sub-clause (b) of para 31 of the award vide order dated 18.4.2000 and as such, application could not be dismissed by the Court on the ground of delay. This court is of the view that while passing order dated 31.1.2009 dismissing the application filed by the petitioners seeking modification of sub-clause (c) of para 31 of the award in question, learned court below has adopted very hyper technical view and has wrongly dismissed the application on the premise of limitation. As has been discussed above, the correction, which was sought by way of the application was natural consequence of the correction allowed by the court below vide order dated 18.4.2000. Corrections in sub-clause(c) of para 31 and para 32 of the award are necessary for giving effect to the amendment/modification allowed by the court below, whereby the petitioners have been held entitled to compulsory acquisition charges @12% p.a.

11. It is pertinent to notice that order dated 18.4.2000 was passed by the court below after recording no objection certification of the respondent-State and same has attained finality. Once sub-clause (b) of para-31 has been ordered to be modified by the court below, para 32 of the award would be deemed to have been modified accordingly in consonance of sub-para (b) of the para 31 of the award.

12. As has been observed above that court below has adopted very hyper technical approach while dismissing the application for correction moved by the petitioners on the ground of limitation. Court below failed to take note of the fact that aforesaid application was filed under Section 114 CPC read with 152, 153 and 153 (a) which clearly indicates that application was moved for correction of some error in the order/judgment which crept due to oversight or accident slip.

13. In this regard, our own high Court in ***Devi Roop v. Smt. Devku and Ors., 2006 (2) Shimla Law Cases 158,*** has held that "*it would a great blot on the system of administration of justice if Courts are held powerless to do justice by correcting their own errors and defects only on the ground of limitation.*"

> "*17.* ***In Raghunathsingh Nandlal Dangi and another v. Mandir Shri Deo Radhaballabhji and others, AIR 1937 Nagpur 173****, incorrect description of the plaintiff in a plaint was ordered to be corrected after decision of the suit in appeal. It would indeed be a great blot on the system of administration of justice if Courts are held powerless to do justice by correcting their own errors and defects only on the ground of limitation. The contention is, therefore, rejected."*

14. The Hon'ble Apex Court in case titled ***Srihari (dead) through LR Ch. Niveditha Reddy*** *v.* ***Syed Maqdoom Shah and ors., 2015 (1) SCC 607***, also held in para12 and 13 as under:

> *"12. On behalf of defendant No.12 Srihari (appellant before us), it is argued that the impugned order passed by the High Court is beyond the scope of Section 152 (read with Section 151 and Section 153) of the Code. In support of his argument he relied in the case of State of Punjab vs. Darshan Singh AIR 2003 SC 4179: (2004) 1 SCC 328 and Bijay Kumar Saraogi vs. State of Jharkhand (2005) 7 SCC 748. Before further discussion, we think just and proper to quote the relevant provision of law under which impugned order appears to have been passed by the High Court. Section 152 of Code of Civil Procedure, 1908 reads as under:*
>
> > *"152.Amendment of judgments, decrees or orders. - Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."*
>
> *13. From the language of Section 152 of the Code, as quoted above, and also from the interpretation of the section given in the case of State of Punjab vs. Darshan Singh, the section is meant for correcting the clerical or arithmetical mistakes in the judgments, decrees or orders or errors arising therein from any accidental slip or omission. It is true that the powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court under guise of invoking after the result of the judgment earlier rendered. The corrections contemplated under the section are of correcting only accidental omissions or mistakes and not all omissions and mistakes. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152. In Bijay Kumar Saraogi (supra) also it has been reiterated that Section 152 of the Code can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in judgments or accidental omissions."*

15. Moreover, it has been held in ***Patel Joitaram Kalidas and others v. Spl. Land Acquisition Officer and Another, 2007 (2) SCC 341***, that "*interest on the additional amount and solatium are automatic and do not involve any judicial discretion and court are bound to grant interest irrespective of whether claim has been made or not*".

> *"17. Having regard to the submissions urged on behalf of the respondents we could have remitted the matter to the High Court to give an opportunity to the claimants to make a claim of interest before the High Court. That however, would only be a formality because*

having regard to the law laid down in Sunder, the High Court is bound to award the interest on the additional amount payable under Section 23(1-A) and solatium payable under Section 23 (2) of the Act. Moreover, grant of interest on these amounts is consequential and automatic and involves only arithmetical calculation and not application of judicial mind or exercise of judicial discretion. It is no doubt true that the appellants ought to have made such a claim before the High Court, even in the appeals preferred by the State. But in fairness to the appellants it must be conceded that during the pendency of the appeals before the High Court the law as laid down in Prem Nath Kapoor held the field and, therefore, it would have been futile for them to claim interest. The claimants could have filed such an application before the High Court if the judgment in Sunder was pronounced when the appeals were pending before the High Court. Unfortunately, they could not do so because the judgment in Sunder and the impugned judgment in the appeals preferred by the State before the High Court were pronounced on the same day. Having regard to these facts, peculiar to this case, we are persuaded to allow the appeals preferred by the appellants as a special case in the interest of justice. Accordingly, we hold that the appellants are entitled to interest on the amounts payable to them under Section 23 (1-A) and Section 23 (2) of the Land Acquisition Act. We direct the Collector to calculate the interest payable and pay the same to the appellants without further delay. These appeals are accordingly allowed. No order as to costs."

16. The Hon'ble Apex Court also in ***Panna Lal Ghosh and others v. Land Acquisition Collector and Ors., AIR 2004 (Vol.91) SC 1179*** (1-1248) held that once solatium is to be paid @30 % in under Section 23(2) of the Act, an interest @9% p.a. is also payable under the Act, which reads as under:-

17. In the light of the above, the compensation @ 36,000/- per acre as awarded is to be paid @30% under Section 23(2) of the Act and an interest @9% per annum is also payable under Section 28 of the Act. The award made by the Reference Court is affirmed by the High Court shall stand modified accordingly and the appeal is allowed to that extent. No orders as to costs. Ordered accordingly."

17. In the present case also, once vide order dated 18.4.2000, sub-clause (b) of para 31 of the award was modified and petitioners were held entitled to the compulsory acquisition charges @30% instead of 12 %, sub-clause (c) of para 31 was also required to be modified accordingly with para 32 of the award so that effect could be given to amendment/modification allowed by the Court vide order dated 18.4.2000. In the present case, when calculations were to be made on the basis of 30 percent compulsory acquisition charges, its necessary fall out would have been that petitioners would have got interest under Section 28 of the amended Act on the enhanced amount of compensation which was required to be re-calculated in terms of amended carried out in sub-clause (b) of para 31.

18. In view of the aforesaid observations and discussions, order dated 31.8.2009 passed by the learned Additional District Judge (I), is quashed and set-aside and application bearing No. CMP No. 7-P/2003 filed by the petitioner is allowed and the award dated 26.11.1998 is ordered to be modified accordingly, as prayed for, in the application filed by the petitioners. The petition is disposed of accordingly, so also the pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Navneet Singh .....Petitioner.

Versus

State of HP and Ors. .....Respondents.

CWP No. 2387 of 2008.
Date of Decision: 24.5.2016.

Constitution of India, 1950- Article 226- Petitioner submitted a tender - the rates quoted by him were found to be lowest, he was called for negotiation but work was not allotted to him- subsequently tender was recalled- State pleaded that work was reviewed in accordance with the decision of Scrutiny Committee- held, that tender submitted by the petitioner was the lowest and the tender was recalled without any discussion- no notice was issued to the petitioner, even petitioner was not called for negotiation- Secretary, PWD directed to issue necessary directions/guidelines to avoid misuse of power. (Para-6 to 16)

For the petitioner: Mr. N.S. Chandel, Advocate, for the petitioner.
For the respondents: Mr. Rupinder Singh Thakur, Additional Advocate General.

The following judgment of the Court was delivered

Sandeep Sharma, J. *(Oral).*

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

a) *It is, therefore, most respectfully prayed that the writ in the nature of mandamus may kindly be issued by directing the respondents to allot the tenders dated 03.9.2007 to the petitioner.*

b) *That writ in the nature of Certiorari may kindly be issued for quashing orders all the order issued pursuant to so called meeting dated 8.4.2008 whereby tenders awarded in favour of the petitioner has been recalled.*

c) *Any such Writ, Order or Direction, as this Hon'ble Court may deem fit and proper in the peculiar facts and circumstances of the present case.*

d) *That a writ in the nature of Certiorari may kindly be issued whereby the respondents be directed to produce the minutes of proceeding of scrutiny committee, dated 8.4.2008, whereby the tender dated 3.9.2007 awarded in favour of petitioner has been recalled and therefore it is humbly prayed that the same be quashed in the interest of justice.*

2. Briefly stated facts necessary for adjudication of the case are that the petitioner is a registered 'A' class contractor duly registered with respondent PWD. Petitioner in the capacity of 'A' class contractor has been executing various works of considerable amounts with the respondents. Vide Annexure P-1, respondent No. 2 invited tenders for periodical maintenance of various roads. Pursuant to the aforesaid tender notice, petitioner also participated in the work known as Thakurdwara Chowki Khalet Morla Phatta Chadrehar Harizen Basti Road Km. 0/0 to 3/995 (SW: earth filling, passing places, retaining walls, breast walls, CD work and parapets in Km.0/0 to 3/995). It also emerges from the pleadings that apart from petitioner, two other contractors namely Sanjeev Dadwal and Suresh Patyal also participated in the above tender. As per averments contained in the petition, petitioner was found to be lowest and accordingly, he was awarded the work (supra). Since the rates quoted by the petitioner were found to be lowest, he was called for negotiation on 11.1.2008 by the respondent department. However, negotiations could not be held on the given date for the reasons best known to the respondents. The petitioner has stated in the petition that he repeatedly inquired about the awarding of tender in which he was found lowest one but no reason whatsoever was assigned, however, petitioner applied for the documents under the Right of Information Act (RTI) vide application dated 23.7.2008 (Annexure P-2). He received a letter dated 7.8.2008 from respondent No. 4 intimating therein that tender dated 3.9.2007 qua the work namely Thakurdwara Chowki Khalet Morla Phatta Chadrehar Harizen Basti Road Km. 0/0 to 3/995 (SW: earth filling, passing places, retaining walls, breast walls, CD work and parapets in Km.0/0 to 3/995) allotted to the petitioner, has been received unapproved in view of the decision taken by the Scrutiny Committee chaired by the Engineer-in-Chief on 8.4.2008 (AnnexureP-3). Petitioner also submitted that vide

communication dated 25.2.2008, work had already been accorded/awarded by respondent No.3, which was further approved by respondent No. 3. Petitioner also averred that after the Assembly Elections in December, 2007, with the change in the Government, certain people who had vested interest, managed to get the tender recalled in an arbitrary manner against the recognized principle of law. Tenders were scrutinized in the office of respondent No. 2 on 14.3.2008, wherein decision was taken to call the petitioner for negotiations, since the rates quoted by the petitioner were found to be on the higher Side (AnnexureP-5). Meeting of the scrutiny committee chaired by respondent No. 2 was held on 8.4.2008 wherein decision with regard to work in question was taken and work awarded to the petitioner was not approved. It is also alleged in the petition that despite there being specific prayer for supplying the proceedings/minutes of the meeting of the scrutiny committee dated 8.4.2008, no information whatsoever was supplied to him.

3. Petitioner by way of present petition challenged action of the respondents, wherein decision was taken to recall the tender. It is specifically averred in the petition that decision to recall the tender has actually effected at the instance of certain vested interests and same is a politically motivated one. Petitioner averred that 29 numbers of the tender cases were scrutinized by respondent No. 3 in the meeting of scrutiny committee but he was singled out that too without any reason. Petitioner contended that once his rates were found to be the lowest one and he was awarded work, it could not be cancelled without assigning any reasons. Moreover, in the instant case, where the petitioner was called for negotiations but for the reasons best known to the respondents, no negotiation proceedings were held. Petitioner specifically alleged that aforesaid decision was taken by the respondents to please some vested interest, who are influential persons. Pursuant to the notice issued by this Court, respondents filed reply to the petition, wherein in Para -3, it was held as under:-

> *"That the present CWP is also liable to be dismissed on the ground of maintainability being without any cause of action. In fact the tender for the balance work of Thakurdwara Chowki Khalet Morla Phatta Chadrehar Harizen Basti road Km. 0/0 to 3/995 (SW: Earth filling, passing places, retaining walls, breast walls, CD work and parapets in Km.0/0 to 3/995 was invited and opened on 3.9.2007. Since the tendered amount of lowest Contractor/Petitioner was Rs. 75.92.988/- which was beyond the competence of respondent No. 4 viz. Executive Engineer, the case for approval was submitted to the Chief Engineer, (North), HPPWD Dharamshala (Respondent No. 3) through Superintending Engineer, 5th Circle, HPPWD Palampur. It is further submitted that due to imposition of Modal Code of conduct on account of Assembly Election, the Govt. of H.P. circulated instructions vide Principal Secretary (PW) to the Government of H.P. Shimla office letter No. PBW (B&R) (B) 17(1)3/2006 IV dated 1.2.2008 (Annexure-R-1), wherein it was decided by the Government that all the tenders floated between 10.10.2007 to 31.12.2007 should be scrutinized by concerned Zonal Chief Engineers to see whether those are in order in terms of sanctions/approvals following appropriate procedure and final decision on them will be taken with the prior approval of Administrative Department of PWD. The respondent No. 3, Chief Engineer (North), HPPWD Dharamshala sent the case of petitioner to the Engineer-in-Chief (PWD) Shimla (respondent No.2) as per instructions of Principal Secretary (PW) to the Govt. of HP, Shimla office letter No. PBW (B&R) (B) 17(1)3/2006 IV datd 1.2.2008 (Annexure-R-1). The Govt. had constituted a Scrutiny Committee consisting of seven well experienced technical and financial Senior Officers namely: Engineer-in Chief, HPPWD Shimla, Superintending Engineer, (Design-III) O/o Engineer-in-Chief HPPWD Shimla, Superintending Engineer, 5th Circle, HPPWD Palampur, Superintending Engineer, 7th Circle, HPPWD Dalhousie, Superintending Engineer, 9th Circle, HPPWD Nurpur, Executive Engineer, HPPWD Division. Dharamshala, Deputy Controller (F&A) O/o Engineer-in-Chief, HPPWD Shimla and during meeting total 29 cases were placed before the said Committee. The Scrutiny Committee, after evaluating financial aspect, considering technical implication and*

also capabilities, experience and nature and style of working of contractors, had arrived at conscience decision after due deliberations and application of mind to ***continue, recall or cancel*** *the process of tendering of different works. In some cases, process was cancelled and in some cases continued and in some cases it was decided to review in accordance with budgetary provisions, some tender cases were cancelled and in the case of petitioner it was decided to recall and process. It is therefore submitted that since the work was still in process of being awarded and could not be awarded due to non-approval of Scrutiny Committee of Administrative Deptt., of PWD, the petitioner has no enforceable cause of action.*

4. Perusal of the averments contained in reply filed by respondents suggests that tender for the balance work of Thakurdwara Chowki Khalet Morla Phatta Chadrehar Harizen Basti Road was invited and opened on 3.9.2007, wherein admittedly, petitioner being the lowest contractor was to be awarded contract but since the tender amount of lowest contract was Rs. 75,91,988/-, same was sent for approval of the Chief Engineer, Dharamshala through Superintending Engineer, Dharamshala but it also emerges that before aforesaid tender could be finalized, Modal Code Of Conduct was imposed on account of ensuing assembly elections in the State of Himachal Pradesh. In the meanwhile, Principal Secretary, Government of Himachal Pradesh circulated instructions vide order dated 1.2.2008 (Annexure–R1), wherein it was decided that all the tenders floated between 10.10.2007 to 31.12.2007 could be scrutinized by concerned Zonal Chief Engineers to see whether they are in order in terms of sanctions/approvals following prior approval of Administrative Department of PWD. Pursuant to the aforesaid decision of the Government, scrutiny committee was constituted and 29 cases were placed before the committee. Scrutiny committee after evaluating financial aspects, considering technical implication and also capabilities, experience and nature and style of working of contractors, arrived at a collective decision to continue, recall or cancel the process of tendering of different works and in the case of the petitioner, it was decided to recall and reprocess, meaning thereby, tender which was actually allowed to the petitioners being the lowest for the work, as mentioned above, was ordered to be cancelled and decision was taken to invite the fresh tender.

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

6. Admittedly, in the present case, petitioner being lowest tender was allotted work for the construction of Thakurdwara Chowki Khalet Morla Phatta Chadrehar Harizen Basti road amounting to Rs. 75,91,988/-. Perusal of communication dated 25.2.2008 (Annexure-P-4) clearly suggests that tender submitted by the petitioner was found to be lowest and accordingly, decision was taken by the competent authority to call him for negotiation. Annexure P-4 is reproduced as under:-

"It is submitted that the A/A & E/S of the above cited work has been accorded by the Pr. Secy. (PW) to the Govt. of HP. Shimla vide letter No. PBW(B)-3(7)5/2006 dt. 19.2.2007 for Rs. 191.95 lacs. The working estimate approved vide this office letter No. PW/NZ/CTR-I-2006-07-36 26-28 d. 10.7.2007 amounting to Rs. 50,13,397/- only.

The DNIT for the above work approved by the Superintending Engineer, 5th Circle, HPPWD. Palampur vide his office letter No. PW-SEV-WS-III-B&R-2006-07-8644-45 dt.31.8.2007 amounting to Rs. 50,13,392/- only. The tender for the above cited work was invited by the Executive Engineer, HPPWD, Palampur which scheduled to be opened/received on 3.9.2007. In response to this call three Nos. tenders were sold to various contractors and all of them have put their rates as under:

1. *Sh. Sanjeev Dhadwal, Rs. 7700705/- 53.60% above.*
2. *Sh. Suresh Patial, Rs. 7655163/- 52.69% above*
3. *Sh. Navneet Singh Rs. 7591988/- 51.43% above.*

The tender case alongwith other documents were submitted by the Superintending Engineer, 5th Circle, HPPWD, Palampur in this office vide his letter No. PW-SEV-WS-II-Reads-09-06-09 dt.5.11.2007. The tender case was scrutinized in this office and the technical implication of the tender case is given as under:-

1.	*A/A & E/S.*	*Rs. 191.95 lacs.*
2.	*Corresponding Provision:-*	*Rs. 91.55 lacs*
3.	*DNIT amount;-*	*Rs. 50,13,397/-*
4.	*Justification amount :-*	*Rs. 69,01,236/-*
5.	*Lowest contractor's amount:-*	*Rs. 75,91,988/-*
6.	*Percentage of lowest tender to the amount put to tenders*	*51.43 % above.*
7.	*Percentage of lowest Bidder with Justification:-*	*10 % above.*

In view of the rates quoted by the lowest contractor the rates need to be negotiated. Now as per instruction received by the Pr. SEcy. (PW) to the Govt. of HP. Shimla, letter No. (PBW) B&R-(B)-17(1)-06-IV dt. 1.2.2008, the tender case received/opened on 3.9.2007, has not been awarded as prior approval of Administrative Department of PWD is required.

The three Nos. Tenders document (in original) alongwith comparative statement/Justification Statement/Approved DNIT and copy of Press cutting of Giri Raj News Paper form A&B are submitted herewith for obtaining approval of the component authority."

7. Perusal of the last para of the aforesaid communication suggests that lowest rates quoted by the contractor were required to be negotiated but in view of the instructions received from the Government, tenders received/opened as on 3.9.2007, could not be awarded for want of approval of the Administrative Department of PWD.

8. Further perusal of the document (AnnexureP-5) suggests that ten cases were sent by Chief engineer (North) HP Dharamshala vide letter 48-74-77 dated 25.2.2007 along with justification/comparative statement, D.N.I.T., if approved, for the scrutiny of that committee constituted in terms of the instructions issued by the State of Himachal Pradesh, which reads as under:-

"PW.CTR.29.949/08 (loose Noting)

Diary No. 4026 dated 28/2

Subject: Thakurdwara Chowki Khalet Morla Phatta Chadrehar Harizen Basti Road Km. 0/0 to 3/995

The subject cited ten cases has been received from C.E. (North) HP PWD, D/shala vide their letter No. 4874-77 dated 28.02.20008 a.w. justification/comp. statement, D.N. if approved we may send the tender case in Drawing Section (Building) for scrutiny of the case."

Submitted please.....

.....The rates by the contractor Shri Navneet Singh are on higher side. The contractor may be called for negotiation.

Chief Engineer North Zone has submitted the case without negations however worthy Engineer-in-chief has discussed the matter with Chief Engineer north Zone on 8.4.04 and decided to recall and process the tender. Hence we may send the document to chief engineer North zone with approval please."

9. Last para of the communication suggests that since rates quoted by the contractor Navneet Singh were on higher side, he was to be called for negotiation. The Chief Engineer (North) submitted the case to the Scrutiny Committee without any negotiation and merely his having discussed the matter with Chief Engineer North on 8.4.2004, matter was sent to the Scrutiny committee, which decided to recall and process the tender. Perusal of the documents available on record nowhere suggests that Scrutiny Committee while taking into consideration with regard to recalling and re-processing of the tender in question ever deliberated on the rates quoted by the petitioner, rather, perusal of the communication supra suggests that the case of the petitioner, which was admittedly the lowest tender was placed before the Scrutiny Committee without calling him for negotiation. Further, Scrutiny Committee without discussing the matter with the authority, who had actually found the petitioner lowest, decided to recall and process the tender. Perusal of the communication supra nowhere suggests that matter was discussed at length, wherein pros and cons with regard to awarding of the work to the petitioner were ever discussed. Rather, it suggests that matter was simply listed before the committee, wherein without any discussion, decision to recall and reprocess tender was taken by the Committee, as has been observed above. There is no document worth the name, which could suggest that notice was ever issued to the petitioner indicating therein the circumstance and reasons for recalling and reprocessing of the tender. Once, the petitioner was found to be lowest tender and in case, his rates were above justification, respondents were bound to call him for negotiation in the present case. Though decision was taken by the respondent to call petitioner for negotiation but there is no document available on record to suggest that actually negotiation took place, meaning thereby, respondent department purposely without having negotiation with the petitioner sent the case to the scrutiny Committee, who also without looking into the rates quoted by the petitioner decided to recall and reprocess the tender.

10. While going through the file of the present case, this court is unable to find any document on record either filed by the petitioner or respondent, which may be suggestive of the fact that case of the petitioner for allotment of work in question was rejected for some plausible reasons. Only explanation rendered in the reply is that matter was sent to scrutiny committee, which decided to recall and reprocess the tender. Admittedly, there is no discussion/justification on record available which could persuade this Court to hold that the decision of the respondents to recall and reprocess the tender in question was justified. To the contrary, perusal of the material available on record compels this Court to conclude that tender of the petitioner was purposely sent to the Scrutiny Committee that too without having any negotiations with the petitioner, on some extraneous considerations.

11. True, it is that discretion lies with the department whether to accept the tender or not but certainly once the tender of the petitioner was held to be the lowest, he had every right to know, for what reasons, his tender was not being accepted. Had department called him for negotiation and in that event, if he had not agreed to the rates proposed by the department at the time of negotiation, respondents were well within right to reject the tender. But in the present case, no negotiation actually took place and case was sent to the committee, who also without looking into the merits/demerits of the case, decided to recall and reprocess the tender. Aforesaid action of the respondent cannot be termed to be justified in the present facts and circumstances of the case and such practice of the respondents deserves to be highly deprecated and condemned. Respondents being instrumentality of the State are expected to work/perform its duties without any bias and mala-fides. As has been observed above, it was well within the rights of the respondents to accept or reject the tender but such decision should not be based on some extraneous considerations as appears in the present case.

12. This Court after perusing the material available on record as well as pleadings available on record, has no hesitation to conclude that respondents purposely did not negotiate with the petitioner and without affording him any opportunity of being heard, decided for re-tendering qua the work in question. It has been observed by the Court in many cases, where authorities like the respondents, as in the present case, act /work like autocrats while issuing

tender forms and thereafter awarding works to the contractors or construction agencies. Respondents are expected to deal very fairly and without any bios while dealing with tender matters. In the present case, where the tender of the petitioner was certainly lowest but without any rhyme and reason, decision was taken by the respondents to re-tender and re-process the work, which was to be awarded to him.

13. However, during the pendency of this petition, pursuant to the directions dated 9.5.2012 issued by this Court, respondents filed supplementary affidavit detailing therein the status of the work in question, para 3 of which affidavit reads as under :-

> *3. That the deponent has all the respect for the order of the Hon'ble Court dated 24.2.2009. The order of the Honb'le Court has been fully complied with and has not been violated in any manner.*
>
> *4. That a few works which were not covered under the scope of the work specified for this tender of the instant case were allotted to some other contractors in order to maintain and keep this road in use for public in general. The detail of the maintenance/construction works carried out has been annexed as AnnexureRA-1."*

14. Perusal of the averments contained in para supra suggests that respondent could not re-invite tender for the balance work during the pendency of the petition and as such budget, which was made available by Nabard authorities lapsed, meaning thereby, authorities concerned need to get allocated fresh budget for the construction of the road in question.

15. At this Stage, Mr. Rupinder Singh Thakur, learned Additional Advocate General submitted that in view of the averments contained in Para-3 of this affidavit, this petition does not survive and as such same can be disposed of accordingly.

16. In view of the aforesaid discussion, it is ample clear that decision of the respondents in rejecting the tender of the petitioner and thereafter, their decision to recall and re-process the tender in the given facts and circumstances cannot be held to be justified, rather, same appears to be result of colourable exercise of powers. Though, in view of the subsequent development occurred during the pendency of present petition, no effective relief can be granted to the petitioner at this stage but decision taken by the respondents to reject the offer of the petitioner without assigning any reason, is declared illegal and unjustifiable and in this regard, petitioner is at liberty to seek appropriate remedy in the appropriate court of law for damages, if any, caused to him due to illegal and unjust action of the respondents. Before parting, this Court deems it necessary in the facts and circumstances of the case to direct Secretary PWD, to issue necessary instructions/guidelines specifically detailing therein the procedure and manner with regard to issuance of tender forms to the contractors so that no scope for complaint of bias and malafide is left to the contractors, if any. Though, while dealing with the tender matters, department is always at liberty to reject or accept tenders but certainly, same cannot be done without assigning any reason. Right of accepting/rejecting tenders should not be allowed to become tool in the hand of officers/officials of the department, who may for certain extraneous considerations, misuse the aforesaid power. Accordingly, Secretary PWD is also expected to explore some mechanism to deal with such like situation and issue necessary directions in this regard to avoid mis-use of so called unbridled powers of acceptance/rejection of tenders. Needless to say that principle of natural justice is strictly required to be adhered to while rejecting tender of a lowest bidder. This Court expects that needful would be done, as observed above, within a period of three months and necessary circular, detailing therein uniform procedure to be adopted by the officials, shall be circulated thereafter immediately. In view of the aforesaid discussion, petition is allowed and disposed of accordingly, so also pending applications, if any.

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

Raj Kumar .....Petitioner
Versus
Dev Raj and another .....Respondents

CMPMO No. 433/2015
Decided on: May 24. 2016

Specific Relief Act, 1963- Section 38- Suit filed by the plaintiff was decreed after conciliation - parties had agreed that they would not raise any construction over the suit land till partition – an application for violation of the decree was filed by the Decree Holder – Court ordered the Judgment Debtors to restore the nature of the suit land by demolishing the shed and to raise no other construction over the suit land- Judgment Debtors filed an application undertaking to remove the temporary structure/shed, but the construction was not removed - Court again ordered the Judgment Debtors to remove the construction- aggrieved from the order, revision was filed, which was dismissed- a special leave petition was filed, which was also dismissed- when the order was not complied, warrants of arrest were issued- held, that civil suit was instituted in the year 1992- Judgment Debtors had not removed the construction raised by them- orders passed by the Courts are in conformity with the law- there is no perversity or illegality in the orders- petition dismissed. (Para-7 to 10)

For the petitioner : Mr. Bhuvnesh Sharma, Advocate.
For the respondents : Mr. R.K. Gautam, Senior Advocate with Ms. Megha Kapoor Gautam, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral**)**

The present petition has been filed against Orders dated 16.5.2015 and 9.9.2015 rendered by the learned Civil Judge (Senior Division), Nadaun, District Hamirpur, Himachal Pradesh in Execution Petition No. 67/1998 RBT No. 8/2003.

2. "Key facts" necessary for the adjudication of the present petition are that respondent No.1-Decree Holder (hereinafter referred to as 'Decree Holder' for convenience sake) filed a suit for permanent prohibitory injunction restraining the petitioner/Judgment Debtor and proforma respondent No. 2/Judgment Debtor (hereinafter referred to as 'Judgment Debtor(s)' for convenience sake) from raising *Gobar* gas plant and any other sort of construction adjoining to the house of the Decree Holder shown in site plan as 'ABCD' over the land detailed in the plaint. It was also prayed that if the Judgment Debtors succeed in constructing *Gobar* gas plant adjoining to the house of Decree Holder, during the pendency of the suit, they may be directed by way of mandatory injunction to restore the original position by dismantling the *Gobar* gas plant. The parties compromised the suit as per Order date 16.6.1993, which reads as follows:

> "Case taken up for conciliation and through conciliation, both the parties have entered into compromise. Both the parties have agreed that they would not raise any construction of any nature on any part of the suit land till the same partitioned. The defendant in his statement separately recorded has also undertaken not o raise any 'Gover' plant in the suit land till the dame is partitioned. In view of the statements of the parties, which shall form part of the decree, the suit of the plaintiff is decreed with no orders as to costs. A decree sheet be drawn and file after completion be consigned to the record room."

3. Parties had agreed that they will not raise any construction over the suit land till the same was partitioned. Decree Holder was constrained to move an application under Order 21 rule 32 CPC for enforcement of Order dated 16.6.1993 rendered in Civil Suit No. 174/1992. According to the Decree Holder, Judgment Debtors started raising construction over the suit land in the form of tin shed. Judgment Debtors filed reply to the same. Rejoinder was filed by the Decree Holder. Civil Judge (Junior Division) decided the petition No. 67/1998 on 10.3.2010 and ordered the Judgment Debtors to restore the nature of the suit land by demolishing the tin posh shed and any other construction raised by them over the suit land specified by the local commissioner in site plan Ext. AW-2/B within 15 days. Judgment Debtors filed an application /undertaking for removal of temporary structure/shed. Civil Judge (Junior Division) passed Order dated 17.4.2010 and again ordered the Judgment Debtors to remove the construction of tin shed as per site plan Ext. AW-2/B within 15 days.

4. Decree Holder appeared as AW-1. According to him, suit land was joint and issue of partition has not attained finality. In the month of March 1998, Judgment Debtors constructed a shed on the suit land. Local Commissioner intimated the date of visit to the parties.

5. Ajay Thakur has appeared as AW-2. He was appointed as local commissioner. He has visited the spot on 30.9.2002. He submitted report Ext. AW-2/E. Objections were filed by the Judgment Debtors against the report. Objections were considered in accordance with law by the executing court.

6. One of the Judgment Debtors, Amrit Lal appeared as RW-1. In his cross-examination, he admitted that he has constructed a Tin shed over the suit land for tethering buffalos and the height was four feet. He had knowledge of Ext. P-2 (decree) and Ext. PW-3 (undertaking given by him that he would not raise any construction over the suit land).

7. Judgment Debtors assailed order dated 17.4.2010 by filing CR No. 38/2010 in this Court. Civil Revision was dismissed by the Court on 22.8.2013. Judgment Debtors filed an SLP against Judgment dated 22.8.2013. The Hon'ble Supreme Court was pleased to dismiss the same. Thereafter, learned Civil Judge (Junior Division) passed Order dated 16.5.2015 and warrant of arrest was ordered to be issued against the petitioner Raj Kumar. Thereafter, the learned Civil Judge (Junior Division) passed another order on 9.9.2015. Learned advocate appearing on behalf of the petitioner filed Power of Attorney on his behalf. He also filed an application under Section 151 CPC. However, fact of the matter is that as per Order dated 9.9.2015, petitioner has not surrendered before the Court. Non-bailable warrants issued against him were received back unexecuted. The Executing Court has ordered execution of the non-bailable warrants against the petitioner by an officer not below the rank of ASI for 14.10.2015.

8. Civil Suit No. 174/1992 was compromised on 16.6.1993. Judgment Debtors have raised construction in the year 1998. Execution Petition No. 67/1998 RBT No. 8/2003 was filed by Decree Holder. Order dated 17.4.2010 has attained finality since SLP against the dismissal of Civil Revision by this Court, also stands dismissed.

9. Petitioner has not surrendered before the Court. Non-bailable warrants were received back unexecuted. It is in these circumstances, that the executing Court was constrained to direct non-bailable warrants to be executed by an officer not below the rank of ASI for 14.10.2015. Civil Suit was instituted in 1992. Judgment Debtors have not removed the construction raised by them. Orders dated 16.5.2015 and 9.9.2015 are in conformity with law. There is neither any perversity nor any illegality in the orders passed by the executing Court.

10. Accordingly, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are disposed of. Interim order 12.10.2015 is vacated. Parties through their counsel are directed to appear before the learned executing Court on 16.6.2016. Executing Court is directed to ensure execution of judgment and decree dated 16.6.1993 in their letter and spirit within a period of three months from today.

****

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

Zumla Zamindaran of Village Shong through their representatives ..Appellants

Versus

Zumla Zamindaran of Village Chansu through their representatives ..Respondents

RSA No. 302/2005
Reserved on May 23, 2016
Decided on May 24, 2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they have been exercising their customary rights of collection of *Chilgoza,* grass, dead leaves, fuel wood, etc. over the suit land – defendants denied the claim of the plaintiffs- suit was decreed by the trial judge- an appeal was preferred, which was dismissed- held, in second appeal that defendants started exercising their rights as per the order passed by Settlement Collector- however, ample opportunity was not given to the plaintiffs before passing the order- plaintiffs were not permitted to cross examine the witnesses- plaintiffs have proved that they were exercising their customary rights over the suit land since time immemorial peacefully- Courts had correctly declared the order passed by the Settlement Collector and the mutation attested on the basis of the same as illegal and void- appeal dismissed. (Para-23 to 31)

Case referred:
Purna Chandra v. Durlav Chandra, AIR 1980 (Cal) 10

For the Appellants : Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.

For the Respondents : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against Judgment dated 1.12.2004 rendered by the learned District Judge, Kinnaur Division at Rampur Bushahr, HP in Civil Appeal No. 15 of 2004.

2. "Key facts" necessary for the adjudication of the present appeal are that the respondents-plaintiffs (hereinafter referred to as 'plaintiffs' for convenience sake) filed a suit for declaration against the appellants-defendants (hereinafter referred to as 'defendants' for convenience sake). According to the plaintiffs, since time immemorial, they have been exercising their customary rights of collection of *Chilgoza* fruits, grazing cattle, collection of dead leaves and fuel wood, cutting of leaves for fodder and timber for houses and allied matters exclusively, peacefully, openly, continuously, without any interruption and to the exclusion of the defendants and all others over land comprised in Khata Khatauni No. 40/55 Min. Khasra Nos. 1/2/2 and 2 area measuring 2-74-50 hectares, Khasra No. 1 measuring 0-21-01 hectares and Khasra No. 1/1/2 area measuring 0-11-83 hectares situate in Up Mohal Limoden of Mohal Chansu, Tehsil Sangla, District Kinnaur HP. They have been enjoying pasturage and other *Bartandari* rights exclusively over the suit land to the knowledge and exclusion of the defendants. Initially, the land was un-measured and it was in the Limoden Up Mohal of Mohal Chansu but during the recent settlement, it was measured and was denoted by the present Khasra numbers. In the year 1990, after the completion of settlement operation, the defendants moved an application before the Settlement Collector for correction of entries in the revenue records pertaining to the suit land upon which the Settlement Collector ordered the Naib Tehsildar (Assistant Collector 2nd Grade) to inquire into the matter and on the basis of that inquiry, ordered to delete the suit land from Up

Mohal Limoden of Mohal Chansu and added the same to Mohal Shong. While doing so, the Settlement Collector exercised the jurisdiction not vested in him and gravely erred in ordering the deletion of the suit land from Up Mohal Limoden to Mohal Chansu. It is further stated that since time immemorial, the Shong *Khud* (Shong stream) has been the natural boundary between Shong and Chansu Up Mohals and plaintiffs have been enjoying all of their rights in the suit land. Defendants started threatening to interfere in the peaceful and exclusive enjoyment of the rights of the plaintiffs over the suit land and in case the defendants are not restrained by way of permanent prohibitory injunction from doing so, plaintiffs will suffer irreparable loss and injury. The suit was filed by the plaintiffs in representative capacity. Plaintiffs have prayed for declaration that they have exclusive customary rights over the suit land and Order of the Settlement Collector dated 7.12.1991 (Ext. PW-1/A) as well as mutation order No. 15 dated 23.3.1992 (Ext. PW-1/B) vide which the said order has been given effect, are illegal, inoperative and void having no effect on the above mentioned customary and *Bartandari* rights over the suit land. Plaintiffs also prayed for restraining the defendants from interfering in the rights of the plaintiffs over the suit land, in any manner.

3. Suit was contested by the defendants. On merits, the defendants have denied that the plaintiffs had been exercising customary or *Bartandari* rights over the suit land. Rather, they claimed that the defendants had been exercising these rights over the suit land openly, continuously and without any interruption since time immemorial to the exclusion of the plaintiffs. They further alleged that Limoden area was part and parcel of the Mohal Shong and villagers of village Shong were in effective control of the suit land and it never remained in Mohal Chansu. As per the defendants, the settlement operation in the area was done at their back and so the defendants are not bound by the wrong revenue entries vide which new Up Mohal Limoden was created during the settlement of village Chansu. They have further alleged that the Settlement Collector has rightly ordered the deletion of the suit land from Up Mohal Limoden of Mohal Chansu to Mohal Shong. The Settlement Collector had made order on the basis of inquiry made by Assistant Collector 2nd Grade, who had recorded the statements of witnesses. Rather the plaintiffs had conceded the claim of the defendants. They have supported the order dated 7.12.1991 of the Settlement Collector as well as mutation order dated 23.3.1992. It is also alleged that the distance between Shong *Khud* (Shong Stream) and Chansu village was more than 9 kilometres and the distance between the Shong *Khud* (Shong Stream) and Shong village was not even fifty feet. The distance between Shong Village and Ruea *Nallah* was not more than 2 kms. Distance between Ruea *Nallah* and Chansu village was more than 7 kilometres. Defendants have been exercising customary rights of collection of *Chilgoza,* grass, collection of dead leaves, fuel wood, cutting leaves for fodder and timber for houses, from the suit land.

4. Issues were framed by the learned trial Court on 22.10.1993. Suit was decreed by the learned Civil Judge (Senior Division) on 23.12.2003. Defendants filed Appeal before the District Judge, Kinnaur Division at Rampur Bushahr, which was dismissed on 1.12.2004. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was admitted on 9.8.2005 on the following substantial question of law:

> **"whether the finding given by the courts below suffers from vice of perversity as the same have been given in ignorance of Sections 13 and 48 of the Indian Evidence Act.**
>
> **Whether the courts below have mis-read the Forest Settlement Manual for the year 1921 and the Settlement Collector's Order i.e. Exb. PW4/A, PW4/B and Exb.PW1/A and P-1 respectively and have therefore wrongly forfeited the rights of the present appellants/defendants."**

6. Mr. B.C. Negi, learned Senior Advocate, on the basis of substantial questions of law framed, has vehemently argued that the finding given by the learned Courts below were in

ignorance of Sections 13 and 48 of the Indian Evidence Act. He then contended that the Courts below have mis-read the Forest Settlement Manual for the year 1921 and Order of Settlement Collector, Ext PW-4/A, Ext PW-4/B, Ext PW-1/A and Ext P-1.

7. Mr. G.D. Verma, learned Senior Advocate has supported the judgments and decrees passed by the Courts below.

8. I have heard the learned counsel for the parties and also gone through the judgments and decrees and record carefully.

9. Bhagat Ram (PW-1) testified that the suit land was known as Mauauma Limoden. The area started from Shong *Khud* (stream) and went towards Sangla upto Kalang *Khud* (stream). The villagers of Chansu used to graze their cattle, take grass and leaves etc. from this land. They also collected *Chilgoza* from the said land. They had their temporary residences on the land. No other persons except the villagers of Chansu had rights over the suit land. Villagers of Shong had their rights below Shong *Khud* (stream) towards Ruea. Settlement took place about 5-6 years back and in the settlement, the area in question was measured and it was formed as Limoden Up Mohal of Mohal Chansu. Thereafter, a dispute started between the parties. Three years after settlement, the villagers of Shong filed a case before Settlement Collector. They were also called and at that time it was told that area in question will remain in Chansu Mohal. However, the Settlement Collector did not call them at Shimla but he sent papers from Shimla to Sangla Tehsil and Tehsildar Sangla told them that Up Mohal Limoden had been deleted from Mohal Chansu and added to Mohal Shong. Before doing so, the Settlement Collector never called them to Shimla nor any opportunity was given to them to lead their evidence. Ext. PW-1/A is the copy of order of Settlement Collector, Ext. PW-1/B is the copy of mutation, Ext. PW-1/C is the copy of *Misal Hakiyat* and Ext. PW-1/D is the copy of Aks *Tatima*. According to him, between villages Chansu and Shong, there was a *Khud* (stream) known as Shong *Khud* (streatm) and this *Khud* (stream) was the boundary between the two villages. He denied in his cross-examination that the defendants were ejoying rights over the area known as Limoden. He has denied that Ruea *Nallah* was the natural boundary. He denied that defendants enjoyed their customary rights.

10. Vidya Sain (PW-2) deposed that he was conversant with the facts of the case. Earlier he was serving in revenue department and retired as Kanungo. He remained Field Kanungo and Office Kanungo from 1986 to 1992. Area from village Kulba to Village Chitkul fell in his jurisdiction and he used to visit the villages Shong and Chansu in connection with official work. He further deposed that from the side of village Shong towards Chansu, there was a *Nallah* which was known as Shong *Nallah*. As per revenue record, upto Shong *Nallah*, the villagers of Chansu had their rights. He had also personal knowledge about this fact. The area from Shong *Nallah* upto village Chansu was known as Limoden where villagers of village Chansu had their residences and *Dogris* (thatches). Villagers of village Chansu had their rights to graze cattle, take leaves, fodder, fuel wood and *Chilgoza* from the land. Villagers of village Shong had no right in the suit land.

11. Hukam Lal (PW-3) deposed that he was a resident of village Sangla. He was 80 years old. He deposed that he knew the parties. He used to live in village Chansu. He used to graze cattle and for some time, he also worked on the forest road. There was a bridge and it used to be repaired by the villagers of both the villages, whenever it was broken. There were *Chilgoza* trees in the Ruea area, fruits of which were extracted by the villagers of Chansu. Villagers of Shong had no right over the land.

12. Satish Kumar (PW-4) was the Range Officer. He has proved Ext. PW-4/A and Ext. PW-4/B. According to him, compartment No. 152 fell in village Chansu.

13. Ghanshayam Dass (PW-5) deposed that he remained posted as Block Officer Forest in Sangla from January 1970 to August, 1974. The area from village Ruea upto village Chitkul fell in his jurisdiction. Villages Shong and Chansu also fell in this area and he used to visit this area. From Karchham to Sangla, there was a forest road which went via Chansu. Later

on half of this road came under Public Works Department. The natural boundary between villages Shong and Chansu was Shong *Khud* (stream) Upto Shong *Khud* (stream) towards Chansu, villagers of Chansu were enjoying their rights while the villagers of village Shong never exercised their rights in this area.

14. PW-6 (Laxman Dass) deposed that he knew the parties and had seen the land in dispute. Earlier he kept sheep and goats. He was having 400-500 sheep/goats. He used to graze cattle in Dehradun and then in Simour District in Himachal Pradesh. He did this profession for about 20-22 years. He deposed that he used to visit Chansu. Towards Chansu from Shong *Khud* (stream) only the villagers of Chansu had their rights. He had paid `30-35 to the villages in lieu of grazing his cattle.

15. Balwant Singh (DW-1) is one of the defendants. He testified that the boundary of village Shong was Ruea *Nallah*. Land in dispute fell between Shong *Khud* and Ruea *Nallah*. Prior to settlement, the land was unmeasured. In this land, there were trees of *Chilgoza*, walnut etc. and upper area was used for grazing cattle. Villagers of village Shong had been taking *Chilgoza*, grass, leaves and wood etc. from this land and they were enjoying these rights. From Ruea *Nallah* to Shong *Khud*, the villagers of Chansu had no right. During settlement, the villagers of village Chansu in connivance with the settlement officials got created a new Up Mohal Limoden. The area from Ruea *Nallah* upto Shong *Khud* was shown wrongly in Up Mohal Limoden in village Chansu. He made complaint to Settlement Collector. Settlement Collector thereafter visited the spot in the presence of the villagers. At that time, villagers of village Chansu admitted that Ruea *Nallah* was the boundary of village Shong. Settlement Collector made correction. According to them, villagers of Chansu never interfered in their rights to take *Chilgoza*. Sometimes, other persons namely Jamuna Dass, Sunder Dass and Laxman Dass used to graze their cattle in this area in lieu of which they used to pay Devkuru i.e. goat as compensation to the villagers of village Shong. Earlier whenever the Raja of Rampur Bushahr and other dignitaries used to come on tour, villagers of village Shong used to receive them at place Atangara. The villagers also used to see off the dignitaries at the same place in Ruea area which was known as Atangara. Ruea *Nallah* was the natural boundary between the villages of Chansu and Shong since time immemorial. He admitted in his cross-examination that he did not know about the settlement operation. He also admitted that towards Chansu from Shong *Khud* (stream) no land was owned by the villagers of village Shong.

16. Ganga Lal (DW-2) testified that he had seen the suit land which was known as Ruea. He had been visiting the place. He deposed that once Kanwar Jagjit Singh had come from Rampur and at that time, he had come to village Atangara to receive him because Atangara was the boundary. At place Ruea, the villagers of Shong used to graze their cattle.

17. Bhagat Ram (DW-3) has corroborated the statement of Ganga Lal (DW-2). In his cross-examination, he admitted that he did not know the area of Ruea. He has feigned his ignorance about the fact that the Shong *Khud*(stream) was the natural boundary between villages Shong and Chansu.

18. Ram Chand (DW-4) testified that he has seen the suit land. It was known as Ruea. He has never seen the villagers of Chansu grazing cattle, sheep or goat in the area. In his cross-examination, he has admitted that he did not know exact area of Ruea or from where it started.

19. Jamna Dass (DW-5) deposed that natural boundary between Chansu and Shong was Ruea. He further deposed that he grazed sheep and goats on this land in the year 1981-82. At that time, when he grazed the sheep and goats, the villages of village Chansu never objected to it. In his cross-examination, he stated that after 1981 and 1982, he never visited the suit land. He feigned ignorance about the fact that Shong *Khud* (stream) was the natural boundary between both the villages. He also feigned ignorance about the rights of both the parties in the suit land.

20. Vidya Singh (DW-6) stated that his in-laws were in village Shong and about 10 years back he had gone to the house of his in-laws for the purpose of cutting *Chilgoza*. He and other villagers had cut *Chilgoza* cones from the suit land which was known as Ruea. Only the villagers of village Shong had rights over this land.

21. Anant Ram (DW-7) deposed that he had seen the suit land. Their land was situate between Shong *Khud* and Ruea *Nallah*. Ruea *Nallah* was at a distance of about 2 kms from village Shong towars Chansu whereas distance of village Chansu from Ruea *Nallah* was about 7 kms. In the year 1978, he had taken the contract of *Chilgoza* in this land from villagers of village Shong for a consideration of Rs.1600, in the year 1979 for Rs.14,500/-, in the year 1982 for Rs.32,000/- and then in 1983 for Rs.35,500/- from the villagers of village Shong. Villagers of village Shong used to graze their cattle on this land. He never saw the villagers of Chansu exercising such rights.

22. Gita Ram (DW-8) testified that he remained posted as Patwari Halka Sangla from 1962 to 1966. During this period he used to go to Sangla on foot via Shong and Chansu. He remained posted as Patwari in village Kamru in 1978-80. During 1981-82 he remained posted as Office Kanungo and village Kilba upto village Chitkul was under his jurisdiction. He used to visit villages Shong and Chansu in connection with his official duty. He has also deposed that there was Ruea *Nallah* which was about 7 kms from village Chansu towards Shong and distance of village Shong from this *Nallah* was about 2 kms. He saw villagers of village Shong exercising their customary rights of taking grass, fuel, wood leaves etc. in the area. Residents of Chansu have never exercised any such rights over the suit land. However, in his cross-examination, he has admitted that residents of village Chansu had their lands in the area on upper side of Limoden.

23. Bhagat Ram (PW-1) proved Misal Hakiyat Ext. PW-1/C for the year 1982-83. However, the Settlement Collector vide order dated 7.12.1991 has deleted the area of Limoden from village Chansu and added it to village Shong. Application was preferred for correction of Ext. PW-1/C on 10.9.1991. Thereafter, spot was visited on 2.10.1991 and case was fixed for evidence of both the parties on the very next day i.e. 3.10.1991. Application was decided on 7.12.1991 vide Ext. PW-1/A. Plaintiffs have not been given ample opportunity before passing order dated 7.12.1991. Plaintiffs ought to have been permitted to cross-examine the witnesses produced by the defendants. Settlement Collector has observed that the suit land from Shong *Khud* towards Chansu was part of revenue estate Shong. He has also not mentioned that boundary determined by him formed ridges of hill. Natural boundary between Shong and Chansu was Shong *Khud*. According to the material placed on record, Limoden fell in revenue estate Chansu. Defendants have started exercising their rights only as per Order dated 7.12.1991. Ext. PW-1/C could not be altered in a slipshod manner by the Settlement Collector. He has sent Naib Tehsildar (Assistant Collector 2nd Grade) to collect evidence. This evidence could not be used by him to delete Limoden Mohal from Chansu Mohal. Order passed on 7.12.1991 was passed in a haste without following principles of natural justice. Villagers of Chansu were never called to Shimla though the order has been passed at Shimla on 7.12.1991 by the Settlement Collector. Order has been passed on the basis of statements of DW-3 Bhagat Ram, DW-4 Ram Chand and DW-5 Jamna Dass. According to their deposition before the trial Court, they did not know about the boundaries of village Chansu and Shong. They used to visit the areas for short duration. They did not have any knowledge about the rights of respective villagers. DW-5 Jamna Dass had gone to the area in 1981-82. He stayed for three days. He did not know about the natural boundary of villages Shong and Chansu. He feigned ignorance about the rights of villagers. In his cross-examination, he admitted that his daughter was married at Village Shong.

24. DW-1 Balwant Singh testified that the persons named Jamna Dass of Kamru, Sunder Dass of Barseri and Laxman Dass of Kamru used to graze their cattle in this area. Similarly, Ram Chand (DW-4), in his cross-examination admitted that he did not know the exact area of Ruea or from where it started and where it ended.

25. Satish Kumar (PW-4) has proved Exts. PW-4/A and PW-4/B. These documents show that the forest compartment No. 151 known as Shong was situate on the left bank of the Baspa river between the Rapo Dhar and the Shong stream. Villagers of Chansu were exercising their grazing rights and other rights. The rights of the villagers of village Shong over this area are mentioned at Sr. Nos. 1 to 13, 16 to 17 and 21 to 24. Ext. PW-4/A and Ext. PW-4/B are copies of record of rights in Sutlej valley forest settlement of the year 1921. Authenticity of these documents was never disputed by the defendants. Ext. PW-1/C is for the year 1982-83, however application for correction was moved only on 10.9.1991. Plaintiffs have duly proved that they were exercising their customary rights over the suit land since time immemorial. Their rights are duly recognized as per *Misal Hakiyat Bandobast Jadid* for the year 1982-83. Natural boundary was Shong *Nallah* and not Atangara. Merely that the villagers of village Shong used to receive the dignitaries at Atangara does not mean that it was the natural boundary between Shong and Chansu. Laxman Dass (PW-6) has testified that he used to pay compensation to the villagers of Chansu for harvesting *Chilgoza*. Though Anant Ram (DW-7) has testified that he used to make payment for *Chilgoza* however, he has not placed on record any receipt qua the same. Rather, in his cross-examination, he has admitted that in the land known as Limoden, there were the land and orchards of villagers of village Chansu. Gita Ram (DW-8) did not know the boundary between the villages Chansu and Shong. He has only visited the area in the year 1982.

26. Vidya Sain (PW-2) was working as Kanungo in the area from 1986 to 1992. This area fell in his jurisdiction. He used to visit the villages Shong and Chansu. According to him, from the side of village Shong towards Chansu, there was a *Nallah* called Shong *Khud* (stream). According to revenue record, upto Shong *Nallah*/*Khud*, villagers of Chansu had their rights. He had personal knowledge about this fact. Area from Shong *Nallah* upto village Chansu was called as Limoden, where villagers of Chansu had their residences and *Dogris* (thatches/huts). They used to graze their cattle, collect leaves and used to harvest *Chilgoza* from the land. Villagers of Shong had no right in the area. He is an expert witness. He had personal knowledge about the area being a Kanungo during the years 1986-1992. Similarly, Satish Kumar (PW-4), has proved Ext. PW-4/A and Ext. PW-4/B. Court has noticed that compartment No. 152 fell in village Chansu. Ghanshayam Dass (PW-5) remained posted as Block Officer Forest in Sangla during the period 1970-74. Natural boundary between village Shong and Chansu was Shong *Khud*(stream). Villagers of Chansu were enjoying their rights upto Shong *Nallah*/*Khud* (stream) and villagers of Shong never exercised their rights in the area. He also denied that Ruea was the natural boundary.

27. Plaintiffs have duly proved that they are exercising their rights of collecting leaves, fuel wood and *Chilgoza* since time immemorial, which was open to the knowledge of the defendants, peaceful, and not by stealth or force. They have also proved that they are exercising their rights over long usage.

28. A Learned Single Judge of the Calcutta High Court in **Purna Chandra v. Durlav Chandra** reported in AIR 1980 (Cal) 10, has held that in order to prove customs it is not necessary that the exercising of customary rights is from time immemorial. It is only that the right is reasonable, it is ancient and it has been exercised openly and peaceably. The learned Single Judge has further held that inhabitants of a particular locality can file a suit to enforce such customary rights. The learned Single Judge has held as under:

> "3, Mr. Promatha Nath Mitter, learned Advocate appearing on behalf of the appellants, takes up a point, namely, that the suit is not maintainable. He submits that the suit has been brought by the plaintiffs on behalf of Serampore Sani-para Sikdar Gajon Utsab Sarnity and Hindu public of Serampore Sanipara. Mr. Mitter contends that a suit for establishing customary right and by such a small section of a particular locality is not maintainable, Mr. Mitter frankly concedes that this point was not taken in the courts below. Even this ground was' not taken in this Court in the memorandum of appeal. He however submits that as it is a point of law and as the point involves the maintainability of the suit

the appellants should be allowed to urge this point. An additional ground being ground No. 12 was taken on behalf of the appellants. After hearing the learned Advocates for the parties, I allowed the appellants to take the additional ground which is as follows;- "For that the courts below should have held that there cannot in law be a customary right only in favour of a section of the inhabitants of one 'para' of a village as there can be customary right only in respect of all the inhabitants of a district and as such the courts below should have held that the plaintiffs' suit is not maintainable". Mr, Mitter next places reliance on a decision reported in (Patneedi Rudravya v. Velugubantla Venkayya). In this case it has been held that "a phenomenon is said to be happening from time immemorial when the date of its commencement is not within the memory of man or the date of its commencement is shrouded in the mists of antiquity". Mr. Bakshi, on the other hand, contends that law in India is different. It is not necessary that in order to prove a customary right it should be proved that the right is being exercised by the persons claiming the same from time immemorial. It is only necessary that the right is ancient and it has been exercised by the persons claiming the same for a long time. In the present case, Mr. Bakshi submits that it is in evidence that the inhabitants of the locality exercised such right even prior to 1905. Mr. Bakshi refers to a decision reported in (1895) ILR 17 All 87 (Kuar Sen v. Mamman). In this case it was held that "where the local custom excluding or limiting the general rules of law is set up a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned". Mr. Bakshi submits that in the present case it has been proved by oral and documentary evidence that the inhabitants of the particular locality exercised the rights which they claimed for a long time openly and uninterruptedly and as such it must be held that they have acquired a customary right Mr. Bakshi next refers to a decision reported in AIR 1943 PC 111 (Baba Narayan Lakras v. Saboosa). It has been held that "it is by no means conclusive against a claim to customary right that the practice should have begun by permission or agreement, but it must be shown to have continued in such circumstances and for such length of time that it has come to be exercised as of right." MR Bakshi also seeks reliance from a case reported in (1941) 68 Ind App 1 (PC) (Musammat Subhani v. Nawab) in support of his contention that it is not necessary to prove that the right has been exercised from time immemorial. It has been held by the Judicial Committee that "having regard to the circumstances under which local customs have arisen, and do arise, in India, both with reference to Muslims and Hindus, and the case and frequency with which people migrate from one district or Province to another, it would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man". After considering the arguments advanc-ed by the learned Advocates for the parties and the principles of law enunciated in the cases referred to above, I am of opinion that in India it is not necessary that it must be proved that the right is being exercised from time immemorial. If it is proved that the right is reasonable, it is ancient and it has been exercised openly and peaceably and without any interference and not stealthily then such a right assumes the character of a customary right and that right can be enforced in a court of law. I cannot accept the submission of Mr. Mitter that such a right can be claimed only

by all the inhabitants of a district and the same cannot be claimed by the inhabitants of a particular locality."

29. Mr. B.C. Negi, learned Senior Advocate has also made reference to Section 47 of the Indian Easements Act, 1882. This point was never raised before the learned Courts below. Thus, the defendants are precluded from taking this plea at this stage.

30. The learned Courts below have correctly declared dated 7.12.1991 (Ext. PW-1/A) as well as mutation order No. 15 dated 23.3.1992 (Ext. PW-1/B) as illegal and void. The learned Courts below have correctly appreciated the oral as well as documentary evidence on record as well as Exts. PW-4/A, PW-4/B, PW-1/A and Ext P-1. The plaintiffs have proved their customary rights strictly as per Sections 13 and 48 of the Indian Evidence Act.

31. The substantial questions of law are answered accordingly.

32. Accordingly, in view of the discussions and analysis made hereinabove, the present appeal has no merits and the same is dismissed.

33. Pending application(s), if any, also stand disposed of. No costs.

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

Bharat Heavy Electrical Limited .....Petitioner
Versus
Union of India ....Respondent.

Cr.MMO No. 158 of 2014
Date of Decision: 25.5.2016

Contract Labour (Regulation and Abolition) Act, 1970- Section 23 and 24- Petitioner entered into a contract with National Thermal Power Corporation Limited (NTPC) for erection, testing and commissioning of 4X200 MW Hydroelectric Project –petitioner had a right to subcontract the work awarded to it- it engaged M/S Purvanchal Engineering Projects for execution of the work- a complaint was filed for violation of Sections 23 and 24 of the Act by the respondent- petitioner was summoned by the Court- petitioner filed an application, which was dismissed- held, that M/S Purvanchal Engineering Projects is carrying the work assigned to it by the petitioner - M/S Purvanchal Engineering Projects had the authority to engage the workmen either through contractor or through subcontract- petitioner does not fall within the definition of the contractor and will not be liable for violation of the provisions of the Act- petition allowed. (Para-2 to 6)

For the petitioner: Mr. K.D Shreedhar, Sr Advocate with Mr. Yudhveer Singh Thakur and Ms. Shreya Chauhan, Advocate.
For the Respondent: Mr. Ashok Sharma, ASGI with Mr. Angrej Kapoor, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The respondent herein instituted a complaint against the petitioner herein before the learned Chief Judicial Magistrate, Bilaspur. The complaint stands enclosed with the petition at hand as Annexure P-8. Thereunder allegations stand constituted against the petitioner herein of it by its various omissions constituted in the apposite complaint, infracting the provisions of Sections 23 and 24 of the Contract Labour (Regulation and Abolition)Act, 1970 (for short "the Act"). On the complaint standing instituted before the learned Chief Judicial Magistrate, Bilaspur

the latter Court issued summons upon the petitioner-company for its recording its presence thereat on 6.3.2009 through its authorized representative. On appearance standing put on behalf of the petitioner/company before the learned Chief Judicial Magistrate, an application under Section 190 (1) (A), 204, 203 readwith Section 245(2) Cr.P.C stood instituted thereat by the petitioner-company. The aforesaid apposite application stands dismissed under orders comprised in Annexure P-12 by the learned Chief Judicial Magistrate concerned. The petitioner-company stands aggrieved by the order rendered by the learned Chief Judicial Magistrate comprised in Annexure P-12.

2. The petitioner-company recorded in the year 2006 a contract with National Thermal Power Limited (for short "NTPC") for erection, testing and commissioning of 4X200 MW Hydroelectric Project and material testing at Kol Dam Hydroelectric project, Barmana, District Bilaspur, H.P. Under Annexure P-2 the petitioner-company was authorized to engage the service of other sub-contractors for execution of the work aforesaid awarded to it by the NTPC foisting a right in the petitioner-company to subcontract the work awarded to it by the NTPC stands embodied in clause 19 thereof. In pursuance to the aforesaid empowerment foisted in the petitioner-company, it proceeded to on 24.11.2006 under Annexure P-3 assign all the works pertaining to erection, testing and commissioning of 4X200 MW Hydroelectric Project and material testing at Kol Dam Hydroelectric project to M/S Purvanchal Engineering Projects, B/M-27, Nehru Nagar, Bhopal execution of works whereof stood hitherto awarded to it under a contract which stood entered inter-se the petitioner-company with the NTPC. The aforesaid assignment of works by the petitioner-company to M/S Purvanchal Engineering Projects which hitherto stood awarded to it for execution by the NTPC, occurred on 24.11.2006, however the apposite complaint stood instituted before the learned Chief Judicial Magistrate by the respondent in the year 2009. Having extracted from the pleadings existing before this Court the relevant facts germane for putting at rest the controversy engaging the parties at lis before this Court, it is imperative to advert to the prime factum of the respondent alleging infringements standing begotten at the instance of the petitioner-company of the apposite provisions of Sections 23 and 24 of the Act constituted by its apposite omissions displayed in the complaint. Hereat the relevance of the petitioner-company prior thereto under Annexure P-3 on 24.11.2006 assigning to M/s Purvanchal Engineering Projects the hitherto work allotted to it under an agreement recorded inter-se it with NTPC comes to the forefront. The factum of the petitioner-company prior to the institution of the complaint against it by the respondent assigning works, ordained to be executed by it under a previous contract recorded inter-se it and NTPC, to M/S Purvanchal Engineering Projects is of its assignee aforesaid alone holding responsibility to mete adherence to the provisions of Section 23 and 24 of the Act. Given the inference recorded by this Court on the anvil of the petitioner-company assigning to M/S Purvanchal Engineering Projects works hitherto allocated to it by NTPC has a bearing upon the respondent herein holding empowerment to solitarily insist upon the compliance by M/S Purvanchal Engineering Projects of the apposite provisions of the Act also in the event of non-compliance thereto occurring it alone being penally inculpable.

3. Contrarily, the respondent herein was de-facilitated to for the reasons aforesaid hold of the petitioner-company yet especially when it is not executing the work hitherto allotted to it by NTPC, to form an opinion of the petitioner-company subsequent to 24.11.2006 whereat it assigned the apposite works for their execution to M/S Purvanchal Engineering Projects holding any liability to beget compliance with or adherence to the apposite provisions of the Act nor also it was tenable on the part of the respondent herein to hold any opinion of any infraction at its instance standing begotten of the aforesaid provisions of the Act. Amplifying vigor to the aforesaid inference stands spurred from the factum of a manifestation in Annexure P-6 unveiling the factum of NTPC engaging M/S Purvanchal Engineering Projects to complete the execution of the apposite project besides when there exists a disclosure therein of NTPC as the Principal employer undertaking to adhere to the apposite provisions of the Act, in sequel thereto also the respondent herein could not conclude of the petitioner-company holding in any manner any liability to mete reverence to its apposite provisions. Also it was inapt for the respondent herein

to conclude of the petitioner-company infracting the apposite provisions of the Act especially when the principal employer as manifested in Annexure P-6 had rather undertaken therein to mete reverence to the apposite provisions of the Act. The learned ASGI had contended of the definition of "Contractor" occurring in Section 2 (C) of the Act which stands extracted hereinafter encompasses also the liability of the petitioner-company arising from infraction if any even by M/S Purvanchal Engineering Projects of any of its provisions. He contends of the opening part of the definition of "Contractor" occurring in Section 2 (c) of the Act aforesaid while communicative of establishments as is the work undertaken to be executed by M/S Purvanchal Engineering Projects when would on its completion produce a result initially assigned to be produced by the petitioner-company hence on completion of work by the assignee of the petitioner-company the work whereof stood initially allotted to it by NTPC to the petitioner-company notwithstanding the apposite assignment of work hitherto allotted to it by the NTPC occurring prior to the institution of the complaint yet when on its completion it would produce a result as initially was enjoined to be produced by the petitioner-company would also thereupon attract the liability of the petitioner-company qua infringements if any qua the apposite provisions of the Act begotten by M/S Purvanchal Engineering Projects especially when the provisions of Section 2 (c) of the Act stand attracted qua the petitioner herein. However, the aforesaid submission as espoused by the learned ASGI while his reading the definition of contractor occurring in Section 2 (c) aforesaid in a fragmentary and in an isolated manner has obviously rendered him unmindful of the latter communications occurring therein whereas on theirs standing read conjunctively with the earlier communications occurring therein theirs bearing a parlance of not as articulated by the learned ASGI of its mere completion begetting the sequel of its standing foisted with an inculpatory penal liability alongwith its assignee rather a reading of the apposite provisions in their entirety bearing a signification of for a entity or an individual to fall within the ambit of the definition of a "Contractor", it or he merely undertaking to suo moto complete the work for the establishment besides also encompassing within its ambit any entity/individual who for completing the work of the establishment supplies contract labour to the entity/individual who has secured an award for its execution from the competent authority moreover also takes within its fold a sub-contractor whose services stand engaged by the principal employer for supplying man power on a contract basis for producing a given result for the establishment. Now with M/S purvanchal Engineering Projects being the assignee of the works hitherto allotted for execution to the petitioner-company by NTPC thereupon perse its undertaking to by completing works assigned to it by the petitioner-company produce the apposite result of its hence completing the project for the assignor naturally its concert to complete execution of the project hitherto to be executed by the petitioner-company by its suo moto engaging contract labour or its requisitioning though an appropriate aegis supply of contract man power for execution of the apposite work of the establishment besides its also requisitioning the services of a sub-contractor for the latter purveying man power to it for enabling it to complete the project would render the assignee to solitarily fall within the ambit of the definition of "contractor" dehors the factum of its completing the apposite work for the establishment or its executing the project hitherto to be executed by the petitioner-company. For reiteration, a reading of the definition of contractor occurring in Section 2 (c) of the Act in a wholesome manner when efficaciously effaces the submission of the learned ASGI of on a mere completion of the project by M/S Purvanchal Engineering Projects an assignee of the petitioner-company begetting also the fastening of the apposite penal liability on completion thereof upon the petitioner-company, also has the effect of this Court standing facilitated to conclude of the petitioner-company when has assigned the work hitherto allotted to it by NTPC to M/S Purvanchal Engineering Projects, the latter alone holding authority to engage workmen either through contractors or through sub-contractors. In no manner it can be held of the petitioner-company hence either suo moto engaged/engaging contract labourers for completion of the work of the project or its engaging or having engaged relevant man power for executing the project through contractors or through sub-contractors. In sequel when the aforesaid inference constrains a conclusion of the petitioner-company falling outside the ambit of the definition of "contractor" occurring in Section 2 (c) of the Act besides when as manifested in Annexure P-6 of the principal employer undertaking therein to mete adherence to the provisions of the Act

thereupon a conclusion can also stand erected of the petitioner-company also not being the principal employer.

> " 2 (c):- Contractor" in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture of such establishment other contract labour or who supplies contract labour for any work of the establishment and includes a sub contractor;"

4. In aftermath with the petitioner-company neither holding the capacity as a "contractor" within the ambit of its definition occurring in Section 2 (c) of the Act nor it being the principal employer of any workmen deployed for completion of the project, it is un-understandable as to what prodded the respondent to proceed to constitute allegations against the petitioner-company.

5. Further more the respondent herein had as divulged by Annexure P-14 arrayed M/S Purvanchal Engineering Projects as an accused arising from the factum of its infracting the provisions of Section 23 and 24 of the Act. The complaint aforesaid stands instituted before the learned CJM in the year 2009. The aforesaid embodiment in the complaint instituted by the respondent herein before the Court concerned against M/S Purvanchal Engineering Projects, is a manifestation of its acquiescing to the factum of M/S Purvanchal Engineering Projects alone holding the capacity to execute the work hitherto allotted to the petitioner-company for its execution by NTPC also it evinces an inference of its acquiescing to the factum of M/S Purvanchal Engineering Projects alone standing enjoined to mete compliance to the apposite provisions of the Act. Concomitantly when infraction of the apposite provisions of the Act stands begotten the ensuing penal liability is fastenable only qua M/S Purvanchal Engineering Projects.

6. Moreover given the averments in the complaint of the M/S Purvanchal Engineering Projects executing work through contractors, labourers without license hence its begetting contravention of the apposite provisions of Section 23 and 24 of the Act is facilitative of an inference of the respondent herein openly acquiescing of M/S Purvanchal Engineering Projects constituting the entity engaged in executing the work of the project by deploying workmen through contractors or sub-contractors. The overwhelming effect of the aforesaid inference is of the complaint instituted by the respondent herein against the petitioner-company is squarely off the statutory tangent. Since the aforesaid inferences with clarity unearth of the penal inculpation of the petitioner-company by the respondent herein in the complaint instituted against it before the learned Chief Judicial Magistrate, concerned was wholly unwarranted besides when the entire material alluded to hereinabove wherefrom the aforesaid inferences stand drawn by this Court, was even available before the learned Chief Judicial Magistrate concerned, as apparent from the averments in congruity thereof standing constituted in an application preferred thereat by it under section 190 (1) (a) 204, 203 readwith Section 245 (2) Cr.P.C with underscorings therein of a relief of dismissal of the complaint and of its standing discharged as an accused whereas with the learned Chief Judicial Magistrate in a cryptic and cursory manner manifestative of its not applying its judicial mind to the impact of the apposite averments displaying its untenable penal inculpation by the respondent as a natural corollary the learned Court below has committed a gross illegality besides an impropriety in dismissing the aforesaid application. In view of the above, the present Petition is allowed. All pending applications stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

Bharat Heavy Electrical Limited .....Petitioner

Versus

Union of India ....Respondent.

Cr.MMO No. 159 of 2014
Date of Decision: 25.5.2016

Minimum Wages Act, 1948- Section 2(e)- Work was allotted to the petitioner by the National Thermal Power Corporation Limited – petitioner assigned the work to M/s Purvanchal Engineering Projects- a complaint was filed against the petitioner for violation of the provision of Minimum Wages Act- petitioner was summoned- application was filed, which was dismissed- held, that the term 'employer' means a person who employs another person either by himself or through some other person- therefore, even if the petitioner had assigned the work to M/s Purvanchal Engineering Projects, workman was engaged by the petitioner through M/s Purvanchal Engineering Projects- Minimum Wages Act is a beneficial provision and is applicable to assignor- petitioner was rightly summoned- petition dismissed. (Para-2 and 3)

For the petitioner: Mr. K.D Shreedhar, Sr Advocate with Mr. Yudhveer Singh Thakur and Ms. Shreya Chauhan, Advocate.

For the Respondent: Mr. Ashok Sharma, ASGI with Mr. Angrej Kapoor, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The learned counsel for the petitioner contends with vigor before this Court of with the petitioner assigning the apposite work for execution to M/S Purvanchal Engineering Projects, B/M-27, Nehru Nagar, Bhopal which work hitherto stood allotted to it by National Thermal Power Limited (for short "NTPC") ipso facto ex facie absolves it of its liability to mete adherence or beget compliance with the apposite provisions of the Minimum Wages Act provisions whereof stand concluded by the respondent herein to beget infraction by the petitioner herein. Hence he contends of the complaint instituted by the respondent herein before the learned Chief Judicial Magistrate, Bilaspur under the apposite provisions of the Minimum Wages Act, 1948 (for short "the Act) suffering from non-application of mind. He also contends of the learned Chief Judicial Magistrate while dismissing under Annexure P-12 an application preferred before it by the petitioner herein under Section 190(1) (a), 204, 203 readwith Section 245(2) Cr.P.C wherein relief of dismissal of the complaint besides a relief for the petitioner-company standing discharged as an accused stood ventilated, also suffering with a vice of non-application of mind qua the apposite averments constituted therein displaying its penal inculpation in the apposite complaint instituted thereat by the respondent herein being merit less.

2. This Court has considered all the aforesaid submissions addressed by the learned counsel for the petitioner before this Court. However even if the petitioner has assigned to M/s Purvanchal Engineering Projects, B/M-27, Nehru Nagar, Bhopal the hitherto work allotted to it for completion besides execution by National Thermal Power Corporation nonetheless with the provisions of Section 2 (e) of the Minimum Wages Act, 1948 (for short "Act") while therein constituting the definition of an employer rendering a communication of its embodying within its fold "any person" who employs man power either directly or through another person also hence brings within its amplitude the petitioner who even while assigning the work hitherto allotted to it for execution by NTPC to M/S Purvanchal Engineering Projects, B/M-27, Nehru Nagar, Bhopal yet it indirectly or through its assignee employing work force or labourers for execution of the work of erection, testing and commissioning of 4X200 MW Hydroelectric Project and material testing at Kol Dam Hydroelectric Project, Barmana, District Bilaspur, H.P. With the aforesaid signification standing imputed by this Court to the apposite phrase occurring in Section 2 (e) of the Act (extracted hereinafter) the inevitable ensuing deduction therefrom is with hence strict vicarious penal liability upon the petitioner-company alongwith its assignee on its standing contemplated therein qua it arouse-able from its falling within the ambit of definition of an "employer" constituted in Section 2 (e) of the Act also concomitantly attracts qua it the penal inculpation alongwith its assignee. For reasons aforesaid it also holds a strict statutory vicarious penal inculpablity alongwith M/S Purvanchal Engineering Projects, B/M-27, Nehru Nagar, Bhopal its assignee of the work hitherto allotted to for execution by NTPC qua infraction, if any, of

the apposite provisions of the Act especially when given its falling within the definition of an employer under the apposite provisions of the Act also enjoined upon it to conjointly alongwith its assignee mete adherence to the apposite provisions of the Act hence empowered the respondent herein to institute a complaint also against the petitioner. Consequently, its standing arrayed as an accused in the apposite complaint also the order of learned Chief Judicial Magistrate dismissing its application preferred before it merits no interference. Hence, the instant petition stands dismissed.

3. In holding the aforesaid conclusion the factum of the provisions of "the Act" being a welfare beneficent legislative mechanism to ensure defrayment of minimum wages by the employer to the workmen, cannot remain un-slighted hence with reverence standing enjoined to be meted to a labour welfare beneficent legislative mechanism constituted in the apposite legislation, concomitantly enjoins of the assignor not holding any leverage to shrug off its responsibility to ensure payment of minimum wages contemplated under the apposite Act even by its assignee to workmen engaged in the project. Hence it appears of the legislature in its wisdom to fasten a liability also upon the assignor to ensure of the assignee defraying minimum wages to workmen deployed by it in the project has taken also the assignor within the fold of the definition of "employer" constituted in the apposite provisions aforesaid, also the aforesaid interpretation standing lent to the definition of "employer" occurring in the apposite provisions of the Act would facilitate even the assignor to ensure the defraying of minimum wages by its assignee to workmen employed by the latter for executing the project. With aplomb it can be held of the expression "employer" occurring in the apposite provisions of Section 2 (e) of the Act ought to take within its ambit the assignor company as also its assignee also it has to be held of hence the phrase "employer" holding the apposite contemplation of the legislature of the latter on the formers behalf for carrying forward the salutary mission of the Act of ensuring defrayment of minimum wages to workmen though standing engaged by its assignee renders their engagement by the assignee Co. being amenable to a construction of it being also on behalf of the assignor Co. The purveying of the aforesaid definition would facilitate the carrying forward of the salutary beneficent provisions of the Act also would enable the assignor Co. to monitor adherence thereof by its assignee Co. moreso when hence a power of monitoring qua facets embodied in the Act stands foisted upon the assignor Co., it is expected to efficaciously monitor the apposite facets by keeping a close vigil qua its assignee meteing compliance qua the apposite provisions of the Act. It appears that the aforesaid positivist interpretation is renderable to the definition of an "employer" occurring in the apposite provisions of the Act as it would obviate any departure by any assignor from the beneficent salutary provisions occurring therein in favour of workmen.

> " (e) "employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, and includes, except in sub-section (3) of Section 26,
>
> (i) in a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person named under {Clause (f) of sub section (1) of Section 7 of the Factories Act, 1948 (63 of 1948)}, as manager of the factory;
>
> (ii) In any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authrot8y appointed by such government for the supervision and control of employee or where no person or authority is so appointed, the head of the department;
>
> (iii) in any scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act, the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the chief executive officer of the local authority'
>
> (iv) In any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person

responsible to the owner for the supervision and control of the employee or for the payment of wages."

4. In view of the above discussion, the instant petition stands dismissed, so also the pending applications, if any.

5. Any observation made herein-above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made hereinabove.

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

Bimla Devi .....Petitioner.

Versus

Onkar Nath ....Respondent.

CMPMO No. 261 of 2014.
Date of Decision: 25th May, 2016.

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a Civil Suit for recovery of Rs. 18,000/- towards arrears of rent – the suit was dismissed by the Trial Court- an appeal was preferred which was dismissed- held in second appeal, averments in the plaint were not proved as the plaintiff had not stepped into witness box rather had examined the power of attorney- translation of rent note was not produced- suit was rightly dismissed in these circumstances - Petition dismissed. (Para 8-9)

Cases referred:
Roshan Lal versus Krishan Dass, S.L.J. 2002, Vol.I, page 261 (H.P.)
Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and another, AIR 2005 SC 439

For the Petitioner: Mr. Rajesh Mandhotra, Advocate.
For the Respondent: Mr. Virender Singh Rathore, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The plaintiff/petitioner herein instituted a suit before the learned trial Court against the defendant/respondent herein for recovery of Rs.18,000/- amount whereof constituted the arrears of rent towards the suit premises. The suit came to be dismissed by the learned trial Court. An appeal therefrom stood preferred by the plaintiff/petitioner herein before the learned first Appellate Court which also suffered a similar fate. Standing aggrieved by the concurrently recorded findings of facts against her by both the learned Courts below, the petitioner herein/plaintiff has instituted the instant petition before this Court for assailing them.

2. The brief facts of the case are that the plaintiff is owner of six shops situate in Village and Post Office Milwan, Tehsil Indora, District Kangra, H.P. On 28.8.1998, the defendant entered into an agreement with the plaintiff to take on rent three shops @ Rs.500/- per month per shop, total rent amounting to Rs.1500/- per month for running his business of Hotel. The tenancy of the aforesaid shops is claimed to be monthly commencing from 1.8.1998 and the defendant is legally bound to pay the rent of the aforesaid three shops on monthly rent basis to the plaintiff. It has been averred that the defendant has not paid even a single penny to the plaintiff w.e.f. 1.9.1998 to 31.8.1999, as such, he is in the arrears of rent to the tune of Rs.18,000/-. Hence the instant suit.

3. The defendant has contested the suit and filed a written statement wherein he has taken preliminary objections inter alia, maintainability, estoppel, cause of action and locus standi. On merits, it is admitted that on 28.8.1998, the defendant entered into an agreement with the plaintiff and three shops were taken on rent w.e.f. 1.9.1998 @ Rs.500/- per month of each shop and the total rent was fixed at the rate of 1500/- per month. It is also admitted that the tenancy of the aforesaid shops started from 1.9.1998. It is denied that the defendant has not made any payment of rent. It is averred that the defendant had made payment of rent regularly upto January, 1999. However, thereafter, the plaintiff along with her husband did not allow the defendant to run the shop and even attacked on the defendant and a case was also registered against the husband of the plaintiff on 10.2.1999 under Section 307 of the IPC. As per the defendant, he asked the plaintiff to issue the receipts of payment of rent, but she did not issue the same and denied the issuance of receipts on the ground that there is a dispute between the parties. It is averred that the plaintiff has also rented out another three shops to the defendant for running a business of Hotel. The plaintiff has also received through her husband an amount of Rs.80,000/- as advance on 28.8.1998. The said amount is also lying with the plaintiff and at the most rent can be adjusted against that amount, as such, the defendant is yet to recover his balanced amount. It is averred that the defendant had paid the rent to the plaintiff upto January, 1999. According to the defendant, the plaintiff has no cause of action.

4. The plaintiff/petitioner filed replication to the written statement of the defendant/respondent, wherein, she denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled to recover the suit amount, as alleged? OPP.
2. Whether the suit is not maintainable? OPD
3. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD
4. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the petitioner herein/plaintiff. In an appeal, preferred therefore before the learned first Appellate Court by the appellant/plaintiff, the learned first Appellate Court dismissed the appeal.

7. Now the plaintiff/appellant has instituted the instant petition before this Court assailing the concurrently recorded findings of both the learned courts below.

8. The learned trial Court as well as the learned First Appellate Court had concurrently held of the averments constituted in the plaint against the defendant/respondent herein standing not proved by the plaintiff/petitioner herein by hers stepping into the witness box rather when the said averments stood proven by her General Power of Attorney, precluding hence both the learned Courts below from theirs reading the deposition of the General Power of Attorney of the plaintiff/petitioner herein wherein he had testified in proof of the averments constituted in the plaint. The recording of the aforesaid inference by both the learned Courts below stood anvilled upon a judgment of this Court reported in ***Roshan Lal versus Krishan Dass, S.L.J. 2002, Vol.I, page 261*** (H.P.). However, reliance by both the learned courts below upon the rendition of this Court would not be grossly inapt unless there occurred a manifestation of Kundan Lal in his capacity as attorney of the plaintiff had executed a rent note qua the suit premises, with the defendant/respondent. Only in the event of a display occurring in the rent note executed qua the suit premises of Kundan Lal executing it with the defendant/respondent while his standing authorized by the plaintiff/petitioner under an apposite document executed by her would lend empowerment to him to depose on behalf of the petitioner/plaintiff in

substantiation of the averments constituted in the plaint. However, when the rent note executed qua the suit premises by the purported general power of attorney of the plaintiff/petitioner herein stands neither executed by him under an authorization foisted upon him under an apposite document executed by the plaintiff/petitioner herein nor when it stands proven in accordance with law necessarily hence it was open to its being unreadable in evidence also its being discardable as tenably done by both the learned courts below. Though, the learned counsel appearing for the plaintiff/petitioner placed reliance upon a judgment of the Hon'ble Apex Court reported in ***Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and another, AIR 2005 SC 439,*** the relevant paragraph whereof stands extracted hereinafter, to contend before this Court of the General Power of Attorney holding authorization to depose in proof of the averments constituted in the plaint only when the apposite averments embody acts personally performed by him whereupon he erects an argument of with the rent note qua the suit premises standing executed by the General Power of Attorney of the plaintiff/petitioner on the latter's behalf hence with his on behalf of his principal executing the apposite rent note qua the suit premises he thereupon stood empowered to depose in substantiation of the apposite averments qua it constituted in the plaint against the defendant/respondent.

> "Order 3, Rr.1 and 2 empowers the holder of power of attorney to 'act' on behalf of the principal. The word 'act' employed in O.3, Rr.1 and 2, confines only in respect of 'acts' done by the power of attorney holder in exercise of power granted by the instrument. The term 'acts' would not include deposing in place and instead of the principal. If the power of attorney holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

The above argument of the learned counsel appearing for the petitioner/plaintiff stands to suffer rejection in the face of this Court concluding with formidability of, with the rent note purportedly executed qua the suit premises by Kundan Lal, GPA of the plaintiff/petitioner herein whereupon he contends of hence with the General Power of Attorney under an apposite authorization purveyed to him by the plaintiff/petitioner herein his in pursuance thereof his performing on behalf of the plaintiff/petitioner the apposite act of his executing the apposite rent deed qua the suit premises, he hence qua the apposite factum probandum held personal knowledge,facilitating him to hence depose as a witness on her behalf in proof of the apposite averments qua it constituted in the plaint, with its standing not proved in accordance with law rendered it hence unreadable besides discardable. Furthermore, the original of the rent note though is placed on record yet, a perusal thereof discloses of its standing scribed in Punjabi. Neither its authentic Hindi translation has been placed on record nor it stands proved by any proficient translator. Consequently, for the aforesaid infirmities, besides with its remaining unexhibited precludes this Court to hold of its constituting an authorization bestowed upon him by the plaintiff in pursuance whereof he on her behalf executed an apposite rent deed qua the suit premises. Also this Court cannot hence conclude of the execution of the apposite rent note by Kundan Lal was in furtherance of an authorization purveyed to him under an apposite document executed in his favour by the plaintiff/petitioner herein nor this Court would hold of his holding any empowerment to depose in substantiation of the averments constituted in the plaint rather this Court holds of the plaintiff standing enjoined to depose in substantiation of the averments constituted in the plaint whereas hers omitting to depose in substantiation thereof, the verdicts concurrently recorded against her by both the learned Courts below are to hold tenability in law. Even if, a Hindi translation by a proficient translator of the apposite rent note scribed in Punjabi is unavailable yet with there occurring a display therein of Kundan Lal while his proclaiming therein of his holding title to the suit premises his executing it qua the suit premises contrarily negates the factum of the the plaintiff/petitioner holding title to the suit property in capacity

whereof she has instituted the suit against the defendant/respondent hence also concomitantly rendering her suit to be mis-constituted.

9. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration.

10. In view of above discussion, the instant petition 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.

Smt. Kamira Devi and another .....Petitioners
Versus
Munshi Ram and others .....Respondents

CrMMO No. 182/2009
Reserved on May 24, 2016
Decided on May 25, 2016

H.P. Panchayati Raj Act, 1994- Section 33- Gram Panchayat imposed a fine of Rs. 5/- on the petitioner, which was to be deposited on or before 26.8.2005 and in case of default, a fine of Rs. 10/- was to be charged each day- an appeal was preferred in the Court of Judicial Magistrate 1st Class, Naudan, which was dismissed on 10.8.2009- petitioners challenged the order passed by Gram Panchayat by filing the present petition - held, that appeal filed before Judicial Magistrate was barred by limitation and was rightly dismissed - petitioners have challenged the original order of the Panchayat which has merged in the order of the Judicial Magistrate 1st Class- they should have challenged the order of Judicial Magistrate instead of challenging the order of Gram Panchayat- petition dismissed. (Para-2 and 3)

For the Petitioners : Mr. Sunil Chuahan, Advocate.
For the Respondents : Mr. Parmod Thakur, Additional Advocate General, for the respondent-State.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge(oral)

This petition has been preferred against Order dated 8.8.2005 passed by the Gram Panchayat, Sarehari Tehsil Nadaun, District Hamirpur, Himachal Pradesh .

2. "Key facts" necessary for the adjudication of the present petition are that the respondent No. 2 has imposed a fine of Rs.5/- (` Five only) each on the petitioners and fine was ordered to be deposited in the office of Panchayat by 26.8.2005 and if fine was not deposited by the scheduled date, additional fine of Rs.10/- was to be charged each day. Petitioners feeling aggrieved by Order dated 8.8.2005, filed an appeal on 20.1.2009 in the court of learned Civil Judge (Junior Division), Nadaun, District Hamirpur being Panchayat Appeal No. 1/2009. The appeal was permitted to be withdrawn with liberty reserved to the petitioner to bring fresh legal

action, on 14.10.2008. Thereafter, petitioners filed an appeal before the learned Judicial Magistrate 1st Class, Nadaun being Panchayat Appeal No. 1/2009, which was dismissed on 10.8.2009. Hence, this petition.

3. The fine was imposed upon the petitioners by the Gram Panchayat vide order dated 8.8.2005. Petitioners filed an appeal in the wrong forum which was permitted to be withdrawn vide Order dated 14.10.2008. Petitioners again filed an appeal before the learned Judicial Magistrate 1st Class. It was barred by limitation. The same was dismissed on 10.8.2009. Petitioners ought to have challenged Order dated 10.8.2009 by way of present petition instead of challenging Order dated 8.8.2005 alone rendered by the Gram Panchayat. Order dated 8.8.2005 has merged with Order dated 10.8.2009.

4. Accordingly, there is no merit in the present petition and the same is dismissed, so also the pending applications, if any.

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

Oriental Insurance Company Ltd. .... Petitioner
Versus
Smt. Kamla Devi and others .... Respondents

CWP No. 2906/2008
Reserved on: May 23, 2016
Decided on May 25, 2016

Motor Vehicles Act, 1988- Section 166- A claim petition was filed pleading that ground floor of the house was damaged, when a truck rammed into the dwelling house – amount of Rs. 2,37,000/- was awarded as compensation to the claimants- held, that claimants had duly proved that their house was damaged- roof had collapsed and furniture was damaged- damage was assessed by PW-5- it was admitted by respondent No. 6 that truck had rammed into the house of the claimants- a sum of Rs. 10,000/- was given to help the claimant no. 1- MACT had rightly deducted Rs. 10,000/- from the compensation and had awarded the compensation correctly- petition dismissed. (Para-13 to 15)

For the petitioner : Mr. Lalit K. Sharma, Advocate.
For the respondents : Mr. Rajiv Rai, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral):

This petition has been instituted against Award dated 30.8.2008 rendered by the learned Motor Accident Claims Tribunal, Presiding Officer, Fast Track Court, Mandi, District Mandi, Himachal Pradesh, in Claim Petition Nos. 78 of 2001, 212 of 2005.

2. "Key facts" necessary for the adjudication of the present petition are that respondents/claimants No.1 to 5 (hereinafter referred to as 'claimants' for convenience sake) owned and possessed a double storey house on the road side, comprised in Khewat /Khatauni No. 10/13 Khasra No. 290 situate at village Kunnu (Batehar) Tehsil Padhar, District Mandi, Himachal Pradesh. Ground floor of the house was damaged when a Truck bearing registration No. HP-K-1255 rammed into the dwelling house of the claimants on 2.5.2001 at about 8.30 AM,

which was being driven rashly and negligently by respondent No. 7 (Suresh Kumar). Ground floor walls were damaged and glazed verandah having wooden covering, doors and windows were also damaged. Furniture lying in the drawing room of the ground floor was also damaged. Damaged house was visited by police authorities and also by the Assistant Engineer (retired), B & R Division of PWD, for the purpose of making an assessment of loss and he assessed the loss suffered by the claimants to the tune of Rs.2,37,000/-. Claimants also claimed compensation towards mental torture and physical harassment.

3. Petition was contested by respondents No. 6 and 7. They filed joint reply to the petition. It was denied that the accident has taken place due to rash and negligent driving of the respondent No. 7. It was denied that the house in question was badly damaged and that the walls and furniture were destroyed. Claimants forced respondent No. 6 to pay Rs.10,000/- under threats. Vehicle in question was insured with the petitioner-insurance company from 15.12.2000 to 14.12.2001 at Palampur office. It was also denied that respondents No.6 and 7 were jointly and severally liable to pay compensation.

4. Petitioner-insurance company also filed a separate reply. Preliminary objection was taken that driver of the truck bearing registration No. HP-K-1255 was not holding a valid and effective driving licence at the time of accident. There was breach of mandatory terms and conditions of the policy. Vehicle in question was not road worthy. Claimants had already compromised the matter by accepting Rs.10,000/- as final settlement. Insured has colluded with the claimants.

5. Issues were framed by the learned Motor Accident Claims Tribunal below on 19.6.2003. A sum of Rs.2,27,000/- was awarded to the claimants alongwith interest @ 7.5% per annum from the date of filing the petition till its realisation. Hence, this petition.

6. Mr. Lalit K. Sharma, Advocate has vehemently argued that the Award was excessive and the Motor Accident Claims Tribunal has not correctly appreciated the oral as well as documentary evidence on record. He has relied upon the assessment made by the Surveyor.

7. Mr. Rajiv Rai, Advocate has supported the Award dated 30.8.2008.

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

9. Bhupinder Pal (PW-1) has proved FIR No. 182/2001 under Sections 279 and 337 IPC, Ext. PW-1/A. Kamla Devi (PW-2) has deposed that the accident took place due to rash and negligent driving on the part of respondent No. 7. Kishori Lal (PW-7) deposed that truck driver was driving the truck in a rash and negligent manner as a result of which the truck rammed inside the house of claimants. Suresh Kumar (RW-2) has admitted that he applied brakes and vehicle went out of control. He admitted that the road was *Pucca* and wide. Claimants had proved that the accident has occurred due to rash and negligent driving on the part of driver i.e. respondent No. 7 namely Suresh Kumar. The truck has rammed into the dwelling house of the claimants on 2.5.2001 at 8.30 AM. Kamla Devi (PW-2) deposed that her house comprised of four rooms and two verandahs on upper storey and ground floor. House was constructed about 7-8 years back and was constructed with stone masonry and wood. It was slate roofed. Roof of the house also collapsed. Furniture was also damaged including sofa set, *Diwan*, TV Trolley. *Tatima* was prepared by Patwari. She suffered a loss of Rs.3.00 Lakh. They were forced to shift their residence. Devinder Singh (PW-4) has proved *Tatima* Ext. PW-4/A. Ravi Kumar (PW-6) has proved the photographs Ext. P1 to Ext. P7 and negatives of photoraphs Ext. P8 to Ext. P14. Kishori Lal (PW-7) has testified that when the truck rammed into the house of claimants, a loud noise was heard. All the windows and doors of the house of the claimants were broken. Roof had also collapsed. Nokhu Ram (PW-5) is a material witness. He was retired SDO. He visited the spot. He prepared site plan of the house of the claimants, Ext. PW-5/A, detailed measurement of House, Ext. PW-5/B, annexures of the measurement, Ext. PW-5/C and Ext. PW-5/D, abstract of costs Ext. PW-5/E. According to him, the house was not fit for habitation nor it was fit for repairs. He

has given the estimate of damages as per schedule at the time of construction of the house. According to him, the damage sustained by the claimants was to the tune of Rs.2,37,000/-. He has denied the suggestion that he has not visited the spot and Exts. PW-5/A to PW-5/E have been falsely prepared.

10. Shri Rajinder Pal (RW-1) deposed that no damage was caused to the claimants except one wooden pillar was damaged. In his cross-examination, he admitted that house of the claimants was made of stones, bricks and wood. He admitted that the walls of the house were cemented. He also did not deny that the verandah of the house of claimants was covered with wood.

11. Suresh Kumar (RW-2) has denied that the truck has entered the house of the claimants and furniture, windows, doors and walls of the house were broken and walls had developed cracks.

12. Mohinder Sharma appeared as RW-3. he has prepared drawing of the house Ext. RW-3/A and Ext. RW-3/B, measurement sheet Ext. RW-3/C, abstract of costs Ext. RW-3/D and photographs Ext. RW-3/E-1 to Ext. RW-3/E-17 and report Ext. RW-3/F. In his cross-examination, he admitted that he was an automobile engineer. He has admitted that he has not given any assessment that how much wooden work was done in the building and he has also not given any reference of furniture etc. in his report. He had taken one Sanjay Rana, Civil Engineer for the purpose of assessment of damaged house of the claimants.

13. Claimants have duly proved that their house was damaged, roof had collapsed, furniture lying in the house was also damaged. Damage has been assessed by Nokhu Ram (PW-5). Mohinder Sharma (RW-3) was only an automobile engineer. He was not a civil engineer. According to Mohinder Sharma, he has taken one Shri Sanjay Rana, Civil Engineer to assess the damage to the house of the claimants. However, Sanjay Rana has not been cited as a witness. Nokhu Ram (PW-5) is a civil engineer. He has retired as SDO.

14. There is no evidence that the claimants have compromised the matter with respondent No. 6 (Rajinder Pal), rather, as per the contents of Ext. RA respondent No. 6 has admitted that the truck bearing registration No. HP-K-1255 rammed into the house of the claimants. He had given Rs.10,000/- to help claimant No.1, Kamla Devi.

15. Learned Motor Accident Claims Tribunal has rightly deducted Rs.10,000/- from the amount of compensation awarded to the claimants. The truck in question was duly insured with the petitioner-insurance company from 15.12.2000 to 14.12.2001. Driver was having a valid and effective driving licence.

16. Thus, there is no illegality or perversity in the Award passed by the Motor Accident Claims Tribunal below.

17. Accordingly, there is no merit in the present petition and the same is dismissed, so also the pending applications, if any.

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

Ram Rattan .....Petitioner

Versus

Ashwani Kumar and another .....Respondents

CMPMO No. 468/2015
Reserved on May 24, 2016
Decided on May 25, 2016

Code of Civil Procedure, 1908- Order 6 Rule 17- Suit filed by the plaintiff was dismissed- an appeal was preferred in which an application for amendment of plaint was filed- it was pleaded that plaintiff had made efforts to explain the facts to the Counsel but due to lack of communication, facts were not communicated in a chronological order- application was opposed by the defendant pleading that plaintiff was trying to wriggle out of the admissions by filing the application for amendment- application was dismissed by the Appellate Court- held, that amendment application was filed to incorporate the fact that mother of the plaintiff had contracted second marriage and the plaintiff was born from of the second marriage- Trial Court had given a specific finding that plaintiff was born from of the first marriage and second marriage was not proved- plaintiff cannot be permitted to incorporate the new facts- application has been filed to prolong the litigation and to wriggle out of the admissions made by the plaintiff as a witness in the cross-examination- allowing the application would cause prejudice to the defendant, thus, same was rightly not allowed- petition dismissed. (Para-8)

For the Petitioner : Mr. Pratap Singh Goverdhan, Advocate.
For the Respondents : Mr. B.C. Negi, Senior Advocate with Mr. Raj Negi, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge(oral)

This petition has been filed against Order dated 21.8.2015 rendered by the learned District Judge, Solan, HP in Application No. S/6 of 2015 in Case No. 60-S/13 of 2013.

2. "Key facts" necessary for the adjudication of the present petition are that the petitioner-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake), filed a suit No. 48-K/1 of 2003 before the learned Civil Judge (Junior Division), Kandaghat, District Solan, HP for declaration to the effect that he be declared owner in joint possession of the suit land comprised in Khata/Khatauni No. 5/6, Kita 9, measuring 108-10 Bigha situate in Village Koon, H.B. No. 38, Pargana Bharoli, Tehsil Kandaghat, District Solan, HP as per Jamabandi for the year 2001-02 and half share in respect of land comprised in Khata/Khatauni No. 11/16 Kitas 5 measuring 4-11 Bigha and ¼ share in Khata Khatauni No. 12/18-20 Kita 15 measuring 10-10 Bigha situate in village Kanguti, HB No. 37, Pargana Bharoli, Tehsil Kandaghat, District Solan, HP vide Jamabandi for the year 2000-01, and ½ share in respect of land comprised in Khata Khatauni No. 45/58 Kitas 3 measuring 3-15 Bigha, ¼ share in the land comprised in Khata Khatauni No. 46/59 Kitas 23, measuring 37-19 Bigha, 1/8th share of land comprised in Khata Khatauni No. 47/60 bearing Khasra No. 700 measuring 1-7 Bigha, 1/8th share in the land comprised in Khata Khatauni No. 48/61, bearing Khasra No. 387, measuring 0-13 Bigha situate in village Kothi, HB No. 37, Pargana Bharoli, Tehsil Kandaghat, District Solan, Himachal Pradesh.

3. Learned Civil Judge (Junior Division) dismissed the suit. Plaintiff filed first appeal in the Court of learned District Judge, Solan.

4. The plaintiff moved an application under Order 6 Rule 17 CPC for amendment of the plaint. Plaintiff wanted to amend the plaint by incorporating /inserting paragraph 3(a) in the plaint. It reads as under:

> "3(a). That Smt. Phoola Devi was firstly married to Shri Chet Ram in village Koon-Bara where she begot six children, named Smt. Janki Devi, Shri Megh Ram, Smt. Kamla Devi, Shri Liaq Ram, Smt. Padma Devi and Shri Shobha Ram. Due to disaccord and disharmony in her marital relations, she left the company of Shri Chet Ram and contacted second marriage with Shri Jash Ram of village Bara. She contacted marriage with Shri Jash Ram in the year 1941 and resided with him in his house as his wife. She begot the plaintiff (Shri Ram Rattan) from the loins of Shri Jash Ram i.e. out of her second marriage. She lived there in the house of Shri Jash Ram for about 6-7 years.

> Shri Jash Ram, in the year 1948, contacted second marriage with one Smt. Dwarki Devi. Out of this wedlock, the defendant No.2 Shri Liak Ram took birth. After getting married with Smt. Dwarki Devi, Shri Jash Ram forced Smt. Phoola Devi to live a life of destitute. As a result of which their relations became strained and sore. Consequently, in late 1948, Smt. Phoola was compelled to leave the house of Shri Jash Ram alongwith her child Ram Rattan and she again started living with her children begotton by her from the loins of her previous husband Shri Chet Ram, who had expired in the year 1946."

5. According to the averments made in the application, he could not plead the aforementioned facts despite exercise of due diligence and though the petitioner had made efforts to explain the entire facts to the counsel, however, due to lack of communication, applicant failed to express the above said facts in a chronological order. Amendment was explanatory in nature and same was not likely to change the nature of the suit. No prejudice would be caused to the opposite party.

6. Application was contested by the respondents. It is averred that the petitioner by way of amendment in plaint was trying to wriggle out of the admissions made before the trial Court. Stand taken by the petitioner earlier was that Phoola Devi, mother of the petitioner was the first wife of Jash Ram. He never pleaded that she was firstly married to Chet Ram where she begot six children from the loins of Chet Ram. Thereafter, she contracted second marriage with Jash Ram and after living with Jash Ram, she left Jash Ram and Jash Ram contracted second marriage with Smt. Dwarki Devi. Phoola Devi was proved to be the mother of the petitioner. Thus, the amendment can not be allowed. Application has been filed by the petitioner after suit has been dismissed by the learned trial Court by holding that petitioner was proved to be son of Chet Ram, to whom Phoola Devi was married. Amendment would change the nature of the suit resulting into de novo trial. Learned District Judge dismissed the application vide a detailed order dated 21.8.2015. Hence, this petition.

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

8. Suit bearing No. 48-K/2003 was instituted by the petitioner stating therein that he was son of Jash Ram as Phoola Devi was firstly married to Jash Ram and thereafter Jash Ram married Dwarki Devi. Respondent No.2 Liaq Ram was born from the womb of Dwarki Devi. After some time, Phoola Devi could not pull along her marriage and left Jash Ram. She started living separately in village Shilli. Learned trial Court has given findings that Phoola Devi was married to Chet Ram and petitioner was born to Phoola Devi from the loins of Chet Ram. Petitioner has failed to prove that Jash Ram ever married his mother Phoola Devi. It is reiterated that, in fact, Phoola Devi was the wife of Chet Ram. Petitioner can not be permitted to incorporate new facts. Plaintiff while appearing as PW-1, in the cross-examination, has admitted categorically that his mother was married to Chet Ram. Shobha Ram, PW-2 has deposed that Phoola Devi was married to Chet Ram. Suit was instituted on 8.8.2003. Application has been filed merely to prolong the litigation and also to wriggle out of the admissions made by the plaintiff as a witness in the cross-examination. Amendment sought for would completely change the nature and cause of action, which would seriously prejudice the rights which have already accrued in favour of the respondents. Character of the suit can not be permitted to be altered. Amendment of suit at this belated stage would definitely amount to de novo trial.

9. Accordingly, there is no illegality or perversity in the order passed by the Court below.

10. There is no merit in the present petition and the same is dismissed, so also the pending applications, if any.

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

The Chairman-cum-Managing Director and another. .....Petitioners.

Versus

Sh. Anoop Kumar and another. .....Respondents.

CMPMO No. 77 of 2015
Date of decision: 25th May, 2016

Code of Civil Procedure, 1908- Order 21- DH was deployed through a contractor- wages were not paid to him on which a reference was made to Labour Court who passed the award for Rs. 5,08,501/- a writ petition was preferred against the award which was dismissed- LPA was preferred but stay was not granted- objection was preferred that the award is not executable in view of the pendency of the appeal- held, that mere pendency of an appeal does not have the effect of automatic stay of execution proceedings – it is not necessary to frame issue whenever the objections are filed- objections were rightly dismissed by the court- petition dismissed.

(Para- 2 to 4)

For the petitioners: Mr. Bhuvnesh Sharma and Mr. Ramakant Sharma, Advocates.

For the respondents: Mr. Desh Raj Thakur, Advocate for respondent No. 1.
Mr. Vinod Chauhan, Advocate for respondent No. 2.

The following judgment of the Court was delivered:

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

Challenge herein is to an order passed by learned Civil Judge (Senior Division) Court No.-I, Paonta Sahib, District Sirmaur, H.P., whereby the objections preferred by the petitioners herein in execution proceedings initiated on an application under Section 11(10) of the Industrial Disputes Act, 1947 registered as Execution Petition No. 33-WC/10 of 2013/14 have been dismissed and on the request of learned counsel representing the petitioners-JDs, the application was adjourned to 24.02.2015 for appearance of the JDs so that the amount due and payable under the decree sought to be executed could be released in favour of respondent No.1-workman.

2. The decree holder is respondent No. 1 Anoop Kumar in this petition. He was deployed by the petitioner-establishment through a Contractor. When the payment of his wages was not made despite, he having raised demand repeatedly, the dispute was referred to the Presiding Officer, Central Government Tribunal-cum-Labour Court-1, Chandigarh. The same was registered as LCA No. 4/2010. Learned Industrial Tribunal-cum-Labour Court below after holding full trial has passed the award, Annexure P-2 to this petition. Respondent No. 1 establishment was held entitled to pay a sum of Rs.5,08,501/- on account of difference of wages and the reference was answered accordingly. The petitioner-establishment has preferred Civil Writ Petition No. 7430/2010 in this Court against the award, Annexure P-2. The writ petition was dismissed long back by a detailed and reasoned judgment, Annexure P-4. The matter, no doubt is pending in the Letters Patent Appeal in this Court, however, admittedly the execution of the award, Annexure P-2 has not been stayed in the appeal.

3. Learned counsel has canvassed that in view of the pendency of the appeal, award Annexure P-2 cannot be executed. Also that the objections the petitioner-establishment preferred in the execution proceedings have been dismissed summarily without framing issues and taking on record the evidence.

4. Both points as urged on behalf of the petitioner-establishment are not tenable for the reason that mere pendency of an appeal against an order or judgment not amounts to staying of execution proceedings automatically. Otherwise also, the execution of the order or judgment

under challenge in an appeal, the decretal amount can be ordered to be paid to the claimant-decree holder on furnishing of security including bank guarantee, in order to ensure the recovery thereof, in case the judgment debtor ultimately succeeds in the appeal. I find no force in the second limb of argument also, for the reason that it is always not necessary to frame issues in a matter of this nature, that too, when the award, Annexure P-2 is specific qua the entitlement of the respondent-workman to receive the difference of wages and the same has even been affirmed by a Co-ordinate Bench of this Court vide judgment Annexure P-4. The objections to the execution of award, Annexure P-2 is only that Letters Patent Appeal is still pending disposal in this Court and also that the petitioner-Company is a sick industry and not in a position to make the payment of decretal amount. No issue was required to be framed in view of the observations hereinabove and also that a sick industry if paying the salary to the Chairman-cum-Managing Director or General Manager and other staff, can also make the payment of the amount due and admissible to a poor workman. Learned trial Court, therefore, has not committed any illegality or irregularity in dismissing the objections preferred by the petitioner-establishment.

5. The petition, therefore, being devoid of any merits is dismissed. Pending application(s), if any, shall also stand disposed of.

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

Bihari Lal ..... Petitioner.
Versus
Dina Nath ..... Respondent.

Civil Revision No.17 of 2006.
Date of decision: 26th May, 2016.

Specific Relief Act, 1963- Section 6- Plaintiff filed a suit for possession on the ground that he was forcibly dispossessed by the defendant- the suit was dismissed by the Trial Court- held in revision, plaintiff had not only sought the possession but had also sought the injunction - suit was not tried summarily– the judgment and decree cannot be agitated by invoking the revisional jurisdiction of the High Court- petition dismissed. (Para 9-11)

For the petitioner: Mr. G.R. Palsra, Advocate.
For the respondent: Mr. Mohan Singh, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J (Oral).

Challenge herein is to the judgment and decree dated 29.9.2005, passed by learned Civil Judge (Junior Division), Court No.II, Mandi, in Civil Suit No.252 of 1999, whereby the suit for vacant possession of the land entered in Khewat No.342 min, Khatauni No.504, Khasra No.873, measuring 0-0-18 bighas and Khewat No.152, Khatauni No.219, Khasra No.872/1, measuring 0-1-0 bigha, situate in village Nagchala, Illaqua Balh, Tehsil Sadar, District Mandi, HP, with consequential relief of permanent prohibitory injunction has been dismissed.

2. Admittedly, the petitioner herein (plaintiff in the trial Court) has no title in the suit land. He filed the suit for possession of the suit land under Section 6 of the Specific Relief Act, 1963, hereinafter referred to as 'the Act', on the grounds that he was in possession of the suit land and it is on 8.11.1998 he was forcibly dispossessed by the respondent (defendant in the trial Court). The cowshed in existence was demolished, grass destroyed and the trees standing over the suit land were cut and the timber removed.

3. In the written statement it has been pleaded that neither the plaintiff is in possession of the suit land nor having his cowshed over Khasra No.873 as alleged. There is no question of his using land bearing Khasra No.872/1 as kitchen garden or place for storage of grass, cow-dung, timber etc. He never remained in possession of the suit land nor have any right, title or interest over the same. It is rather the defendant, who is owner-in-possession of the suit land. It is denied that the plaintiff was in exclusive possession of the suit land since 1960. The plaintiff has concealed these facts from the Court as according to the defendant, the suit land bearing Khasra No.873 in the revenue record has been shown in the possession of one Lachhu, who has abandoned the same long ago and settled at some other place. Now Khasra No.873 is in exclusive possession of one Hem Chand son of Harnam Dass of village Nagchala. The suit, therefore, has been stated to be bad for non-joinder of necessary parties also. Replication was also filed.

4. Learned trial Court has framed the following issues:

1) Whether the plaintiff is entitled to recover the vacant possession of the suit land alongwith relief of permanent prohibitory injunction as alleged? OPP.
2) Whether the suit of the plaintiff is not maintainable in the present form? OPD.
3) Whether the suit is bad for non-joinder of necessary parties? OPD.
4) Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
5) Whether the plaintiff has no enforceable cause of action to file the present suit? OPD.
6) Relief.

5. On appreciation of the evidence, learned trial Court has concluded that on 8.11.1998 the plaintiff was not in possession of the suit land and has dismissed the suit.

6. The judgment and decree passed by learned trial Court has been assailed in this Court in the present petition on several grounds, however, mainly that the evidence available on record has not been appreciated in its right perspective and to the contrary the suit dismissed on surmises and conjectures.

7. Mr. Palsra, learned Counsel representing the petitioner-plaintiff while admitting that the petitioner has no title in the suit land, has strenuously contended that he was in possession of the suit land and his possession should have been protected by learned trial Court by decreeing the suit.

8. Mr. Mohan Singh, learned Counsel representing the respondent-defendant has raised the question of maintainability of the petition, as according to him, the present is not a suit strictly in terms of Section 6 of the Act and as decree for permanent prohibitory injunction under Section 38 of the Act has also been sought, therefore, the petition is not maintainable.

9. On analyzing the rival submissions and also the evidence available on record, the suit cannot be treated to be one under Section 6 of the Act for the reason that a decree for permanent prohibitory injunction has also been sought under Section 38 of the Act. Learned trial Court has also not treated the suit to be the one under Section 6 of the Act, as it is for this reason it has not been decided either within six months from the date of its institution or summarily as contemplated under Section 6 of the Act. On the other hand, on the basis of the pleadings of the parties, the issues were framed and the decree passed after holding full trial. Had it been a suit filed strictly under Section 6 of the Act, the trial Court should have been apprised accordingly and the same sought to be tried summarily. The record reveals that such procedure was never sought to be resorted to. The law on the point is no more *res-integra*, as the Apex Court in ***Sanjay Kumar Pandey and others*** v. ***Gulbahar Sheikh and others, (204) 4 SCC 664,*** has held that a suit under Section 6 of the Act is required to be tried summarily and the findings confined only to the possession and dispossession of the plaintiff within a period of six months from the date of institution of the suit ignoring the question of title. It has further been held in this judgment that

no appeal is maintainable against the decree passed in a suit under Section 6 of the Act. No review of the order or decree is also permissible. The only remedy available to unsuccessful person is to file a regular suit establishing his title to the suit property and recovery of possession thereof. The remedy of filing a revision though is available, however, that too only by way of an exception. This judgment reads as follows:

> "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 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 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."

10. The High Court of Andhra Pradesh while placing reliance on the judgment of the Apex Court referred to hereinabove has went one step further in ***Adapa Tatarao*** v. ***Chamantula Mahalakshmi, AIR 2007 AP 44***, while holding that in a suit under Section 6 of the Act the relief of perpetual injunction under Section 6 cannot be included. This judgment also reads as follows:

> "11. In a suit filed under Section 6 of the Act, the occasion for the trial Court to address itself to the question of title or other entitlement of the plaintiff does not arise. The only question assumes significance in such a suit is, as to whether the plaintiff was dispossessed from the suit schedule property, otherwise than through the procedure prescribed by law, and whether the suit was filed within six months from the date of such dispossession.
>
> 12. The proceedings in such suits are, almost summary in nature. However, the trial Court did not address itself to this basic requirement. Both the issues, framed by it, are totally unrelated to an adjudication, to be undertaken in a suit, filed under Section 6 of the Act.
>
> 13. Another serious infirmity in the proceedings is, that the respondent incorporated the relief of perpetual injunction in respect of another item, filed under Section 6 of the Act. This is totally impermissible. The parameters for adjudication of claim under Section 6, on the one hand, and the one, for perpetual injunction, under Section 38, on the other hand, of the Act, are totally different. In the case of the former, the trial is summary in nature. The decree passed in such proceedings is not appealable. In contrast, a detailed trial has to be conducted in a suit for perpetual injunctions. An appeal under Section 96 and second appeal under Section 100 is provided against the decree passed in such suits. It is impossible and impermissible to mix up such divergent types of adjudication. Therefore, the judgment and decree passed by the trial Court need to be set aside, and the matter needs to be adjudicated on proper lines, afresh."

11. In view of the legal as well as the factual position discussed hereinabove, the judgment and decree could have not been agitated by invoking revisional jurisdiction of this Court. On dismissal of the suit the remedy, if any, available to the plaintiff, in accordance with law, should have been resorted to. This petition, therefore, is not maintainable and the same is

accordingly dismissed. The petitioner, if so advise, may resort to the remedy available to him in accordance with law.

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

Smt. Ganpatu & Others. ...Petitioners

Versus

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

CMPMO No. 109 of 2015
Date of decision: 26.5.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 & 2- Plaintiffs sought interim injunction for restraining the respondents from transferring, encumbering, damaging or dispossessing the plaintiff from the suit land- it was pleaded that predecessor-in-interest of the plaintiffs was priest and suit land was given to him by Raja Dalip Singh - suit land was declared surplus by defendant no. 1 and the defendants no. 2 to 6 started interfering with the possession of the plaintiffs- State filed a reply pleading that suit land had vested in the State of H.P. as per provisions of the Ceiling Act - the application for interim relief was dismissed by the Trial court - an appeal was preferred which was also dismissed - held, that plaintiffs had based their case on oral transfer- revenue record does not support the case of the plaintiff - whether Raja was competent to gift the land or not is a matter of evidence- plaintiffs failed to prove their prima facie possession- the State had proposed construction of Divisional and Sub-Divisional offices, which are in public interest- the injunction cannot be granted in such situation as the right of individual is subservient to the right of public at large- the injunction was rightly declined - appeal dismissed. (Para-14 to 20)

Constitution of India, **1950**- Article 227- High Court can exercise jurisdiction under article 227 when the order passed by the court is vitiated by an error, which is manifest and apparent on the face of the proceedings - the power must be exercised sparingly to keep the subordinate courts and tribunal within the bounds of their authority-power is not available to correct mere errors of facts or laws nor is it a cloak of an appeal in disguise. (Para-5 to 13)

Cases referred:

Waryam Singh and another vs. Amarnath and another, AIR 1954 SC 45
Bathutmal Raichand Oswal vs. Laxmibai R. Tarta, AIR 1975 SC 1297
Laxmikant Revchand Bhojwani and another vs. Pratapsing Mohansing Pardeshi Deceased through his heirs and legal representatives, JT 1995 (7) SCC 400
State of Maharashtra vs. Milind & Others, 2001 (1) SCC 4
State vs. Navjot Sandhu (2003) 6 SCC 641,
Mohammed Yusuf vs. Faij Mohammad and others, 2009 (1) Scale 71
State of West Bengal and others vs. Samar Kumar Sarkar, JT 2009 (11) SC 258
Jai Singh and others vs. Municipal Corporation of Delhi and others (2010) 9 SCC 385,
M.Gurudas and others versus Rasaranjan and others (2006) 8 SCC 367
Mahadeo Savlaram Shelke and others versus Pune Municipal Corporation and another 1995 (1) Scale 158: (1995) 3 SCC 33,

For the Petitioners: Ms. Seema Guleria, Advocate.

For the Respondents: Ms.Meenakshi Sharma, Additional Advocate General with Mr.J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

This petition under Article 227 of the Constitution of India is directed against the order passed by learned Additional District Judge, Shimla on 1.12.2014, whereby he affirmed the order passed by learned Civil Judge (Junior Division), Court No. 6, Shimla on 18.1.2014, thereby, declining the prayer for injunction as sought for by the petitioners.

The facts leading to the filing of this petition may be stated thus:-

2. The plaintiffs/petitioners filed a suit for declaration and permanent prohibitory injunction and along with the same also filed a separate application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure for restraining the respondents/defendants from transferring, encumbering, damaging or dispossessing the petitioners from the land comprised in Khewat No. 81/77, Khatauni No. 159 old, Khasra No. 1271/38, new Khasra No. 329, measuring 1 bigha 10 biswas, 1272/38, measuring 11 bighas 3 biswas and 1278/44, measuring 17 biswas, new Khasra No 329, situated at Mauza Bajhair (Sheel), Pargana Dhamehr, Tehsil and District Shimla, H.P. (herein after referred to as the suit land). It was averred that the suit land was owned by the erstwhile ruler of Dhami Estate Raja Dalip Singh, son of Shri Hira Singh. The predecessor-in-interest of the petitioners Sh. Anant Ram was a priest, performing pooja of Deo Kurgan and late Raja Dalip Singh out of gratitude and in lieu of the services of pooja gave the suit land to Sh. Anant Ram in the year 1952. Sh. Anant Ram was put in possession thereof and was assured by late Raja that the entry qua the same would be incorporated in the revenue records. It was averred that the possession of predecessor-in-interest and thereafter the petitioners is continuing since 1952 without any interference, let or hindrance. It was further averred that in the year 1995 Sh. Anant Ram came to know that the suit land under the H.P. Ceiling on Land Holding Act, 1972 (hereinafter referred to as the "Act" in short) has been declared surplus by defendant No. 1 after litigating with the proforma defendants. It was also averred that the petitioners were not aware of this litigation and came to know about the same on filing of the application for correction of the revenue entries by invoking Sections 37 and 38 of the H.P. Land Revenue Act, which was registered as case No. 21/95-96. The successors of late Raja Dalip Singh have admitted the oral transfer by their predecessor-in-interest in favour of Sh. Anant Ram and have also admitted the possession of Sh.Anant Ram over the suit land since 1952, but despite this admission, the case is still pending. The petitioners further alleged that in the month of December, 2013, respondents No. 2 to 6 started interfering in the suit land and uprooted the trees planted by their predecessor-in-interest and despite repeated requests were still interfering in the suit land, constraining the petitioners to file the instant suit.

3. The respondents contested the application by filing reply, wherein it was stated that the petitioners were neither the owners nor were in possession of the suit land. It was further averred that the suit land had been vested in the State of H.P. as per the provisions of the Ceiling Act on 19.5.1990 and the same was supported by the revenue record.

4. Learned trial Court on the basis of the pleadings and material placed on record dismissed the application and appeal preferred against this order also came to be dismissed by the learned lower appellate Court. Aggrieved by the orders passed concurrently by the learned Courts below, the petitioners have filed the instant petition on the ground that the findings recorded by the learned Courts below are totally perverse and therefore, deserve to be set aside.

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

5. The first and foremost question that arises for consideration is as to what is precisely the scope of judicial intervention in such like matters. It is well settled that the High Court can exercise jurisdiction under Article 227 when the orders passed by the learned Court below is vitiated by an error, which is manifest and apparent on the face of the proceedings, i.e.

when it is based on clear ignorance or utter disregard of the proposition of law and a grave injustice or gross failure of justice has occasioned thereby. The supervisory jurisdiction is wide and used to improve the ends of justice. The power must however be exercised sparingly only to keep the subordinate courts and tribunals within the bounds of their authority. Power is neither available to be exercised to correct mere errors (whether on the facts or laws), nor is it a cloak of an appeal in disguise. The supervisory powers of revision under Article 227 cast an obligation on the High Court to keep the inferior courts and tribunals within their bounds and erroneous decision may not be accorded for exercise of jurisdiction under Article 227 of the Constitution of India, unless the error is referable to the Court or there is dereliction of duty or flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party, therefore, the scope of interference in proceedings under Article 227 of the Constitution is limited and the power conferred thereunder has to be exercised within certain parameters.

6. In ***Waryam Singh and another*** vs. ***Amarnath and another, AIR 1954 SC 45,*** the Hon'ble Supreme Court observed:

> *"This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in "Dalmia Jain Airways Ltd. vs. Sukumar Mukherjee", AIR 1951 CAL 193 (SB) 1 (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."*

7. In ***Bathutmal Raichand Oswal*** vs. ***Laxmibai R. Tarta, AIR 1975 SC 1297,*** the Hon'ble Supreme Court again reaffirmed that the power of superintendence of the High Court under Article 227 being extraordinary was to be exercised most sparingly and only in appropriate cases. The Hon'ble Supreme Court speaking through Bhagwati J. as his Lordship then was observed thus:

> *"If an error of fact, even though apparent on the face of the record, cannot be corrected by means of a writ of certiorari it should follow a fortiori that it is not subject to correction by the High Court in the exercise of its jurisdiction under Article 227. The power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior Court can do in exercise of its statutory power as a Court of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the legislature has not conferred a right of appeal and made the decision of the subordinate Court or tribunal final on facts".*

The Hon'ble Supreme Court in the case of ***Bathutmal*** (supra) approved the dictum of Morris L. J. in Res v. Northumberland Compensation Appellate Tribunal, 1952 All England Reports 122.

8. In ***Laxmikant Revchand Bhojwani and another*** vs. ***Pratapsing Mohansing Pardeshi Deceased through his heirs and legal representatives, JT 1995 (7) SCC 400,*** the Hon'ble Supreme Court observed:

> *"The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes."*

9. In ***State of Maharashtra*** vs***. Milind & Others, 2001 (1) SCC 4,*** the Hon'ble Supreme Court observed:

> *"The power of the High Court under Article 227 of the Constitution of India, while exercising the power of judicial review against an order of inferior tribunal being supervisory and not appellate, the High Court would be justified in interfering with the conclusion of the tribunal, only when it records a finding that the inferior tribunal's conclusion is based upon exclusion of some admissible evidence or*

consideration of some inadmissible evidence or the inferior tribunal has no jurisdiction at all or that the finding is such, which no reasonable man could arrive at, on the materials on record."

10. Again in ***State*** vs**. *Navjot Sandhu (2003) 6 SCC 641,*** the Hon'ble Supreme Court observed as under:

"Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However, the power under Article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate Courts and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised as the cloak of an appeal in disguise."

11. In ***Mohammed Yusuf*** vs. ***Faij Mohammad and others, 2009 (1) Scale 71,*** the Hon'ble Supreme Court held as under:

"The jurisdiction of the High Court under Article 226 & 227 of the Constitution is limited. It could have set aside the orders passed by the learned trial Court and revisional Court only on limited ground, namely, illegality, irrationality and procedural impropriety".[

12. In ***State of West Bengal and others vs. Samar Kumar Sarkar, JT 2009 (11) SC 258***, the Hon'ble Supreme Court held as under:

"10. Under Article 227, the High Court has been given power of superintendence both in judicial as well as administrative matters over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. It is in order to indicate the plentitude of the power conferred upon the High Court with respect to Courts and the Tribunals of every kind that the Constitution conferred the power of superintendence on the High Court. The power of superintendence conferred upon the High Court is not as extensive as the power conferred upon it by Article 226 of the Constitution. Thus, ordinarily it will be open to the High Court, in exercise of the power of superintendence only to consider whether there is error of jurisdiction in the decision of the Court or the Tribunal subject to its superintendence."

13. In ***Jai Singh and others*** vs. ***Municipal Corporation of Delhi and others (2010) 9 SCC 385***, the Hon'ble Supreme Court in paras 15, 16 and 42 of the judgment held as under:

"15. *We have anxiously considered the submissions of the learned counsel. Before we consider the factual and legal issues involved herein, we may notice certain well recognized principles governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi judicial tribunals, exercise the powers vested in them, within*

the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints. It can not be exercised like a `bull in a china shop', to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.

16. The High Court cannot lightly or liberally act as an appellate court and re-appreciate the evidence. Generally, it can not substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi judicial tribunals. The power to re-appreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice.

42. Undoubtedly, the High Court has the power to reach injustice whenever, wherever found. The scope and ambit of Article 227 of the Constitution of India had been discussed in the case of The Estralla Rubber Vs. Dass Estate (P) Ltd., [(2001) 8 SCC 97] wherein it was observed as follows:

> *"The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."*

14. Bearing in mind the aforesaid principles, it would be noticed that the entire case of the petitioners is set up on the plea of so called oral transfer. Now the question whether the land was in fact given by late Raja Dalip Singh to Sh. Anant Ram and whether he was even competent to do so is matter of evidence. Even the revenue record does not support the claim of the petitioners, because as per the pleaded case of the petitioners, even the mutation of the land had not been carried out in the revenue record.

15. The factors required to be borne in mind while granting or refusing injunction have been succinctly dealt with by the Hon'ble Supreme Court in ***M.Gurudas and others*** *versus* ***Rasaranjan and others (2006) 8 SCC 367*** in the following manner:-

> *"18.While considering an application for injunction, it is well- settled, the courts would pass an order thereupon having regard to:*
>
> *(i) Prima facie case*
>
> *(ii) Balance of convenience*
>
> *(iii) Irreparable injury.*
>
> *19. A finding on 'prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhawan that the decision of House of Lords in American Cyanamid v. Ethicon Ltd. (1975) 1 All ER 504 would have no application in a case of this nature as was opined by this Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.(1999) 7 SCC 1 and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, but we are not persuaded to delve thereinto.*
>
> *20. We may only notice that the decisions of this Court in Colgate Palmolive (supra) and S.M. Dyechem Ltd (supra) relate to intellectual property rights. The question, however, has been taken into consideration by a Bench of this Court in Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd. (2006) 1 SCC 540 stating: (SCC pp. 552-53, paras 36-40)*
>
> *"36.The Respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in American Cyanamid Co. v. Ethicon Ltd.(1975)1 All ER 504 holding: (All ER p.510 c-d)*
>
> *'Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expression as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.'*
>
> *It was further observed (All ER pp.511 b-c & 511j)*
>
> *'Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.*
>
> ** * **
>
> *The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople*

would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable surgical sutures and adopted an aggressive sales policy.'

37.We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The Chancery Division in Series 5 Software v. Clarke (1996) 1 All ER 853] opined: (All ER p.864 c-e)

'In many cases before American Cyanamid the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.'

38. In Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. (1999) 7 SCC 1, this Court observed that Laddie, J. in Series 5 Software (supra) had been able to resolve the issue without any departure from the true perspective of the judgment in American Cyanamid. In that case, however, this Court was considering a matter under Monopolies and Restrictive Trade Practices Act, 1969.

39.In S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject matter of consideration for the purpose of grant of injunction in trade mark matters stating : (SCC p.591, para 21)

'21.....Therefore, in trademark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly.'

40.The said decisions were noticed yet again in a case involving infringement of trade mark in Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.(2001) 5 SCC 73."

21. While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue.(See Dorab Cawasji Warden v. Coomi Sorab Warden and Others , (1990) 2 SCC 117, Dalpat Kumar v. Prahlad Singh(1992) 1 SCC 719, United Commercial Bank v. Bank of India (1981) 2 SCC 766, Gujarat Bottling Co. Ltd. v. Coca Cola Co. (1995) 5 SCC 545, Bina Murlidhar Hemdev v. Kanhaiyalal Lokram Hemdev (1999) 5 SCC 222 and Transmission Corpn. of A.P. Ltd (supra)."

16. Adverting to the facts of this case, it would be noticed that the petitioners have failed to prove a prima facie case of their being in possession of the suit land, even the balance of

convenience is not in their favour and therefore, there is no question of irreparable loss and injury being caused to the petitioners.

17. Apart from the above, it would be noticed that during the pendency of this petition, the respondents had filed CMP No. 1276 of 2016 for early hearing of the case, wherein it was pleaded that the respondents have proposed construction of divisional and sub-divisional offices and combined office building of various departments over the suit land, for which the tendering process is already completed and the work was likely to be awarded, but had been kept in abeyance due to interim orders passed by this Court on 8.4.2015. Thus, it stands established on record that the work sought to be carried out by the respondents over this land is of larger public interest.

18. At this stage, it would be necessary to advert to the order passed on 1.4.2016, relevant portion whereof reads thus:-

> *".....It is further contended that construction of a Project for which Rs.8,00,00,000/-(eight crores) stands sanctioned is being delayed only on account of non service of respondents No.7, 8 and 10. Also, public interest is suffering....."*

19. Once, it is established on record that the building proposed to be constructed over the land is meant for larger public interest, it is more than settled that in such circumstances, injunction otherwise cannot normally be granted as the right of an individual is subservient to the rights of public at large. Public interest is one of the material and relevant considerations in either exercising or refusing to grant injunction. The Courts in the cases where injunctions are to be granted should necessarily consider the effect on public purpose thereof and, therefore, also suitably mould the relief and injunctions as against public purpose, especially, in cases relating to public purpose like construction or widening of the road should normally not be granted.

20. In ***Mahadeo Savlaram Shelke and others*** *versus* ***Pune Municipal Corporation and another 1995 (1) Scale 158: (1995) 3 SCC 33***, the Hon'ble Supreme Court held as under:-

> *"7. In Shiv Kumar Chadha v. Municipal Corporation of Delhi (1993) 3 SCC 161, a Bench of three Judges of this Court held that(SCC p. 175, paras 30, 31)*
>
> > *".....A party is not entitled to an order of injunction as a matter of course. Grant of injunction c is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The court grants such relief according to the legal principles-ex debito justitiae. Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him."*
>
> *Further*
>
> > *"The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court."*
>
> *8. In Dalpat Kumar v. Prahlad Singh(1992) 1 SCC 719, a Bench of two Judges (in which K. Ramaswamy, J. was a Member) of this Court held that the phrases*

"prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The Court further held: (SCC p.721, para 5)

> *"The existence of prima facie right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."*

9. It is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession. It is true that the appellants placed reliance in their plaint on resolutions passed by the municipality on 11-11-72 and 29-11-72. A reading of those resolutions would prima facie show that possession would be taken where the acquisition proceedings have become final and land acquisition proceedings would not he pursued where award has not been made as on the date of the resolutions. In this case since the acquisition proceedings have become final, then necessarily possession has to be taken by the Corporation for the public purpose for which the acquisition was made. In that context the question arises whether the appellants can seek reliance on two resolutions. They furnish no prima facie right or title to the appellants to have perpetual injunction restraining the Corporation from taking possession of the building. The orders of eviction were passed by due process of law and had become final. Thereafter no right was created in favour of the appellants to remain in possession. Their possession in unlawful and that therefore, they cannot seek any injunction against the rightful owner for evicting them. There is thus neither balance of convenience nor irreparable injury would be caused to the appellants.

10. In Woodroffe's Law Relating to Injunctions, 2nd revised and enlarged Edn., 1992, at page 56 in para 30.01, it is staled that

> *"an injunction will only be granted to prevent the breach of an obligation (that is a duty enforceable by law) existing in favour of the applicant who*

must have a personal interest in the matter. In the first place, therefore, an interference by injunction is founded on the existence of a legal right, an applicant must be able to show a fair prima fade case in support of the title which he asserts".

At page 80 in para 33.02, it is further stated that

"if the court be of opinion that looking to these principles the case is not one for which an injunction is a fitting remedy, it has a discretion to grant damages in lieu of an injunction. The grounds upon which this discretion to grant damages in lieu of an injunction should be exercised, have been subject of discussion in several reported Indian cases".

At page 83, is stated that "the court has jurisdiction to grant an injunction in those cases where pecuniary compensation would not afford adequate relief. The expression "adequate relief is not defined, but it is probably used to mean - such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before. The determination of the question whether relief by injunction or by damages shall be granted depends upon the circumstances of each case.

11. In Law of Injunctions by L.C. Goyle, at page 64, it is stated that

"an application for temporary injunction is in the nature of a quia timet action. Plaintiff must, therefore, prove that there is an imminent danger of a substantial kind or that the apprehended injury, if it does come, will be irreparable. The word "imminent" is used in the sense that the circumstances are such that the remedy sought is not premature. The degree of probability of future injury is not an absolute standard : what is aimed at is justice between the parties, having regard to all the relevant circumstances".

At page 116, it is also stated that

"in a suit for perpetual or mandatory injunction, in addition to, or in substitution for, the plaintiff can claim damages. The court will award such damages if it thinks fit to do so. But no relief for damages will be granted, if the plaintiff has not claimed such relief in the suit."

12. In Modern Law Review, Vol. 44, 1981 Edition, at page 214, R.A. Buckley stated that "a plaintiff may still be deprived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant. It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to substantiate a claim for equitable relief could be awarded damages". In The Law Quarterly Review" Vol 109, at page 432 (at p. 446), A.A.S. Zuckerman under Title "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies stated that

"if the plaintiff is likely of suffer irreparable or uncompensable damage, no interlocutory injunction will be granted, then, provided that the plaintiff would be able to compensate the defendant _for any unwarranted restraint on the defendant's right pending trial, the balance would tilt in favour of restraining the defendant pending trial. Where both sides are exposed to irreparable injury ending trial, the courts have to strike a just balance".

At page 447, it is stated that

“the court considering an application for an interlocutory injunction has four factors to consider : first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm

outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation".

13. In Injunctions by David Bean, 1st Edn., at page 22, it is stated that

"if the plaintiff obtains an interlocutory injunction, but subsequently the case goes to trial and he fails to obtain a perpetual order, the defendant will meanwhile have been restrained unjustly and will be entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where interlocutory injunction is to be granted, of requiring the plaintiff to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial. The undertaking may be required of the plaintiff in appropriate cases in that behalf."

In "Joyce on Injunctions" Vol. 1 in paragraph 177 at page 293, it is stated

"Upon a final judgment dissolving an injunction, a right of action upon the injunction bond immediately follows, unless the judgment is superseded. A right to damages on dissolution of the injunction would arise at the determination of the suit at law."

14. It would thus be clear that in a suit for perpetual injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong prima facie case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant ad interim injunction. While exercising the discretionary power, the court should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in p favour of the plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction has also jurisdiction and power to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction restraining the defendant to proceed with the execution of the work etc., which is retrained by an order of injunction made by the court. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The pecuniary jurisdiction of the court of first instance should not impede nor be a bar to award damages beyond it pecuniary jurisdiction. In this behalf, the grant or refusal of damages is not founded upon the original cause of action but the consequences of the adjudication by the conduct of the parties, the court gets inherent jurisdiction in doing ex debito justitiae mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit It is common knowledge that injunction is invariably sought for in laying the suit in a court of lowest pecuniary jurisdiction even when the claims are much larger than the pecuniary jurisdiction of the court of first instance, may be, for diverse reasons. Therefore, the pecuniary jurisdiction is not and should not stand an impediment for

the court of first instance in determining damages as the part of the adjudication and pass a decree in that behalf without relegating the parties to a further suit for damages. This procedure would act as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of court at the behest of the plaintiff.

15. Public purpose of removing traffic congestion was sought to be served by acquiring the building for widening the road. By orders of injunction, for 24 years the public purpose, was delayed. As a consequence execution of the project has been delayed and the costs now stand mounted. The courts in the cases where injunction are to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief. In the event the plaintiffs losing ultimately the suit, they should necessarily bear the consequences, namely, escalation of the cost or the damages the Corporation suffered on account of injunction issued by the courts. Appellate court had not adverted to any of the material aspects of the matter. Therefore, the High Court has rightly, though for different reasons, dissolved the order of ad interim injunction. Under these circumstances, in the event of the suit to be dismissed while disposing of the suit the trial court is directed to assess the damages and pass a decree for recovering the same at pro rata against the appellants."

21. The petitioners having failed to carve out a prima facie case in their favour and have therefore, rightly been declined the relief of injunction by the learned Courts below. The findings recorded by the learned Courts below do not suffer from any irregularity, illegality, impropriety, much less perversity, so as to call for interference by this Court in exercise of its jurisdiction under Article 227 of the Constitution of India.

In consequenti, there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bearing their costs. Pending applications, if any, also stands disposed of.

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

Pritam Singh ...Petitioner.

Versus

NHPC & Anr. ...Respondents.

CWP No.1129 of 2011.
Reserved on: 08.04.2016.
Date of Decision : 26th May, 2016.

Constitution of India, 1950- Article 226- Petitioner was arrested by the police for the commission of offences punishable under Sections 302, 382 read with Section 34 of I.P.C.- he was released on bail- he was subsequently convicted and sentenced to imprisonment for a period of three years- he preferred an appeal, which was accepted – he was reinstated by the respondents after acquittal- his period of absence was regularized by granting him leave of kind due- held, that Rule 26.1 providing for the payment of full pay will be applicable when an employee is exonerated and not when he remained imprisoned and was acquitted by the Court- writ petition dismissed. (Para-3 to 7)

For the Petitioner: Mr.N.S.Chandel, Advocate.
For the Respondents: Mr.Vijay Arora, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

During his availing casual leave, the petitioner was arrested by the police for his committing an offence punishable under Section 302, 382 read with Section 34 IPC. However, on 20.12.1999, the petitioner was afforded the facility of bail by the learned Additional Sessions Judge (II), Kangra at Dharamshala. The learned Additional Sessions Judge rendered findings of conviction against the petitioner for his committing an offence under Section 304-II read with Section 34 IPC besides imposed upon him sentence of imprisonment of three years.

2. The petitioner standing aggrieved by the rendition of the learned Additional Sessions Judge, Kangra at Dharamshala preferred an appeal therefrom before the High Court, appeal whereof of the petitioner assailing the rendition of the learned Additional Sessions Judge stood accepted by this Court. Also obviously, the petitioner stood acquitted of the charge for which he faced trial before the learned Additional Sessions Judge. On 31.01.2009 the petitioner was reinstated by the respondents. The respondents on being beset with the representations of the petitioner rendered an order comprised in Annexure P-3 whereby they ordered for regularization of the period of absence from the duty of the petitioner by granting to him leave of kind due.

3. Tritely, the petitioner stands aggrieved by the incorporation in Annexure P-3 of his period of absence being ordered to be regularized by his standing granted leave of kind due. The short submission of the learned counsel for the petitioner in assailing the afore-stated portion occurring in Annexure P-3 flows from the employer/respondent imputing a fallible interpretation to Rules 26.1 and 26.2 of the NHPC Conduct Discipline & Appeal Rules (herein-after for short referred to as 'NHPC Rules') which flawed interpretation rendered qua them by the employer upsurges from a mis-reckoning by the employer of the factum of given his reinstatement in service on his standing acquitted by this Court of the charges whereupon findings of conviction stood rendered against him under Section 304-II IPC by the learned trial Court, he stood entitled to the statutorily accrued full pay and allowances even for the period he remained under suspension. Since the petitioner remained off work since 13.5.1998 till 20.12.1999 given his standing subjected to judicial custody thereat, the learned counsel for the petitioner makes an espousal of the said period when he remained in judicial custody being amenable to a construction synonymous to his facing suspension or the period aforesaid ipso facto bearing a parlance akin to his standing beset with an order of suspension effect whereof when stood effaced by his standing acquitted by this Court for the offence for which he stood charged and convicted by the learned Additional Sessions Judge, Kangra at Dharamshala entitled him to the benefit of the apposite Rules.

4. The synonymity which the learned counsel for the petitioner attracts vis-à-vis the period he stood subjected to judicial custody with an order of the employer/respondent suspending him from service also the synonymity which the petitioner attracts vis-à-vis the order of acquittal by this Court of the offences for which he stood convicted by the learned Additional Sessions Judge with hence his standing exonerated, warrants its being discountenanced. The learned counsel for the petitioner while drawing the afore-stated synonymities vis-à-vis the period he suffered judicial custody with his standing beset with an order of his employer suspending him from service besides the synonymity vis-à-vis he draws inter se the order by this High Court acquitting him for the charges for which he stood convicted by the learned Additional Sessions Judge, Kangra at Dharamshala with his hence standing exonerated, appears to stand erected with his remaining un-awakened to the prime factum of Rule 29.1 of the Rules which stands extracted hereinafter contemplating of none of the major penalties specified in the apt Rules being imposable upon the delinquent unless preceding thereof the delinquent stands subjected to a valid inquiry conducted in conformity with the apposite Rules:

> "29.1. No order imposing any of the major penalties specified in Clause 27.5, 27.6 and 27.7 of Rule 27 shall be made except after an inquiry is held in accordance with these rules."

The effect of the occurrence of the afore-stated Rule in 'NHPC Rules' cannot stand undermined nor can they be omitted to be read into Rules 26.1 and 26.2 of the NHPC Rules which stand extracted herein-after as given the chronology of their occurring prior to Rule 29.1 warrants of both the preceding rules besides the apposite rule succeeding them being read conjunctively besides in harmony. Any dis-conjunctive reading of Rules 26.1 and 26.2 of Rule 29.1 would render each unworkable eroding the very salutary purpose of their incorporation in the apposite Rules:

> "26.1. When the employee under suspension is reinstated, the competent authority may grant him the following pay and allowances for the period of suspension:-
>
> (a) If the employee is exonerated and not awarded any penalties mentioned in the Rule 27, the full pay and allowances which he would have been entitled to if he had not been suspended, less the subsistence allowance already paid to him;
>
> (b) If otherwise, such proportion of pay and allowances as the competent authority may prescribe.
>
> 26.2. - In a case falling under sub clause (a) the period of absence from duty will be treated as a period spent on duty, in case failing under sub clause (b) it will not be treated as a period spent on duty unless the competent authority so directs."

5. As an apt sequitur, the suspension which beset an employee arising from his delinquency in service enjoins holding of a departmental inquiry by the disciplinary authority whereupon in case he stands exonerated he would stand entitled to avail the benefits encapsulated in Clause (a) of Rule 26.1 of the NHPC Rules. Since Rule 29.1 of the Rules omits to with specificity make a reference of the period when an employee stands subjected to judicial incarceration his period spent thereat being amenable to a construction of his being hence beset with an order of suspension also when hence the apposite Rules with specificity exclude the period spent by an employee in judicial custody to fall outside the realm of its being construable to be a period reckonable of his standing beset with an order of suspension, the effect of an omission with specificity in the apposite Rules of the period when an employee stands subjected to judicial custody constituting his standing beset with an order of suspension, obviously the period when the petitioner underwent judicial incarceration cannot hold any synonymity with his being hence come to be suspended. The concomitant sequel thereof is of when he stood acquitted by this Court for the offences for which he was convicted by the learned Additional Sessions Judge cannot render his acquittal by this Court to hold any synonymity with his standing exonerated within the ambit of Clause (a) of Rule 26.1 of the apposite NHPC Rules, significantly when a circumspect harmonious reading of the apposite rules specifically the ones succeeding Rule 26.1 of the NHPC Rules, the relevant portion whereof stands extracted herein-above manifest of the disciplinary authority holding jurisdiction to impose major penalties only when the delinquent employee has faced a valid departmental inquiry on conclusion whereof he is held guilty, imperatively when he stands exonerated therein he would stand entitled to the benefit of Clause (a) of Rule 26.1 of the NHPC Rules hence obviously when for the operation of Rule (a) of 26.1 of the NHPC Rules the *sine qua non* is of the petitioner facing a departmental inquiry on conclusion whereof he stands exonerated begets the obvious sequel of acquittal of the accused by this Court for the offence for which he stood convicted by the learned Additional Sessions Judge not rendering the offence committed under the penal laws by the petitioner to be a delinquency within the ambit of the apposite rules nor also the order of acquittal of the petitioner by this Court for the charge he stood convicted by the learned Additional Sessions Judge holding any

synonymity or analogity with the apposite order of exoneration by an Inquiry officer on conclusion of the departmental inquiry held by him for his committing a delinquency within the ambit of the apposite Rules. Moreover, the period for which the petitioner suffered judicial incarceration not holding synonymity with his standing suspended by the disciplinary authority for his committing a delinquency within the ambit of the rules besides his on standing exonerated by the Inquiry Officer on the latter holding a valid inquiry qua the misconduct committed by him within the ambit of rules he comes to be reinstated whereupon he stands entitled to the benefit contemplated in Rule 26.1 of the apposite Rules also not holding synonymity with his standing acquitted by a Court of law for a penal charge on acquittal whereof he stands reinstated in service, concomitantly the reinstatement in service of the petitioner on his standing acquitted by a Court of law of a penal charge would not secure any entitlement to him to avail the benefit of Rule 26.1 of the apposite Rules, benefit whereof for reasons afore-stated is available only to an employee standing reinstated on his standing exonerated by a valid inquiry conducted in accordance with rules by the Inquiry Officer whereas its benefit would not be available to the petitioner on his standing reinstated in service on his standing acquitted by a Court of law for a penal charge.

6. Be that as it may, with their being no semblance of synonymity vis-à-vis the period the petitioner stood subjected to judicial incarceration with an order of his standing suspended from service by the disciplinary authority, suspension whereof would occur only on his committing a delinquency in service than by his committing an offence under the penal laws nor also their occurring any synonymity inter se his standing exonerated for a charge of misconduct within the ambit of the apposite Rules with an order of acquittal for his committing a penal offence, cannot give any capitalization to the learned counsel for the petitioner to contend of their being any fallacious interpretation rendered by the employer qua the apposite Rules nor also he can contend of the impugned apposite part of Annexure P-3 suffering from any gross infirmity.

7. The result of the above discussion is that the instant writ petition stands dismissed, so also the pending application(s), if any.

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

Rashid Mohammad .....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 287 of 2006.
Date of Decision: 26th May, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg. charas - he was convicted by the Trial Court- held in appeal, independent witnesses had not supported the prosecution version – however, they had admitted their signatures on the memo and they are estopped from denying the content of the memo in view of Sections 91 & 92 of Indian Evidence Act -their testimonies will not shake the prosecution version –however, link evidence was not proved as the road certificate was not exhibited - entry in the malkhana register when the case property was brought to the Court was not proved and the exhibited case property was not linked to the contraband recovered on the spot- the prosecution case was not proved and the Trial Court had wrongly convicted the accused- appeal accepted and accused acquitted. (Para 9-15)

For the Appellant: Mr. Ramesh Sharma, 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/convict against the judgment of the learned Special Judge, Fast Track Court, Chamba, H.P. rendered on 6.9.2006 in Sessions Trial No. 57/2004/03, whereby, it returned findings of conviction against the accused/convict for his committing an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the NDPS Act). The learned trial Court proceeded to hence sentence him to undergo rigorous imprisonment for 1 ½ years for commission of the offence punishable under Section 20 of the NDPS Act besides sentenced him to pay a fine of Rs.15,000/-, in default whereof he was sentenced to undergo further rigorous imprisonment for three months.

2. The facts relevant to decide the instant case are that on 9.01.2003, in the morning police party headed by ASI Uttam Chand, the then In-charge of Police Post, Chauhra was on routine Nakabandi at Barangal Morh, Pargana Bhalei. At about 10.30 a.m. an HRTC bus bearing registration No. HP-48-0982 enroute Langera to Pathankot via Khairi came. The said bus was stopped for checking. When the belongings of the passengers traveling in the bus were being checked, a person who was sitting on seat No.44 of the bus and had kept a green coloured 'pithu' in between his legs got frightened. On suspicion, his name was enquired. He disclosed his name as Shri Rashid Mohammad. The Pithu (bag) which he was carrying was got opened and checked in presence of Shri Anoop Kumar, the driver of the bus and Shri Kishori Lal, the conductor of the bus. A plastic boru tied with a rope was recovered from the bag. The boru was opened and checked. Maize flour weighing about 3 Kg was found in the boru. In the maize flour, a ganth (knot) of the cloth had been kept, such knot was also opened which in turn led the recovery of a polythene lifafa having charas in the shape of sticks. On weighing the aforesaid contraband, it was found to be 150 grams. Thereafter, other codel formalities were completed by the Investigating Officer and the accused was arrested. Report of the FSL was procured. Statements of the witnesses were recorded.

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 an offences punishable under Section 20 of the NDPS Act. In proof of the prosecution case, the prosecution examined 14 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 in the case.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

6. The accused/appellant is aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned counsel appearing for the accused/appellant 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 that 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 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 testimonies of the official witnesses are bereft of any vice of any inter se contradictions in their respective depositions qua the prosecution version comprised in their respective examinations-in-chief vis-a-vis their respective testimonies embodied in their respective cross-examinations. Also when their testimonies are shorn off any vice of any intra se contradictions vis-a-vis their respective depositions on oath, constrains this Court to conclude of their testimonies being both credible as well as inspiring.

10. Furthermore, even if, PW-2 Kishori Lal and PW-6 Anoop Kumar, independent witnesses to the apposite proceedings which stood initiated and concluded at the site, reneged from their previous statements recorded in writing, nonetheless the factum of theirs reneging from their previous statements recorded in writing would not undermine the efficacy of the prosecution case qua its propagation qua recovery of contraband standing effectuated from the conscious and exclusive possession of the accused in the manner as enunciated in FIR Ex. PW10/H. The reason for this Court omitting to belittle their creditworthiness rests upon the fact of both PW-2 and PW-6 admitting their signatures borne on memos Ex.PA, Ex.PB and Ex.PC. Both also admit their signatures occurring on bulk parcel, Ex. P-2. The effect of both PW-2 and PW-6 admitting their signatures borne on Ex.PA, Ex.PB and Ex.PC besides on bulk parcel Ex.P-2 is of their depositions manifestative of theirs repelling besides ousting their previous statements recorded in writing holding no worth given the embodiment of the apt legal principle in Sections 91 and 92 of the Indian Evidence Act of theirs standing estopped to digress from the contents of the afore referred exhibits preeminently when their respective signatures occurring thereon stand admitted by both besides with a mandate foisted in the afore referred provisions of the Indian Evidence Act of with proof emanating of signatures of both existing thereon constituting ex facie ipso facto conclusive evidence in proof of the recitals recorded in the apposite memos constrains this Court to conclude of dehors theirs reneging from their previous statements recorded in writing, yet for reasons aforesaid rendering the recitals recorded therein to stand conclusively proved by the prosecution. In sequel, with the depositions of the official witnesses acquiring corroborative vigour from hence the conclusively proved recitals of the apposite exhibits whereon both PW-2 and PW-6 admit theirs carrying their signatures, besides with the principle engrafted in Sections 91 and 92 of the Indian Evidence Act against the receipt of oral evidence contrary to the signatured recitals occurring in any document preponderantly when signatures of both PW-2 and PW-6 stand un-denied by them rendering them hence incapacitated to depose at variance or in digression to the recitals occurring in the apposite memos. Consequently, the effect of theirs reneging from their previous statements recorded in writing would not preclude this Court to undermine the efficacy of proof adduced by the prosecution qua the apposite recitals depicted in the apposite memos. In aftermath, this Court concludes with aplomb of the prosecution succeeding in proving the factum of the genesis of the occurrence embodied in FIR Ex.PW10/H.

11. Be that as it may, the prosecution was also under a solemn legal obligation to firmly connect the contraband as recovered from the purported exclusive and conscious possession of the accused at the site of occurrence under memo Ex.PA with the one sent for analysis to CTL, Kandaghat which on receiving the apposite samples recorded its opinion borne in Ex.PW10/D also the prosecution was enjoined to connect the opinion manifested in Ex.PW10/D qua sample parcels with their production in Court. Firm connectivity inter se the case property recovered from the purported exclusive and conscious possession of the accused at the site of occurrence vis-a-vis the opinion recorded by the CTL, Kandaghat comprised in Ex.PW10/D stood comprised in the apposite road certificate. However, the apposite road certificate has remained unadduced in evidence. The effect of its remaining unadduced in evidence delinks the opinion recorded by the CTL, Kandaghat comprised in Ex.PW10/D with the case property as stood purportedly recovered from the exclusive and conscious possession of the accused at the site of occurrence. Consequently, the omission of its adduction in evidence by the prosecution has

precluded collation qua the descriptions of the case property borne in the apposite road certificate with the one enunciated in the report of the CTL comprised in Ex.PW10/D. With this Court hence standing deprived of collating the description of the case property borne on the apposite road certificate vis-a-vis enunciations in Ex.PW10/D constrains an inference of with per se incongruity occurring inter se the apposite recitals in the apposite road certificate vis-a-vis the apposite recitals in Ex.PW10/D hence its standing withheld from its standing sighted by the learned trial Court. In aftermath, obviously the opinion recorded in Ex.PW10/D can not be construed to be qua the case property recovered from the purported exclusive and conscious possession of the accused at the site of occurrence nor hence it can be construable to be holding any probative vigour against the accused.

12. Be that as it may, the prosecution was also enjoined to prove qua the case property as stood allegedly recovered from the exclusive and conscious possession of the accused at the site of occurrence being congruous besides akin to the one which stood produced in Court by the learned Public Prosecutor concerned for its being shown to the prosecution witnesses. The best evidence qua hence connectivity or congruity upsurging qua the alleged case property purportedly recovered from the exclusive and conscious possession of the accused at the site of occurrence vis-a-vis the case property produced in Court for its being shown to the prosecution witnesses stood comprised in the prime fact of the prosecution placing on record the apt malkhana register with vivid descriptions occurring therein manifestative of the Incharge of the police malkhana concerned prior to on each occasion it stood produced in Court by the learned Public Prosecutor for its being shown to the prosecution witnesses, his under signatured entries retrieving it from the Malkhana concerned whereupon he transmitted it through an authorized official to the Court concerned for its being shown to the prosecution witnesses concerned. The aforesaid best evidence for connecting the accused qua its standing recovered from his purported exclusive and conscious possession at the site of occurrence with the one as stood produced in Court by the learned Public Prosecutor for its standing shown to the prosecution witnesses remained unadduced. It standing withheld from the view of the learned trial Court constrains this Court to conclude of the case property as shown to the prosecution witnesses by the learned Public Prosecutor standing not either deposited in the Malkhana concerned in quick spontaneity to its standing recovered from the purported exclusive and conscious possession of the accused at the site of occurrence besides an inevitable inference ensues therefrom of the case property as produced in Court by the learned Public Prosecutor concerned for its being shown to the prosecution witnesses being a case property other than the one which stood purportedly recovered from the exclusive and conscious possession of the accused at the site of occurrence. In sequel, with the withholding of the aforesaid best evidence by the prosecution no inference other than of the prosecution merely by its production in Court not proving the prime factum of it being the one as stood recovered from purported exclusive and conscious possession of the accused at the site of occurrence is to be drawn. Also at the time of the learned Public Prosecutor concerned producing the case property before the learned trial Court for its being shown to the prosecution witnesses, there is no echoing of any communication by him to the learned trial Court of his receiving the case property from an authorised official after its retrieval from the apposite Malkhana by its In-Charge, the apt sequitur thereto is of this Court standing constrained to conclude with formidability of the production of the case property by the learned Public Prosecutor concerned before the learned trial Court besides its identification thereat on its being shown to the prosecution witnesses concerned holding no vigour in sustaining any inference of it being the case property as stood recovered from the purported exclusive and conscious possession of the accused at the site of occurrence. Needless to say of the prosecution hence abysmally failing to underscore the prime factum of the case property sent for analysis to CTL, Kandaghat besides the one which stood produced in Court being linkable or holding any connectivity with the one which stood recovered from the exclusive and conscious possession of the accused in the manner as propagated by it.

13. The learned Deputy Advocate General has contended with vigour of with imminent upsurgings occurring in the depositions of the apposite prosecution witnesses to whom

the case property stood shown by the Public Prosecutor concerned at the time of his producing it in Court qua the seals borne thereon remaining intact hence dispelling any inference of the case property as stood produced in Court being unrelatable to the one as recovered from the purported exclusive and conscious possession of the accused besides rendered dispensable the adduction into evidence of the apposite Malkhana register in portrayal of it standing deposited in the Malkhana concerned besides also dispelling any inference of its not standing retrieved therefrom by its In-Charge under signatured entries for its onward transmission to the Public Prosecutor concerned for its production by him before the learned trial Court. However, the aforesaid submission addressed by the learned Deputy Advocate General holds no weight and force as the mere factum of the seals occurring thereon remaining unbroken or intact would not dispel the inference voiced hereinabove of the case property as produced in Court for omissions of the prosecution alluded hereinabove hence not standing firmly connected with the contraband as stood recovered from the purported exclusive and conscious possession of the accused at the site of occurrence, especially when the factum of the police official concerned or the IO after breaking the seals as stood embossed thereon, at the time contemporaneous to its seizure standing effectuated at the site of occurrence, his inserting therein contraband in portrayal of its standing purportedly recovered from the exclusive and conscious possession of the accused. Since, the insertion of contraband in the parcels would occur only after his tampering with the parcels, whereupon he resealed them with analogous seals, imperatively if the aforesaid inference remains a mere possibility whereas its standing engendered would have suffered emasculation by adduction into evidence of the aforesaid best evidence. Necessarily when the aforesaid best evidence connecting the case property as produced in Court with the one as recovered from the purported exclusive and conscious possession of the accused at the site of occurrence has remained unadduced, its production in Court by the learned Pubic Prosecutor concerned is not amenable to an inference of its being linkable to the one as stood recovered from the purported exclusive and conscious possession of the accused at the site of occurrence, rather the effect of its non production is contrarily of the Investigating Officer tampering with the case property. In aftermath, with omissions aforesaid making pervasive inroads qua the efficacy of the prosecution case qua the facet aforesaid its discrepant evidence thereof jolts its vigour hence rendering suspect the prosecution case. Hence, the benefit of doubt ought to be given nto the accused.

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

15. Consequently, the instant appeal is allowed and the impugned judgment is set aside. The accused/appellant is acquitted of the offence charged. Fine amount, if any, deposited by the accused be refunded to him forthwith. Records be sent back 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
Sunil Kumar .....Respondent

Cr. Appeal No. 465/2012
Reserved on: May 25, 2016
Decided on: May 26, 2016

N.D.P.S. Act, 1985- Section 20- Police was on patrolling duty- accused alighted from the vehicle and on seeing the police ran away- he was apprehended- he was apprised of his right under

Section 50 of the N.D.P.S. Act- accused consented to be searched by the police- one bag containing 1 kg charas was recovered from the accused- car was searched and 1 kg charas was recovered from the Car- accused was tried and acquitted by the trial Court- held, in appeal that accused was apprehended at 3:30 a.m.- search, seizure and sampling proceedings were completed at the spot in accordance with the law - accused was apprised of his right to be searched before Magistrate or Gazetted Officer- trial Court had wrongly held that there was no compliance of Section 50 of the Act- there was no habitation and no possibility of joining independent witnesses- judgment passed by the Trial Court set aside- accused convicted of the commission of offence punishable under Section 20 of the N.D.P.S. Act. (Para- 14 to 17)

Cases referred:
Sunil vs. State, 2010 (1) Shim. LC 192
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. Vijay Bir Singh, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 13.7.2012 rendered by the learned Special Judge, Fast Track Court, Chamba, District Chamba (HP) in Sessions Trial No. 2/2012, 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 15.1.2012 at around 3.30 AM, PW-10 IO/HC Shoukat Ali accompanied by Constable Suresh (PW-1), SPO Jamal Deen (PW-2) and SPO Jan Mohd. was present on routine traffic checking and picketing at Zero Point, Jassourgarh. A Maruti car No. HP-47-0149 came from the side of Jassourgarh being driven by accused. On seeing the police, accused alighted from the aforesaid vehicle and after locking the same ran away towards Jassourgarh. Police apprehended the accused. It was a secluded and isolated place. No independent witnesses were available. Accused was apprised of his right under Section 50 of the Act. He opted to be searched by the police party. On personal search of accused one white coloured cloth bag was found inside his jacket, sweater and shirt worn by him. White coloured bag was found on his belly side. On checking the same, a transparent polythene bag containing hard substance in the shape of black coloured sticks was recovered. It was found to be *Charas*. It weighed 1 kg. The recovered *Charas* was put in same polythene bag and polythene bag was put in a cloth bag. Thereafter, in the presence of Jamal Deen, Car was also checked. Beneath the driver seat, one cream coloured bag was recovered containing polythene bag. On opening the polythene bag, hard substance in the shape of black coloured sticks was found. It was found to be *Charas*. It also weighed 1 kg. *Charas* so recovered was put in the polythene bag and polythene bag was put back in cream coloured bag. Sealing proceedings were completed on the spot. NCB form in triplicate was filled in. *Rukka* Ext. PW-5/A was prepared and sent to the Police Station for registration of FIR. FIR Ext. PW-4/A was registered. On reaching the Police Station, Shoukat Ali deposited the case property with MHC Bachhan Singh (PW-4). He made entry to this effect in the Malkhana Register. Case property was sent to the FSL Junga. Report of FSL Junga is Ext. PX.

3. Prosecution has examined as many as ten witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. DW-1 Ashraf Khan and DW-2 Vijender Kumar, were examined from the defence side. 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. Vijay Bir Singh, Advocate, has supported the Judgment dated 13.7.2012.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. Suresh Kumar (PW-1) testified that on 15.1.2012, he alongwith HC Shoukat Ali, SPO Jamal Deen and SPO Jan Mohd. at around 3.30 AM, was present at Zero Point, Jassourgarh road. One vehicle came from the side of Jassourgarh. On seeing the police, driver stopped the vehicle and after alighting and locking the vehicle ran away towards Jassourgarh. He was nabbed. He disclosed his identity. It was a lonely place. There was no habitation in nearby area of 2 kms. Accused was searched. Search memo Ext. PW-1/A was prepared. On personal search of accused, one white coloured cloth bag was found inside the shirt on belly side. Bag was taken out. It contained polythene bag. The polythene bag contained hard substance in the shape of black coloured sticks. It was found to be *Charas*. It weighed 1 kg. Car was also searched. Beneath the driver seat, one cream coloured bag was found. It contained another polythene bag. It was also opened. It contained *Charas*. It also weighed 1 kg. White coloured bag and cream coloured bag containing *Charas* were parcelled with five impressions of seal 'D'. Specimen of seal 'D' was taken on a separate piece of cloth. NCB form was filled in. *Rukka* mark X was prepared by HC Shoukat Ali. It was sent through him to SHO Police Station, Tissa. FIR was registered. In his cross-examination, he has admitted that the distance between PP Nakrod and Zero Point, Jassourgarh was 7 kilometres. He denied the suggestion that at a distance of 100 metres from Jassourgarh, there was a shed of P.W.D. and Chowkidar used to reside there.

8. Jamal Deen (PW-2) also corroborated the statement of Suresh Kumar (PW-1). In his cross-examination, he has admitted that from Madhuwad, no effort was made to take along independent witnesses nor any effort was made at Zero Point, Jassourgarh. Proceedings were held with the help of home light.

9. HC Bachhan Singh deposed that he was posted as MHC Police Station Tissa since 2010. On 15.1.2012, around 9 AM, Constable Suresh Kumar delivered *Rukka* mark X on the basis of which FIR Ext. PW-4/A was registered. On the same day, HC Shoukat Ali delivered a parcel sealed with seal impression 'D' alongwith specimen seal, NCB form in triplicate and case file before SHO Jagdish for resealing of case property. Case property was resealed by affixing five seals of impression 'A' on parcel Ext. P-1. Impression of seal 'A' was drawn on separate piece of cloth Ext. PW-4/C. After resealing the case property alongwith sample seals, seizure memo, NCB form were handed over to him for depositing in the Malkhana. He made entry to this effect in Malkhana Register no. 19 at Sr. No. 178. He proved abstract of Malkhana Register.

10. Constable Deepak Kumar (PW-6) testified that he was posted as General Duty Constable at Police Station Tissa from June 2009. On 16.1.2012, MHC Police Station Tissa handed over to him one parcel duly sealed with seal impressions 'D' and 'A' containing five seals each alongwith sample seal, NCB form, seizure memo, copy of FIR and docket vide RC No. 10/12 for depositing the same with FSL Junga. He handed over the same at FSL Junga on 17.1.2012 at 10.30 AM and handed over receipt to MHC Police Station Tissa.

11. HC Arvinder Singh (PW-7) testified that on 16.1.2012, case property i.e. parcel sealed with five impressions of seal 'D' and 'A' alongwith sample seal, NCB form, seizure memo, copy of FIR and docket were handed over to Constable Deepak Kumar vide RC No. 10/12 for handing over to FSL Junga. He after handing over the same at FSL Junga returned the receipt.

12. Inspector Jagdish Chand (PW-8) also testified that at around 1.15 PM, HC Shoukat Ali produced before him one parcel duly sealed with five seals of impression 'D' alongwith sample seal and NCB form in triplicate for resealing. He resealed the parcel by affixing five seals of seal impression 'A' and inspected the seals impression 'D' on the parcel. Sample seal

of seal 'A' was separately taken on piece of cloth. Reseal memo Ext. PW-4/D was prepared in the presence of witnesses HC Bachhan Singh and Constable Ajay Kumar. Case property was handed over alongwith documents to MHC Bachhan Singh.

13. HC Shoukat Ali (PW-10) also testified the manner in which accused was apprehended at 3.30 AM at Jassourgarh. Accused was apprised of his right as per provisions of Section 50 of the Act. 1 kg *Charas* was recovered from inside his jacket and 1 kg *Charas* was recovered from a cream coloured bag kept in the car. It was weighed. Sealing proceedings were completed at the spot. He produced case property before the SHO Jagdish Chand (PW-8). He resealed the same. He could not associate any independent witnesses at Zero Point since place was secluded. There was no habitation within a radius of 2 kms. He did not make any efforts to associate any independent witnesses nor deputed anyone in this behalf.

14. Accused was apprehended at 3.30 AM at Jassourgarh. 1 kg *Charas* was recovered from his person and another 1 kg *Charas* was recovered from the car. Search, seizure and sampling proceedings were completed at the spot strictly in accordance with the Act. Accused was apprised of his legal right to be searched before a Magistrate or a Gazetted Officer. Consent memo is Ext. PW-2/B. It is strictly in conformity with Section 50 of the Act. Learned trial Court has erred in law by giving findings that consent memo was not in conformity with law. Judgment relied upon by the learned trial Court in **Sunil vs. State** reported in 2010 (1) Shim. LC 192 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....."

15. Accused was apprehended at 3.30 AM. There was no habitation within a radius of 2 kms. There was no possibility of joining independent witnesses at the time of starting search, seizure and sampling proceedings. Statements of official witnesses inspire confidence and are trustworthy.

16. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the exclusive possession of the accused.

17. The appeal is allowed. Judgment dated 13.7.2012 rendered by the learned Special Judge, Fast Track Court, Chamba, District Chamba (HP) in Sessions Trial No. 2/2012 is set aside. The accused is convicted for offence punishable under Section 20 of the Act. Accused be produced to be heard on quantum of sentence on 20.6.2016.

18. Registry is directed to prepare the production warrant.

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

The New India Assurance Company Limited .....Petitioner.
Versus
Smt. Meera Verma .....Respondent.

Civil Revision No. 32 of 2016.
Date of Decision: 26th May, 2016.

Limitation Act, 1963- Section 14- Truck owned by the respondent/ plaintiff suffered damages on account of accident – a complaint was filed before Consumer Forum, Bilaspur which was dismissed holding that respondent/plaintiff was not a consumer - an appeal was preferred, which was dismissed but liberty was granted to the respondent/plaintiff to avail any remedy prescribed by law- plaintiff filed a civil Suit – he also filed an application under Section 14 of Limitation Act for explanation of the delay- the application was allowed by the trial court- held that the plaintiff had filed complaint before consumer forum under a bona-fide belief - hence, the time spent by her before the Consumer Forum is to be excluded especially when liberty was granted to the plaintiff to avail remedy prescribed under law- the application was properly allowed by the trial court-revision dismissed.

For the Petitioner: Mr. B.M. Chauhan, Advocate.
For the Respondent: Mr. Anupinder Rohal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The truck owned by the respondent herein suffered damage in an accident which occurred on 14.03.2009. Its owner, respondent herein holding qua the ill-fated truck an insurance cover issued by the petitioner herein, instituted a complaint against its insurer before the District Consumer Disputes Redressal Forum, Bilaspur. On 21.06.2013, the District Consumer Disputes Redressal Forum, Bilaspur dismissed the complaint instituted thereat by the respondent herein on the score of the complainant/respondent herein not falling within the definition of "consumer" rendering hence the complaint instituted before it by the respondent herein being not maintainable. The respondent herein standing aggrieved by the rendition of the District Consumer Disputes Redressal Forum, Bilaspur, instituted an appeal therefrom before the H.P. State Consumer Disputes Redressal Commission, Shimla. The latter Court recorded a judgment in affirmation to the rendition of the learned District Consumer Disputes Redressal Forum, Bilaspur. However, in the operative part of its order, the H.P. State Consumer Disputes Redressal Commission, Shimla reserved liberty to the complainant/respondent herein to avail any other remedy prescribed by law. The copy of the order of the learned H.P. State Consumer Disputes Redressal Commission, Shimla was supplied to the respondent herein on 1.10.2013.

2. The respondent herein instituted a civil suit against the petitioner herein for recovery of a sum of Rs.9 lcas along with interest constituting the damage suffered by the ill-fated truck owned by the respondent herein. The Civil Suit stood accompanied by an application under Section 14 of the Limitation Act embodying averments in explication of the delay which occurred since the ill-fated truck suffering damage in an accident which occurred on 14.3.2009 till the institution of the suit before the learned trial Court.

3. The learned trial Court on considering the respective espousals of the contesting parties before it accepted the explanation purveyed in the apposite application preferred before it by the respondent herein qua the delay which occurred since the suffering of damage by the ill-fated truck owned by the respondent herein in an accident which occurred on 14.03.2009 till the institution of a civil suit before it at the instance of the respondent herein. There is no wrangle

with the proposition of the civil suit preferred by the respondent herein before the learned trial Court standing mandated by the apposite Article of the Limitation Act of it being preferable within three years from the date of damage suffered by the truck owned by the respondent herein in an accident which occurred on 14.03.2009. Since, the respondent herein instituted a civil suit beyond a period of three years, its institution before the learned trial Court was palpably beyond limitation. However, the learned trial court in its impugned rendition was not off the mark in concluding while revering the observations recorded by the H.P. State Consumer Disputes Redressal Commission, Shimla, of with liberty standing afforded to the respondent herein by the H.P. State Consumer Disputes Redressal Commission, Shimla, to avail any other remedy prescribed by law other than the bonafidely mis-prosecuted remedy of the respondent herein ventilating her grievance against the petitioner herein by hers instituting a complaint before the District Consumer Disputes Redressal Forum, Bilaspur which for reasons recorded in the order of both the District Consumer Dispute Redressal Forum besides the order in affirmation thereto by the H.P. State Consumer Disputes Redressal Commission, Shimla, being not maintainable thereat, concomitantly rendering the period or time spent by the respondent herein to bonafidely mis-prosecute her remedy therebefore standing excluded or unreckonable while computing the period of three years since the damage suffered by the ill-fated truck owned by her in an accident which occurred on 14.03.2009 upto three years thereafter. The apposite provisions of the Limitation Act embodied in Section 14 which stands extracted hereinafter do condone the delay as occurs besides exclude the time spent by the aggrieved by hers bonafidely setting in motion an inappropriate remedy before the inappropriate authority. Section 14 of the Limitation Act reads as under:-

> "14. Exclusion of time of proceeding bonafide in Court without jurisdiction.- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it.
>
> (3) Not withstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908, the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of the Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature."

4. Since, the respondent herein under a bonafide impression had mis-availed the remedy of hers ventilating her grievance by putting in motion the legal mechanism ordained in the Consumer Protection Act besides when its availment by her palpably appears to stand spurred under a bonafide legal advise purveyed to her by her counsel hence hers obviously availing it naturally hence the time spent by the respondent herein by hers bonafidely prosecuting an erroneous remedy or an inappropriate remedy by availing the legal mechanism contemplated in the the Consumer Protection Act stood enjoined to be excluded from the period of limitation prescribed under the apposite Article of the apposite statute for hers ventilating her grievance in a Civil Suit filed before the Civil Judge (Junior Division), Blaspur. Contrarily, the commencement or accrual of cause of action since the damage suffered by the ill-fated truck in an accident which occurred on 14.03.2009 did not cease within three years thereafter rather remained alive uptill the rendition of the H.P. State Consumer Disputes Redressal Commission, Shimla on 13.09.2013 rather more precisely remained alive upto the time when a copy of its

rendition stood supplied to the respondent herein on 1.10.2013. Since, the aforesaid period would stand excluded while computing the period of limitation prescribed in the apposite Article of the Limitation Act for the respondent herein standing yet foisted with a right to avail the appropriate remedy of for hers agitating her claim against the petitioner herein hers instituting a civil suit before the Civil Court of competent jurisdiction or even when the time since hers bonafidely failing to avail the appropriate remedy from 14.03.2009 uptill when a copy of the rendition of the H.P. State Consumer Disputes Redressal Commission, Shimla stood supplied to her on 1.10.2013 would stand excluded from the apposite period of limitation for capacitating her to avail the appropriate remedy by hers instituting a civil suit before a Civil Court of competent jurisdcition, nonetheless the respondent herein is enjoined to explain the delay from 1.10.2013 till the date of hers instituting a civil suit before the learned trial Court which stood instituted on 14.11.2013. The aforesaid delay is minimal. An explanation exists in paragraph 2 of the application of the said delay standing begotten by the respondent herein standing engaged in eliciting sound legal advise from a legal practitioner qua the appropriate legal remedy available to her.. It appears that the engagement of the respondent herein in eliciting a sound legal advise from appropriate quarters qua the legitimate remedy available to her for securing her claim against the petitioner herein precluded her from 1.10.2013 to 14.11.2013 to institute the civil suit before the learned trial Court. Consequently, it appears that the respondent herein has projected a good sound and just reason in explaining the delay which occurred from 1.10.2013 uptill 14.11.2013 in the institution of the suit by her before the learned trial Court.

5. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed. The order impugned before this Court is affirmed and maintained. All pending applications stand disposed of.

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

Amar Singh .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Revision No. 145 of 2008.
Date of Decision: 27.5.2016.

Indian Penal Code, 1860- Section 420, 468 and 471- Accused appeared before medical board for renewal of his disability certificate- disability certificate produced by the accused had some over writing, which excited suspicion of the board - record was inspected and it was found that original certificate was issued showing the disability as 03% which was altered to 83%- accused was tried and convicted by the trial Court for the commission of offences punishable under Sections 420, 468 and 471 of I.P.C.- an appeal was preferred, which was partly allowed and sentence passed under Section 468 of I.P.C. was set aside- aggrieved from the judgment of the Appellate Court, present revision has been preferred- held, in revision, that the Court will interfere in revision when there is a failure of justice or misuse of the judicial machinery or the sentence or order is not correct- it was admitted by the Investigating Officer in the cross-examination that accused is illiterate having no knowledge of Hindi and English and his specimen signatures were not taken due to this fact- Appellate Court had come to conclusion that accused had not forged the document- no appeal was preferred against the judgment of Appellate Court- had the accused forged the document, he would not have appeared before the Medical Board- evidence shows that accused remained under bona fide belief that disability certificate is a genuine document- once a conclusion was reached that accused had not forged the document, he could not have been held guilty of the commission of offences punishable under Sections 420 and 471 of I.P.C. (Para-26 to 33)

Cases referred:
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Guru Bipin Singh v. Chongtham Manihar Singh and Anr., 1997 CRI.L.J.724,

For the petitioner: Mr. Rakesh Dhaulta, Advocate.
For the respondent: Mr. D.S. Nainta, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

The present criminal revision petition filed under Section 397 Cr.PC read with Section 401 Cr.PC, is directed against the judgment dated 11.8.2008, passed by the learned Additional Sessions Judge, Sirmaur District at Nahan, HP, in Criminal Appeal No. 3-N/4 of 2007 titled *"Amar Singh v. State of Himachal Pradesh"*, affirming the judgment of conviction and sentence dated 28.6.2007, passed by the learned Chief Judicial Magistrate, Ist Class, Rajgarh, District Sirmour, HP, in Criminal Case No. 1/2 of 2003 titled "*State of Himachal Pradesh v. Amar Singh*," whereby petitioner (herein after referred to as the "accused" for the sake of brevity) has been convicted and sentenced to undergo as follows:-

> *"To undergo rigorous imprisonment for two years for having committed offence under Section 420 IPC and to pay fine of Rs. 1,000/-. Under Section 468 IPC, he is again sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs. 1000/-. Under Section 471, he is sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs. 1000/- All sentences shall run concurrently."*

2. Briefly stated facts necessary for adjudication of the present case are that on 29.1.2002, on the basis of complaint received from Medical Superintendent, Zonal Hospital, Nahan, FIR Ext.PW-11/B was registered with the Police Station Nahan, HP, wherein, it was complained that accused has committed forgery of disability certificate. Aforesaid factum came to the notice of authorities when the accused appeared before the medical board comprising Dr. Saneha Gupta (PW-3), M.S. Regional Hospital Nahan, Dr. M.L. Gupta and Dr. Oberoy for renewal of certificate on 29.1.2002, where he produced the disability certificate Ext.PW-1/B, wherein disability was mentioned to the extent of 83%. Since on the certificate produced by the accused for renewal had overwriting, medical board got suspicious and called for the records maintained by the Hospital. After inspection of the record, it transpired that disability was mentioned 03% on the certificate, which was originally issued to the accused on 28.5.1998. After perusing the record of the hospital, Ex.PW1/B disability certificate, was found forged and, as such, matter was reported to the police station, Rajgarh. Police after receiving the aforesaid complaint, lodged the FIR i.e. Ext.11/B. During investigation, police procured the duplicate certificate in which the disability was mentioned to be 03% vide memo Ext.PW1/C from Tarsem Kumar (PW1) in the presence of Arun Sharma (PW2)along with original disability certificate and one identity card issued in the name of the accused in which disability was mentioned 83%, which are Ext.PW5/A, Ext.PW1/A and Ext.PW1/B. The abstract of register showing issuance of identity card was also taken into possession vide recovery memo Ext.PW4/A. During investigation, it also revealed that accused also procured concessional pass on the basis of forged disability certificate from the HRTC department. Police after taking documents in custody sent the same to FSL, Junga, and report Ext.PW11/A was obtained wherein documents Ext. P1 to P21 were sought to be examined. Investigation of the present case was conducted by PW-12 ASI Mohan Singh. On 8.3.2002, abstract of register regarding issuance of identify card was also obtained by the police from Shri Kulbhushan (PW-5) the then Senior Assistant, HRTC, Nahan in the presence of Ranvir-PW4. Specimen signatures of accused were also obtained on 18.3.2002. Application of one Suresh Kumar was taken into possession vide memo Ext.PW6/A from Surender Kumar (PW6) the then BMO, Sarahan, in the presence of Sanjeev Arora (PW7). Accordingly, specimen signatures of the accused and admitted writings of Suresh Kumar were sent to FSL Junga for the purpose of

comparison along with disputed writings on the disability certificate and opinion of Dr. Minakshi Mahajan (PW14) Assistant Director, FSL Junga, was obtained vide Ext.PW11A, wherein she concluded that blue enclosed signatures stamped and marked as S-13 to S-16 and red enclosed signatures stamped and marked as Q-1 to Q-6 are written by one and the same person but it is not possible to express any opinion on altered questioned item No. Q-8 to Q-13. The statements of the witnesses were recorded by ASI Mohan Singh (PW12), Inspector Laxman Dass (PW11) and SI Dhan Singh (PW8) as per their version under Section 161 Cr.PC.

3. After conclusion of the investigation, police filed challan under Section 173 Cr.PC before the competent court of law against the accused for having committed offences punishable under Sections 420, 468 and 471 of the Indian Penal Code. The court of learned Judicial Magistrate, Ist Class Rajgarh, after satisfying itself that the prima facie case exists against the accused, framed charges against him. However, accused pleaded not guilty and claimed trial. Prosecution with a view to prove its case examined as many as 14 witnesses and statement of the accused was also recorded under Section 313 Cr.PC, wherein he denied the case of the prosecution in toto and claimed that he has been falsely implicated in the case. However, he did not lead any evidence in his defence.

4. Learned trial Court on the basis of evidence available on record found accused guilty of offences having committed under Sections 420, 468 and 471 of the Indian Penal Code and sentenced him as per the description already given above.

5. Accused, feeling aggrieved and dissatisfied with the judgment of conviction of learned trial Court filed an appeal under Section 374 Cr.PC in the Court of learned Additional District Judge, Sirmour at Nahan, HP, which was partly allowed and sentence recorded against the accused for offence having been committed under Section 468 Cr.PC was set-aside and the remaining sentence imposed by the learned trial Court was upheld. Hence this revision petition before this Court.

6. At this stage, it may be noticed that State did not file any appeal against the judgment of learned Additional Sessions Judge, whereby punishment and conviction recorded by the learned trial court under Section 468 of the Indian Penal Code was set-aside. One thing emerges from the record is that original record pertaining to the case got destroyed due to fire in the court, however, same was reconstructed on the direction of this Court and photocopies of the documents placed by the parties during the trial were relied upon in evidence.

7. Mr. Rakesh Dhaulta, Advocate, appearing for the accused vehemently argued that judgments passed by both the courts below holding him guilty of offences under Sections 420 and 471 are not sustainable as the same are not based on the proper appreciation of the material available on record. He further contended that bare perusal of the findings recorded by both the courts below suggests that evidence available on record has been not appreciated in its right perspective; rather, same is based upon the conjectures and surmises. He further contended that there is no cogent and convincing evidence adduced on record by the prosecution, which could result in passing of conviction order, as has been done in the case of the accused. It is also contended on behalf of the accused that once the appellate Court came to the conclusion that prosecution has not been able to prove that documents has been forged by the accused, it is not understood that how on the basis of some set of evidence, court below came to the conclusion that accused deliberately used that document for obtaining concessions from the other departments of the State. Mr. Dhaulta, strenuously argued that once the court below had concluded that accused is an illiterate person, who could not even write or read English and Hindi, there is no question of his knowing fully well that what would be the consequence of using this forged documents, which as per him, was a valid and genuine one. Mr. Dhaulta while making his submissions before this Court also invited attention of this Court to the statements of various prosecution witnesses to demonstrate that there are material contradictions as well as infirmities, wherein PW-12 (Mohan Singh) admitted in his cross-examination that accused is an illiterate person and neither he knows Hindi nor English and his specimen signatures were also

not obtained in English since he was not knowing English, whereas perusal of the disability certificate Ext.PW-1/B suggests that it is written in English. He also invited attention of this Court to the statement of PW-14 (Dr. Minakshi Mahajan), Forensic Expert, wherein she stated that the blue enclosed signatures stamped and marked as S-13 to S-16 and red enclosed signatures stamped and marked as Q-1 to Q-6 have all been written by one and the same person but it has not been possible to express any opinion on altered questioned item No. Q-8 to Q-13 in the aforesaid document. Mr. Dhaulta prayed that judgments passed by the courts below deserve to be quashed and set-aside.

8. On the other hand, Mr. D.S. Nainta, learned Additional Advocate General, submitted that no interference, whatsoever, of this Court is warranted in the present case, where the prosecution has proved its case beyond reasonable doubt. He forcefully contended that material available on record clearly suggests that accused forged the disability certificate and on the strength of the same, he procured concessional passes from HRTC and District Welfare departments. Mr. Nainta, strenuously argued that once it stands proved on record that disability certificate was forged by the accused; plea with regard to his illiteracy as well as not knowing English could not be a ground for his acquittal. He also submitted that jurisdiction of this Court is very limited while exercising power under Section 397 Cr.PC, especially, in view of the fact that when it clearly emerges from the record that both the courts below have meticulously dealt with each and every aspect of the matter and prayed that judgments passed by both the courts below deserve to be upheld and accused deserves no leniency in the matter.

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 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.

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. Before adverting to the evidence led on record by the prosecution, it would be apt to reproduce the provisions of Section 420 and 471 Indian Penal Code so that evidence adduced on record is analyzed /examined vis-à-vis the ingredients of aforesaid sections:-

> ***"420. Cheating and dishonestly inducing delivery of property****.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*
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> ***471. Using as genuine a forged [document or electronic record]****.—Whoever fraudulently or dishonestly uses as genuine any [document or electronic record] which he knows or has reason to believe to be a forged [document or electronic record], shall be punished in the same manner as if he had forged such [document or electronic record]."*

13. It emerges from the record that accused was charge sheeted under Section 420, 468 and 471 of the Indian Penal Code by the learned trial Court for having committed offences punishable under Sections 420, 468 and 470 of the Indian Penal Code. However, in appeal preferred by the accused before learned appellate Court, the appellate court acquitted him of the offence punishable under Section 468 of the Indian Penal Code by specifically recording therein that there is no evidence worth the name on record that accused has committed forgery in the certificate. Learned appellate Court while recording aforesaid findings specifically referred to the statement made by PW-12 (ASI Mohan Singh), who admittedly, in his cross-examination stated that accused is an illiterate man having no knowledge of Hindi and English. It also came in his statement that specimen of writing of the accused in English was also not obtained as he was not having knowledge of English but perusal of Ext.PW1/B (the forged certificate) clearly depicts that same is in English, rather, careful perusal of the same also suggests that ahead of word "three" the word "eighty three" has been inserted and even the figure which was "0" has been altered to 8 to make it "83". Learned appellate Court also drew strength from the statement of PW-14 Minakshi Mahajan, Assistant Director, who opined vide Ext.11/A that it is not possible to express any opinion qua Q.8 to Q.13. It also emerges from her cross-examination that opinion regarding figure and word in the certificate cannot be given due to overwriting, poor quality and the quantity of the specimen writing sent for comparison on the basis of aforesaid evidence. Learned appellate Court came to the conclusion that prosecution has not been able to prove that document in question was actually forged by the accused. Accordingly, sentence imposed under Section 468 of the Indian Penal Code was set-aside.

14. Now this Court solely with a view to ascertain that the judgments/findings recorded by the courts below holding accused guilty for offences committed under Section 420 and 471 Indian Penal Code are based on the correct appreciation of evidence available on record undertook an exercise to critically examine the witnesses put forth by the prosecution in this regard.

15. As per prosecution story Dr. Sneh Gupta PW3, Medical Superintendent, discovered that accused has forged disability certificate Ext.1/B when accused appeared before the Medical Board for renewal of disability certificate. Since there were certain overwritings and insertions in the disability certificate, Medical Board got suspicious and called for the records from the hospital and found that Ext.1/B has been actually tampered by altering '03%' to '83%'. In the disability certificate, percentage was mentioned in words as well as in figures and it was found that from '0" it was made '8" and in figures word "Eighty" was inserted before word "Three". Cross-examination of PW3 clearly suggests that she stuck to her stand taken by her in examination-in-chief and defence was not able to impeach her statement in any manner. Though, it came in her cross-examination that documents produced by the accused were also having identity card issued by welfare department but in cross-examination, no suggestion worth

the name was put to her from where it can be inferred that she deposed against the accused to falsely implicate him in the case. Though, it also emerges from her statement that accused was also having identity card issued by the welfare department, wherein disability was shown to be 83% but the collective reading of the evidence available on record suggests that accused had actually procured the identity card on the strength of that forged document where allegedly, he altered this from 03% to 83%.

16. PW-1 Tarsem, Junior Assistant in Regional Hospital, Nahan at that relevant time, specifically stated that he had given a copy of disability certificate to police on 8.3.2002 issued in the name of the accused, wherein disability certificate was mentioned to the extent of 03% not only in figures but also in words along with another disability certificate in which it was altered to 83% and one identity card signed by the District Magistrate was also handed over to the police vide memo Ext.PW1/C, where it was also mentioned 83%, which was duly signed by him as well as PW2 Arun Kumar. PW2, fully endorsed the view of PW1 in his cross-examination, rather, perusal of cross-examination of PWs 1 and 2 nowhere suggests that there is any kind of discrepancy or contradiction in the statements given by both the persons. Rather, in their cross-examination, no suggestion worth the name was put to them which could shatter their testimony or suggest that there was any prior animosity/enmity or motive, if any, to depose against the accused.

17. PW4 Ranvir Singh, Senior Assistant in HRTC Nahan, testified that in his presence (PW4) and Joginder Singh, Kulbhushan (PW5) had produced the copy of identity card issued by the HRTC regarding concessional pass for the handicap along with copy of register mark 'x' to the police vide memo Ext.PW4/A, which was signed by him along with Joginder Singh and Kulbhushan.

18. PW5 Kulbhushan, Senior Assistant HRTC Nahan stated on 21.10.1999, accused came to office of HRTC and produced identity card issued by the welfare department, wherein disability was mentioned as 83%. Accordingly, on the basis of same, free travelling pass, valid from 21.10.1999 to 20.10.2003, was issued in his favour, which was signed by Regional Manger. Ext.PW5/A, which was taken into possession by the police vide memo Ext.PW4/A. Defence has not been able to elicit anything contrary from these PWs in cross-examination. Rather statement given by PW-5 fully corroborates the statement given by accused under Section 313 Cr.PC, wherein he admitted the fact of obtaining free traveling pass from the State Transport Corporation. Though, it has come in the Statement recorded under Section 313 that he did not know that it is a forged document.

19. PWs-6 & 7 namely uSrender Kumar and Sanjiv Arora, are the formal witnesses, who only proved the documents on record. PW-8 S.I. Dhan Singh, who was Investigating Officer for some time, stated that Clerk, Surender Singh of the office of District Welfare Office, Nahan had prepared abstract Ext.PW8/A and Ext.PW8/B, which were handed over to him vide memo Ext.PW-8/C in the presence of one Achhpal and Surender Singh. Even in his cross-examination he admitted that he had prepared the memo in the office of District Welfare Office in the presence of witnesses.

20. PW9 Taresem Singh stated that on the asking of the accused, he had given two forms to him in his office. As per his statement, accused affixed his photographs and filled it and gave it to the department. He further stated that accused along with blank identity card and form having appended photographs on it, was sent by him to Medical Board, where the disability certificate of "03%" was issued in favour of the accused and one copy of the same was kept for record for their office. He also stated that in Medical Board, Dr. SS Rathore, Dr. Gulshan Narang, and Dr. Gurdarshan Gupta were the members and the accused was not issued disability certificate by the Medical Board. In his cross-examination, he also stated that accused had come to the office on 28.5.1998.

21. PW-10 Surender Singh, Clerk in the office of District Welfare Office, who was responsible for issuing identity cards to disabled persons stated that he maintains record of

identity cards. He also produced register of issuing of disability certificates/ identity cards in the Court. According to him, at Serial No. 121 of 98 at page No. 59, one identity card was issued to Amar Singh, S/o Almu Ram i.e. accused. It also came in his statement that abstract of Ext.PW8/A and PW8/B are correct as per the original, which was handed over to police vide memo Ext.PW1/C. He also identified the accused present in the court and stated that he had come to the office for making identity card which was made on the basis of disability certificate Ext.PW10/A.

22. PW11 Inspector Laxman Dass**,** in his cross-examination, admitted that no complaint was either received from the transport authority with regard to misuse of the pass by the accused.

23. PW12 S.I. Mohan Singh, who had also partly investigated the matter stated that no Transport Officer ever reported the matter to the police qua the use of false certificate by the accused for procuring concessional passes from departments. It also came in his cross-examination that accused was uneducated and he did not know reading and writing Hindi and English, which fact was enquired by him from his villagers. He also admitted that his specimen of writing in English could not be procured as he did not know English. He also denied of taking any document in possession from transport, welfare as well as medical department, rather, recovery, if any, of disability certificate from accused was denied by him.

24. PW13 Dr. SS Rathore stated that on 28.5.1998, accused was examined by him and was issued disability certificate to the extent of 03%, which was signed by all the members of the Medical Board. He also testified that on the certificate Ext.PW10/A, photograph was of the same person (accused), who was present in the court. He categorically stated that disability certificate has been tampered from 03% to 83% both in the letters as well as in words. In his cross-examination, he stated that he cannot say that address part and words in circle A, B resemble as he is not a handwriting expert and he cannot say that who had tampered with the figures and words on the certificate in question. He categorically denied that tampering could be the clerical mistake of his clerk, because the column of percentage of disability was filled by him (PW-13).

25. PW14, Dr. Minakshi Mahajan, Forensic expert stated that specimen was received in envelop bearing seal intact containing item No. Q1 to Q12 and specimen document S1 to S16. She stated that her report is Ext.PW11/A bears her signatures along with reasons. In her cross-examination, she testified that opinion regarding Ext.P1 to P4 could not be furnished due to the subsequent additions and overwriting/ poor quality and quantity of specimen writing but she categorically denied that similar signatures can be done by a different person and she reported wrongly regarding similarity of signatures.

26. Conjoint reading of evidence discussed herein above clearly suggests that Ext.PW1/A was forged, whereby figure '03%' was altered to '83%'. All the prosecution witnesses unequivocally stated that on 28th May, 1998, the then Medical Board had issued disability certificate in favour of the accused, wherein the then Medical Officer Dr. SS Rathore (PW13) after examining right hand thumb of the accused had granted disability certificate to the accused because of post traumatic stiffness on right thumb, which was duly signed by other three members of the Medical Board.

27. Careful reading of the cross-examination of the prosecution witnesses suggests that there are no inconsistencies, material contradictions and discrepancies. Rather in their cross-examination, they have stuck to their statements in the examination-in-chief, as has been observed above. No suggestion worth the name was put to these prosecution witnesses by the defence that there was any prior animosity or enmity and motive to depose against the accused falsely. It also stands proved on record that on the basis of disability certificate, accused actually availed the benefit of concessional certificates issued by HRTC as well as District Welfare departments.

28. But now question, which remains to be examined by this Court in this case is that once appellate court after careful perusal of the evidence on record came to the conclusion that prosecution has not been able to prove its case beyond reasonable doubt that document in question was actually forged by the accused and accordingly, accused was acquitted of having committed offence under Section 468 of the Indian Penal Code, could the accused be held guilty for committing offences under Sections 420 and 471 Indian Penal Code on the same set of evidence available on record?

29. During the arguments having been made by the learned counsel for the parties, this Court had an occasion to look into the documentary evidence available on record. This court has no hesitation to conclude that finding returned by the learned first appellate court to the effect that 'there is no material available on record to suggest that actually accused forged this document because entire evidence, which has been led in the present case by the prosecution though suggests that disability certificate was issued to the extent of "03%",' which was subsequently altered to "83%" but admittedly, no evidence worth the name has been led on record to prove the forgery having been committed by the accused. Rather, it has come in the statement of the majority of the prosecution witnesses that accused is an illiterate person, who did not even know to write/read English and Hindi. Moreover, it also emerges from the record that no specimens, which were sent to the FSL, Junga, were taken in English as accused was unable to read and write English. Now, if the statement given by the accused under Section 313 Cr.PC is analyzed in view of the aforesaid statements of PWs qua illiteracy of accused and his having no knowledge of English and Hindi, then it can be presumed that stand taken by the accused wherein he stated that "he did not know that document is a forged one", appears to have some force. At this stage, it is pertinent to notice that had the accused forged the document and had full knowledge that it is a forged document, he would have certainly hesitated to appear before the Medical Board convened at the time of the renewal. It has come in the statement of the members of the medical board, as has been referred above, that they got suspicion since there was overwriting on the document and then only matter was got inquired from the records. As observed above, had the accused known that document, which was sought to be reviewed by him, was a forged document, then probably, he would have never gone to the Medical Board. It has nowhere come in the statement of any of the prosecution witnesses that at the time of renewal, the accused appeared to be shaky, from where it could be inferred that he tried to hide something. One thing also emerges from statement of PW-10 Surender that on the asking of the accused, two forms were supplied to him, which were filled by him and after affixing photographs, were sent before the Medical Board, for granting him disability certificate. But it also appears in his statement that there has been procedure, where after filing the forms, same are sent directly to the Medical Board for its report on the identity card as well as form. Here in the statement of PW3 though, there is mention with regard to identity card which was recovered at the time of detection of this forgery allegedly having been committed by the accused but perusal of the record nowhere suggests that it was taken into custody or got proved by any of the witness during recording of their statements before the learned trial Court.

30. Court below while acquitting the accused under Section 468 came to the conclusion that it stands proved on record that on the basis of forged document accused knowingly availed the benefit of concessional passes issued by HRTC and identity card issued by the District Welfare Department, which has not been proved on record because that could not be taken into consideration by both the courts below as far as use of concessional pass of HRTC is concerned. This court is of the view that once it stands proved on record that disability certificate was not actually forged by the accused, both the courts below erred in concluding that accused knowing fully well that it is a forged document tried to use the same for having benefit of concessional passes from departments. At the cost of repetition, it is again observed that it has come in the statements of prosecution witnesses that accused was an illiterate, knowing no English or Hindi, meaning thereby, he was not aware of the implications, if any, of any forgery allegedly committed by him or any other person. Had the courts below analyzed the evidence on record with a view to test and examine the stand taken by the accused under Section 313 Cr.PC,

wherein he stated that he did not know that this is a forged document, certainly finding to the effect that "accused knowing fully well that the document is forged used the same to avail benefit of concessional pass from HRTC", would have not been recorded by the courts below. Courts below did not make any attempt to examine material on record to ascertain whether it was typographical mistake committed by official of the hospital while issuing certificate and no attempt, whatsoever, was made to ascertain that when accused did not know the English, who actually inserted these words in English in the certificate? It nowhere came in the evidence of the prosecution that accused was aware that he is using the forged document, rather, evidence available on record suggests that he remained under bonafide belief that it is a genuine document, then only he went to medical authorities to get it renewed.

31. In the present case, basic ingredient to prove charge under Section 420 of the Indian Penal Code is missing. Section 420 of the Indian Penal Code talks about "dishonestly inducement" of a person to deliver any property etc. In the present case, though prosecution has placed on record concessional certificate issued by HRTC but there is no complainant, who stated that accused deceitfully induced the department (HRTC) to deliver something on the basis of alleged forged document. Admittedly, HRTC, issued concessional pass but did not make any complaint of the inducement, if any, in terms of Section 420 of the Indian Penal Code, rather, it has come in the statement of PW-11 Inspector Laxman Dass that no complaint whatsoever was ever lodged by HRTC with regard to the availing benefit of concessional pass on the strength of forged disability certificate. Hence, case under Section 420 Indian Penal Code against the accused cannot be held to be sustainable.

32. As far as Section 420 of the Indian Penal Code is concerned, it stands duly proved on record that accused did not forge the document and there is overwhelming evidence of accused having no knowledge of English and Hindi. Rather, on the basis of evidence available on record, it can be presumed that accused always remained under the bonafide belief that disability certificate, being used by him, is a valid and genuine document. Prosecution has not led any evidence on record to prove that accused fraudulently and dishonestly used the document having full knowledge and reason to believe that same is forged document. Hence, accused cannot be held guilty of having committed offence under Section 471 of the Indian Penal Code. In this regard, reliance is placed on judgment titled in ***Guru Bipin Singh v. Chongtham Manihar Singh and Anr., 1997 CRI.L.J.724,*** wherein Hon'ble Apex Court has held as under:-

> *"7. It is urged by Shri Jethmalani that for making a false document, the person concerned has to make, sign, seal or execute the same. It is submitted that in the present case, even as per the complaint, the appellant had not move , signed, sealed or executed the alleged manuscript inasmuch as the allegation is that the appellant had passed on some writing as representing the same to be in the hand of the king. In the initial statement the complainant had stated that the appellant relied upon the fabricated book named above "showing the same as genuine and claiming it as written by late Maharaja Bhagachandra ....."*
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> *8. This shows that the allegations is that the appellant had represented some writing to be of the Maharaja, though in fact it was not so. It is not the allegation that the appellant had himself written the manuscript and represented it to be that of Maharaja. According to Dr. Ghosh, despite this being the position, requirement of 464 would be satisfied in view of what has been stated in Explanation shows that for it to get attracted "making of a false document" is essential; and it is this aspect which is missing in the present case, according to Shri Jethmalani. There is apparently force in the submission of Shri Jethmalani because, as already pointed out, it is not the allegation that it is the appellant who had made, signed, sealed or executed the writing in question. This apart, when we desired Dr. Ghosh to bring to our notice as to which writing of King Bhagyachandra was represented to belong to him, we were referred to a printed book titled "Rajarshi Bhagyachandra Govinda*

Sangeet Leela Vilasa". This book, however, is a Manipuri translation by one Pt. Braj Behari Sharma, we do not have the original.

9. In view of all the above, we agree with Shri Jethmalani that the allegations made in the complaint, even if true, do not make out the case of forgery. Now, if forgery be not there, allegations under Section 420 would fail because the allegation in para 5 of the complaint is that by "forging the said book" deception was caused and members of the public were induced to purchase the same. So, forgery is the principal allegation; cheating being a consequential offence. If forgery goes, cheating cannot stand. So,the complaint sections, namely 420, 465 and 468. It may be pointed out that 468 is intimately connected with 420 and 465."

33. In the totality of the facts and circumstances, as emerged from the record, this Court is of the view that once the courts had come to the conclusion that too on the basis of the same set of evidence available on record that accused has not forged the document, then their finding with regard to commission of offences under Sections 420 and 471 does not appear to be based upon the solid reason.

34. Consequently in view of the aforesaid observations, this Court is of the view/opinion that the judgment passed by both the courts below holding accused guilty of having committed offences under Sections 420 and 471 Indian Penal Code are quashed and set aside and accused-petitioner is acquitted of the charges framed against him. Bail bonds are discharged. Petition stands disposed of, so also pending applications, if any.

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

Prem Singh & Others ....Petitioners

Versus

State of H.P. & Others. ..Respondents

CWP No.3599 of 2009
Judgment Reserved on: 09.05.2016
Date of decision: 27.05.2016

Constitution of India, 1950- Article 226- Predecessor-in-interest of the petitioners was appointed as a Depot Holder by the Punjab Government for the sale and receipts of food-grains at Village Keylong - it was agreed that money would be deposited in the Treasury within a period of six months from the date of sale- amount of Rs. 7969.64/- was demanded from him- one S was appointed as Depot Holder- it was found that there was shortage of food-grains amounting to Rs. 97,568.18/-- notice was issued to the petitioners for the recovery of the amount as arrears of land revenue- a civil suit was filed by the petitioners - an application for arbitration was filed- matter was referred to Arbitrator but no Arbitrator was appointed – subsequently a notice was received by the petitioners calling upon them to appear before the Arbitrator for the recovery of the money – a writ petition was filed against the notice – held, that no action was taken in the matter for a long time- proceedings had been initiated after 23 years- period of limitation for the recovery of the amount is 30 years- writ petition allowed- notice of demand quashed and set aside. (Para-18 to 29)

Cases referred:

Maharashtra State Financial Corpn. Vs. Ashok K.Agarwal and Others, (2006)9 SCC 617

Ram Bachan Rai and Others vs. Ram Udar Rai and Others, (2006)9 SCC 446

For the Petitioners: Mr.Vinay Kuthiala, Senior Advocate with Mr.Diwan Singh Negi, Advocate.

For the Respondents: Mr.Rupindr Singh Thakur, Additional Advocate General with Mr.Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present petition the petitioners have prayed for following reliefs amongst other:-

> ***"(i) That the respondents may be directed to produce the entire record of the case and the proceedings initiated by respondent No.3 may kindly be declared to be illegal and wholly without jurisdiction and beyond the period of limitation prescribed by law and may kindly be quashed.***
>
> ***(ii) that the amount sought to be recovered by respondents 1 & 2 may kindly be declared to be time barred and the respondent be restrained from recovering the same in any manner whatsoever from the petitioners.***
>
> ***(iii) that the notice dated 13.8.2009 (Annexure P-7) as well as the claim petition (Annexure P-8), as well as proceedings pursuant thereto may kindly be quashed.***
>
> ***(iv) That the respondents be directed not to resort to coercive measures in order to recover the time barred amounts from the petitioners and the petitioners be declared to be not liable for paying the same."***

2. Bare perusal of the averments contained in this writ petition suggests that the petitioners are aggrieved with the notice dated 13.8.2009, Annexure P-7, issued by the Arbitrator i.e. respondent No.3 in Arbitration Case No.1 of 2009, calling upon the petitioners to appear personally or through authorized agent before him alongwith original record on the given date.

3. Necessary facts, which emerges from the pleadings, are that the predecessor-in-interest and father of the petitioners, namely, Shri Tenzin S/o Sh.Tuk Tuk, resident of Village Keylong, District Lahaul & Spiti, (HP) was appointed as a Depot Holder of Food Grains in the year 1969 by the then Punjab Government for the supply of Food Grains to the general public in the Lahaul & Spiti area. Documents annexed with the reply filed by the respondents also suggests that one agreement dated 10.11.1969 (Annexure R-1) was entered into at that time with the aforesaid predecessor-in-interest of the petitioners and the then Punjab Government through Deputy Commissioner, Lahaul & Spiti, District at Keylong.

4. Since Lahaul & Spiti was snow bound area and use to remain cut off for six months in a year, the Government had taken a decision to appoint depot holder for sale and receipts of food-grains at Village Keylong. The depot holder was given the stocks of food-grains on consignment basis i.e. on credit basis by the Government on the understanding that he, after selling the food-grains to the public on cash, will deposit the money in to the Government Treasury within a period of six months from the date of sale. As per the aforesaid arrangement, late Shri Tenzin continued to serve as depot-holder of food-grains from the year 1969 till his death i.e. 19th October, 1971.

5. Perusal of Annexure P-1 suggests that District Controller, Food Civil Supplies & Consumers Affairs, Lahaul & Spiti at Keylong sent an intimation to Shri Tenzin with a direction to deposit an amount of Rs.7969.64 paise on account of selling food-grains, in the Government Treasury within a period of two days. However, endorsements made below Annexure P-1 also suggests that Shri Tenzin submitted that since he is ill for the last 2½ months, he will settle the accounts once he recovers from the illness. Fact remains that Shri Tenzin could not deposit the amount in question and, ultimately, he passed away on 19.10.1971.

6. Subsequently, Deputy Commissioner, Lahaul & Spiti vide his letter dated 20.12.1971, appointed one Shri Sonam son of Shri Kunga as a depot holder, who was handed over the charge of food-grains stock of Shri Tenzin in the presence of one Angrup, who was alleged to be representative of Smt.Pulzon widow of Shri Tenzin. However, subsequently, it was reported in the office note that there was shortage in the quantity of food-grains for the year 1968-69 to 1970-71, amounting to Rs.97,568.18 paise only.

7. Respondents, after recording alleged shortage, did not take any action to recover the outstanding amount for almost 10 years. It is only in the year 1981 i.e. 7.3.1981, for the first time, the matter was referred to the Collector, Lahaul & Spiti for recovery of amount to be collected as arrears of land revenue (Annexure P-3). Thereafter, again respondents did not take any action till 21.3.1984, when Collector, Lahaul & Spiri vide letter dated 21.3.1984 delegated the matter to the Tehsildar, Keylong to recover an amount of Rs.1,73,567.40 paise (Rs.97,567.18 as principal and Rs.76,102.78 paise as interest) as arrears of land revenue (Annexure P-4). Respondents demanded the aforesaid amount from the present petitioners being legal representatives of late Shri Tenzin, who were admittedly minor at that time. However, present petitioners, feeling aggrieved with the aforesaid order of the recovery passed by the Collector, Lahaul & Spiti, approached the Court of learned Senior Sub Judge, Lahaul & Spiti on 16.9.1985 seeking declaration that the land owned by them could not be sold by way of attachment for recovering the amount allegedly due from their predecessor-in-interest, Shri Tenzin. It further emerges from the record that present respondents moved an application under Section 34 of the Arbitration Act, 1940, during the pendency of the aforesaid suit field by the petitioners and objected the same on the ground that as per agreement entered into between the parties, dispute, if any, arose between the parties had to be referred to the arbitration. Accordingly, vide order dated 29.8.1986, learned Senior Sub Judge, Lahaul & Spiti stayed the suit filed by the petitioners and referred the matter to the learned Arbitrator in terms of the agreement and who was directed to decide the matter first and only thereafter recovery could be affected as per the Arbitration award (Annexure P-5).

8. Respondents, even after passing of order dated 29.8.1986, did not take any step to appoint Arbitrator, as was noticed in the order dated 29.8.1986, except a notice from the Tehsildar Recovery dated 19.1.1988, calling upon the legal representatives of late Shri Tenzin to appear in the office and deposit an amount of Rs.1,73,670/-, failing which harsh action would be taken against them. Perusal of Annexure P-5 clearly suggests that respondents did not take any steps to appoint Arbitrator rather they persisted with the demand, which was made vide latter dated 21.3.1984. i.e. Annexure P-4. Suddenly, after more than 23 years, Arbitrator i.e. Director, Food & Civil Supply and Consumers, called upon the present petitioners to appear before him on 18.9.2009 in Arbitration case No.1 of 2009 filed by the respondents for recovery of Rs.3,25,484.49 paise from the petitioners in the capacity of legal heirs of late Shri Tenzin on account of shortage of food-grains pertaining to years 1968-69 to 1970-71 i.e. Annexure P-7.

9. Feeling aggrieved and dissatisfied with the issuance of aforesaid notice issued by the Arbitrator, petitioners filed the present petition invoking the extra ordinary jurisdiction of this Court. This Court, while entertaining the present petition on 9.10.2009, stayed the operation of notice issued by the Arbitrator (Annexure P-7).

10. The petitioners have contented that documents available on record clearly demonstrate that the amount, being claimed by the respondents, is hopelessly time barred and at this belated stage, respondents have no authority and right to recover the same from the present petitioners. It is also contended that the recovery admittedly pertains to the year 1968-69 to 1970-71 and even, if any, amount was due to the respondents, the same could be recovered within the time prescribed, in accordance with law. It is ample clear on the record that respondents have been negligent in recovering the amount, if any, because admittedly there are documents on record to suggest that the alleged shortage in quantity of the food-grains pertain to the years 1968-69 to 1970-71, which had came to the notice of the respondent on 4.1.1972, i.e. 37 years prior to the issuance of notice by the Arbitrator i.e. 13.8.2009. It is also contended that

order passed by the learned Senior Sub Judge, Lahaul & Spiti, dated 29.8.1986 itself suggests that respondents themselves have resorted to the arbitration proceedings in terms of the agreement entered into by the predecessor-in-interest of the petitioners and the then Deputy Commissioner, Lahaul & Spiti District at Keylong, dated 10.11.1969 and direction was also issued to the respondents to appoint Arbitrator and decide the matter. But, admittedly, no steps whatsoever were taken by them till 13th August, 2009 i.e. more that 23 years after appointment of Arbitrator. It has specifically been contended that the claim of the respondents has become stale and is hopelessly time barred because, admittedly, if alleged amount, if any, was required to be recovered by the respondents from late Shri Tenzin, the same could be recovered by the respondents well within the limitation.

11. Respondents by way of reply refuted the aforesaid averments contained in the writ petition and stated that since late Shri Tenzin, depot-holder, has mis-appropriated the Government food-grains and had failed to deposit the sale produce of the Government as per office order dated 4.1.972, his legal representatives have been rightly asked to deposit an amount of Rs.97,567.60 paise, which includes the previous recovery of Rs.7965.64 paise, pertaining to the years 1968-69 to 1970-71. respondents have admitted the fact with regard to passing of the order dated 29.8.1986 by the learned Senior Sub Judge, Lahaul & Spiti, where the learned Judge, on the application having been preferred by the respondents, had referred the matter to the Arbitrator with the direction to the respondents to refer the matter to the arbitrator, who was directed to decide the matter first and thereafter recover the amount in terms of the arbitration award. Respondents, by way of reply, have not rendered plausible/reasonable and acceptable explanation for inordinate delay in either taking steps to recover the alleged amount, if any, from the petitioners or in appointing Arbitrator in terms of the orders dated 29.8.1986, passed by the learned Senior Sub Judge, Lahaul & Spiti. Only explanation rendered is that during this period matter remained pending with the authorities and, as such, plea of inordinate delay in recovering the aforesaid amount cannot be taken by the petitioners.

12. I have heard learned counsel for the parties and perused the record of the case carefully.

13. Shri Vinay Kuthiala, learned Senior Counsel, appearing on behalf of the petitioners vehemently argued that the impugned notice dated 13.8.2009 (Annexure P-7) calling upon the present petitioners to appear personally through authorized agent, at this belated stage, is not sustainable and deserves to be quashed and set aside, especially in view of the fact that there is inordinate delay in appointment of Arbitrator by the respondents. He vehemently argued that Arbitrators was appointed by the learned Senior Sub Judge, Lahaul & Spiti on the application moved by the respondents themselves, wherein they invoked arbitration clause of the agreement and prayed for appointment of Arbitrator. He invited the attention of this Court to the order passed by learned Senior Sub Judge, Lahaul & Spiti, Annexure P-5, which clearly suggests that the respondents have moved an application under Section 34 of the Arbitration Act, praying therein for appointment of Arbitrator in terms of agreement entered into between the parties. Admittedly, the aforesaid order was passed on 29.8.1986 i.e. 21 years back.

14. Mr.Kuthiala strenuously argued that there is no explanation, in the reply filed by the respondents, for this much inordinate delay in the appointment of the Arbitrator and only explanation rendered by the respondents, whereby they have stated that the matter remained pending before the Authority, cannot be accepted, at this belated stage. He forcefully argued that as per Limitation Act, there is a period of three years for appointment of the Arbitrator and in the present case, admittedly, respondents did not take any steps to appoint the Arbitrator for almost 21 years and, as such, any order of appointment of Arbitrator as well as any action taken by the Arbitrator at the belated stage cannot be given effect because the appointment of Arbitrator, after 21 years of the passing of the order of the learned Senior Sub Judge, is illegal and deserves to be quashed and set aside.

15. Mr.Kuthiala, during arguments, also invited the attention of this Court to the letter dated 9.8.1971 (Annexure P-1), whereby the District Controller, Food Civil Supply & Consumers Affairs, Lahaul & Spiti, had written to late Shri Tenzin with regard to sale produce amounting to Rs.7965.64 paise, which was required to be deposited by him within two days. He submitted that if, for the sake of arguments or discussion, it is accepted that this amount was due and admissible, it cannot be recovered from the legal heirs of late Shri Tenzin that too after an inordinate delay of 38 years i.e. from 1971 till the date of issuance of notice by Arbitrator i.e. 2009. He also referred to Office Note (Annexure P-2), whereby, while handing over the charge to the successor of late Shri Tenzin, it is concluded that amount of Rs.97,568.18 paise is recoverable from said Shri Tenzin. But period given in that letter also suggests that recovery, if any, relates to the years 1968-69 to 1970-71, meaning thereby, that also relates back to period 39-40 years back. He further contented that as this recovery relates back to 40 years, no steps whatsoever can be taken by the respondents to recover the same at this belated stage, as the claim, if any, is hopelessly time barred.

16. However, Shri Rupinder Thakur, learned Additional Advocate General, appearing on behalf of the respondents, stated that there is no infirmity and illegality in the notice dated 13.8.2009, issued by the Arbitrator, because there was an agreement clause entered into between the parties, which provides for the settlement of dispute by way of arbitration. He further contended that right of appointment of Arbitrator lies with the authorities and, as such, Director, Food, Civil Supplies & Consumer Afairs, H.P., Shimla, has rightly been appointed as an Arbitrator. He also stated that it stands proved on record that the predecessor-in-interest of the present petitioners was liable to pay an amount, as has been determined by the authorities, on account of sale proceeds, which he admittedly failed to deposit despite several notices.

17. Mr.Rupinder Thakur also contended that the perusal of the record clearly suggests that the matter always remained under active consideration of the respondents, as such, plea of the petitioners that claim is hopelessly time barred cannot be accepted. Moreover, this is a public money which is required to be recovered and merely on technical grounds the legitimate claim of the State cannot be allowed to be defeated.

18. After hearing the parties and perusing the record, it emerges that communication was sent by the respondents in the year 1971 to late Shri Tenzin calling upon him to deposit Rs.7965.64 paise on account of sale proceeds of the wheat for the period 1968-69 to 1970-71 till 24.7.1971. However, factum, with regard to misappropriation of this amount, cannot be ascertained because perusal of the record nowhere suggests that any imputation with regard to misappropriation by late Shri Tenzin was made in this behalf by the respondent authorities. It also emerges from Office Note (Annexure P-2) that while handing over the charge to Shri Sonam i.e. successor of late Shri Tenzin w.e.f. 21.12.1971, an amount of Rs.97,568/- was determined, which was allegedly recoverable from late Shri Tenzin by the respondents on account of sale of wheat for the period 1968-69 to 1970-71. But, document made available on the record, nowhere suggests that after determining the aforesaid amount, as has been pointed out in Annexure P-2, whether any attempts whatsoever were made by the respondents-authorities to associate present petitioners before determining the sum due, which has been ultimately foisted upon them. Rather, it appears from Annexure P-3 that District Food and Supplies Controller, Lahaul & Spiti directly issued an intimation to the Collector, Lahaul & Spiti at Keylong, with a request to take up the recovery case under H.P. Public Money (recovery) of dues Act, 1973 against legal representatives of late Shri Tenzin and in this regard recovery certificate was issued vide extraordinary Gazette No.nil, dated 23.9.1978. But even the perusal of this communication suggests that it was issued on 7.3.1981 and it remained a fact that the Collector, Lohal & Spiti did not take any action, rather vide Annexure P-4, letter dated 21.3.1984, he authorized Tehsildar, Keylong to effect recovery from the legal representatives of late Shri Tenzin. But even then there is no document on the record to suggest that Tehsildar, Keylong took any steps for recovery of the amount, as has been referred above. Admittedly, aforesaid notice Annexure P-4 was issued by the respondents in 1984, but thereafter present petitioners filed suit for

declaration in the Court of learned Senior Sub Judge, Lahaul & Spiti in the year 1988, meaning thereby that between the years 1984 and 1988, no steps whatsoever, were taken by the respondents to recover the alleged amount from the present petitioners, which clearly suggests that respondents have been quite negligent in recovering the alleged amount from the present petitioners. Admittedly, the decision with regard to recovery of sale proceeds of the Government food-grains, which is a public money, was taken by the respondents and a letter dated 7.3.1981 was sent to the Collector, who vide communication dated 22.3.1984 deputed the Tehildar, Keylong to recover the money. Tehsildar, in turn, took the steps by issuing a letter dated 18.1.1988 for recovery of amount. But, as emerges from record, no steps whatsoever for almost seven years were taken by the respondents to recover the amount. Subsequently, when the suit was filed by the petitioners, the respondents, instead of filing detailed written statement; themselves prayed that the matter be referred to the Arbitrator in terms of the arbitration clause in the agreement. That prayer of the respondents was also allowed on 29.8.1986, whereby the matter was referred to the Arbitrator with the directions that first matter would be decided and then steps would be taken to affect the recovery in accordance with arbitration award. Even at this stage there is no record, whatsoever to suggest that the present respondents took any steps to appoint Arbitrator, as was ordered by the learned Senior Sub Judge on 29.8.1986. Now, suddenly in the year 2009, i.e. after more than 23 years, notice has been sent to the present petitioners with the direction to appear before the respondent-Arbitrator, which action of the respondent, at this belated stage, cannot be termed as legal in any manner. Rather, it appears to be an attempt on the part of the respondents to recover the amount, which, probably at this stage, could not be recovered on account of inordinate delay on their part. Only explanation rendered by the respondents that during all this period matter remained pending before the authorities cannot be accepted at all because during this period their conduct has been very callous and negligent, rather they slept over the matter and now suddenly after 23 years steps have been taken to initiate the recovery proceedings against the legal representatives of late Shri Tenzin that too qua the claim, which have admittedly become very stale. Leaving apart issue of appointment of Arbitrator, the perusal of the record/document, placed on record, leaves no doubt in the mind of the Court that even after issuance of recovery certificate, respondents did not take any steps, for more than 9 years, to initiate proceedings under Act for recovery of amount. Hence this Court has no hesitation to conclude that any attempt, at this stage, by initiating arbitration proceedings against the petitioners for recovery of the amount, which is admittedly hopelessly time barred, cannot be allowed to succeed at this belated stage. Non-placing of documents suggesting therein that legal representatives of late Shri Tenzin were ever associated at the time of determination of amount due, by the respondents compel this Court to conclude that actually no proceedings whatsoever, were initiated by the respondents to ascertain the sum due recoverable from late Shri Tenzin. Moreover, perusal of the agreement, which has been placed on record by the present respondents, nowhere suggests that terms and conditions of agreement binds the legal representatives of late Shri Tenzin also, being a depot-holder, had entered into an agreement with the then Deputy Commissioner/District Controller Food Civil Supplies & Consumers Affairs. Plain reading of the agreement nowhere suggests that legal representatives of late Shri Tenzin shall be liable for any acts and deeds of late Shri Tenzin, the then depot holder. Hence, this agreement cannot be looked into while determining the right and liabilities of late Shri Tenzin.

19. It is undisputed in the present case that the respondents have been quite negligent in effecting recovery, if any, on account of alleged outstanding amount in the name of late Shri Tenzin from present petitioners being his legal representatives. As emerges from the record, as has been discussed above, that no proceedings whatsoever were ever taken to its logical end by the respondents for recovery of amount due, rather same were persuaded half heartedly and as such even under the Limitation Act, there is no provisions which can come to the rescue of the respondents for recovery of such stale claim.

20. Undisputedly, as emerges from record, respondents now by way of arbitration proceedings, which are also hopelessly time barred, are attempting to recover the amount due

from the predecessor-in-interest of the petitioners after 40 years. Respondents by way of issuance of notice of arbitration to the petitioners have now attempted to recover the amount which otherwise has become stale due to negligence and callous attitude of the respondents themselves.

21. Though as per Article 130 of Limitation Act period of 30 years have been prescribed for the State to file suit, but since recovery pertains to the year 1968-69 i.e. 39-40 years back, respondents cannot be allowed to recover the same by taking benefit of Article 112 of the Limitation Act because admittedly period of 30 years, as prescribed under Article 112 of the Limitation Act, has also expired. In the present case though steps were taken by the authorities to recover the amount as arrears of land revenue but as has been discussed no proceedings either in the shape of recovery suit or recovery of dues as land arrears and arbitration were taken to its logical end, rather proceedings, if any, were left in between and as such, now fresh attempt sought to be made by sending notice of the arbitration cannot be allowed to sustain at this belated stage in the given facts and circumstances of the case. What to talk about limitation provided under Article 112 of the Limitation Act, even time/period provided under Article 136 and 137 of the Limitation Act for execution of decree, if any, has expired and no benefit can be taken by the respondent by resorting to the same. At this stage, it would be apt to refer to Articles 136 and 137 of the Limitation Act, 1963.

22. As per Article 136, period of 12 years has been prescribed for execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.

23. Article 137 provides a period of three years for any other application for which no period of limitation is provided elsewhere in this Division.

24. In this regard reliance is placed upon the judgment of the Hon'ble Apex Court in ***Maharashtra State Financial Corpn. Vs. Ashok K.Agarwal and Others, (2006)9 SCC 617,*** wherein it has been held:

> ***"6. Article 137 of the Limitation Act applies in the facts of the present case. When Article 137 is applied, the application moved by the appellant Corporation on 2.1.1992 for proceeding against the sureties i.e. the respondents herein, was clearly barred by time and the courts below were correct in holding so. To recall the facts of the present case, the notice demanding repayment of the amount of loan was issued against the borrower, that is, M/s Crystal Marketing Private Limited on 8.3.1983 and the application under Sections 31 and 32 of the State Financial Corporation was filed against the said borrower on 25.10.1983. The liability of sureties had crystallized then.***
>
> ***7. The amendment under Section 31 of the State Financial Corporation Act which authorities the State Financial Corporation to take action under Section 31 of the Act for enforcing the liability against the sureties, was brought about in the year 1985 by introduction of sub-section (aa) in Section 31(1) of the Act. Even after this amendment the appellant did not wake up to take any step against the sureties in the present case. Notice was issued to the sureties only on 7.12.1991 and the application for enforcement of liability against them was filed on 2.1.1992. The application, therefore, was clearly barred by time and the decisions of the courts below cannot be faulted. The courts below rightly dismissed the application on the ground that it was barred by limitation. The appeal has no merit. It is dismissed with no order as to costs."(P.620)***

25. In ***Ram Bachan Rai and Others vs. Ram Udar Rai and Others, (2006)9 SCC 446,*** the Hon'ble Apex Court has held:

"8. Noticing some conflicts in views expressed by two Judge Benches judgment of this Court, reference was made to a three Judge Bench in Chiranjilal (dead) by Lrs. V. Hari Das (dead) by Lrs. (2005(2) SCC 261). A three Judge Bench by its judgment dated May 13, 2005 in Dr. Chiranji Lal (D) by Lrs. V. Hari Das (d) by Lrs. (2005 (10) SCC 746) has decided the matter observing inter-alia as follows:

> ***"24. A decree in a suit for partition declares the right of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon."***

In paragraph 25 of the same decision, this Court also observed as follows:

> ***25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the Court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of thereupon an only thereafter the period limitation would remain suspended till stamp paper is furnished and decree engrossed of twelve years will begin to run would lead to absurdity. In Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari, it was said that the payment of court fee on the amount found due was entirely in the power of the decree- holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed. (Emphasis supplied) In view of the said decision, the inevitable conclusion is that the Executing Court was not correct in its view. It is to be noted that learned counsel for the respondents conceded to the position that the period of limitation is not to be reckoned from the date of dismissal of the Civil Revision which was filed relating to rejection of the application under Order IX Rule 13, CPC. The entire focus was on the date from which the period of limitation is to be reckoned. Reliance was placed on a decision of the Calcutta High Court in Ram Nath Das and Ors. v. Saha Chowdhury and Co. Ltd. and Ors. (AIR 1974 Cal 246) where it was held that the decree was enforceable and when cost is assessed. The ratio in the said judgment clearly runs counter to what has been stated in Dr. Chiranji Lal's case (supra).***

For the reasons aforesaid, the application for execution filed on 5.4.1991 was clearly time barred having been filed beyond the period of twelve years prescribed under Article 136 of the Limitation Act. Accordingly the High Court as well as the Executing Court committed illegality in coming

to a conclusion that it was not barred by limitation. Therefore, the inevitable result is that the order passed by the High Court and the Executing Court cannot be maintained and are set aside. The appeal is allowed. The application for execution stands rejected. No costs.

(PP.449-450)

26. Mr.Thakur, learned Additional Advocate General, in support of his contention, placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Deepak Bhandari vs. Himachal Pradesh State Industrial Development Corporation Ltd. Civil Appeal No.1018/2014 arising out of Special leave Petition (Civil) No.30825 of 2010.***

27. Perusal of the aforesaid judgment, relied upon by learned Additional Advocate General, suggests that it is not applicable in the present facts and circumstances of the case. In the aforesaid case Hon'ble Apex Court while dealing with the Section 29 of State Financial Corporation Act held that limitation is to be counted from the date when the assets of the Company were sold and not when the recall notice was given. But in the present case where except one letter dated 7.3.1981 whereby the matter was referred to the Collector, Lahaul & Spiti for recovery of amount to be collected as arrears of land revenue, there is no document available on record suggestive of the fact that any proceedings qua the recovery involved in the present case was ever taken to its logical end. Hence, in the present case respondents cannot take any benefit of the ratio laid down by the Hon'ble Apex Court in the present case.

28. Consequently, in view of the aforesaid discussion, the present writ petition is allowed and Annexures P-7 and P-8 are quashed and set aside, accordingly.

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

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

Salender Pal .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Revision No. 159 of 2007.
Reserved on: 09.5.2016.
Date of Decision: 27.5. 2016.

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a bus- bus went off the road and fell into a nallah – two women and one boy died on the spot- other passengers suffered injuries- accused was convicted by the trial Court- an appeal was preferred which was dismissed – held, in revision that PW-3 to PW-6 had categorically stated that accident had taken place due to the negligence of the accused as he was trying to overtake another vehicle- their testimonies were not shaken in the cross-examination - they are best witnesses as they were in the bus at the time of accident- prosecution case was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- however, sentence modified, keeping in view the time lapsed from the date of incident. (Para-15 to 24)

Cases referred:

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
S.Mahaboob Basha versus State of Karnataka 2014 (10) SCC 244.
Dalbir Singh versus State of Haryana 2000 (5) SCC 82
State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182

For the petitioner: Mr. Ajay Sood, Senior Advocate, with Mr. Dheeraj K. Vashishat, Advocate.
For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

The present criminal revision petition filed under Section 397 Cr.PC read with Section 401 Cr.PC, is directed against the judgment dated 01.10.2007, passed by the learned Additional Sessions Judge, Fast Track Court, Solan, District Solan, HP, in case No. 7FTC/of 10 of 2007, titled *"Salender Pal v. State of Himachal Pradesh"*, affirming the judgment of conviction and sentence dated 30.4.2007, passed by the learned Additional Chief Judicial Magistrate, Kasauli, District Solan, HP, in Criminal Case No. 202/2 of 2002 titled "*State of Himachal Pradesh v. Salender Pal*," whereby accused-petitioner herein, has been sentenced to undergo as under:-

> *"Simple imprisonment for six months for committing offence under Section 279 and fine of Rs.1000/-(Rupees one thousand only) and in default of payment, to further undergo simple imprisonment for one month.*
>
> *Simple imprisonment for a period of six months and to pay fine of Rs.500 (Rupees Five Hundred only), and in default to undergo simple imprisonment of one month for committing offence under Section 337 Indian Penal Code.*
>
> *Simple imprisonment for two years and fine of Rs.000/- (Rupees one thousand only) and in default, simple imprisonment for a period of six months for having committed offence under Section 338 Indian Penal Code, and ;*
>
> *Simple imprisonment for two years and pay fine of Rs. 5000/- (five thousand only) and in default simple imprisonment for six months for committing offence under Section 304-A of Indian Penal Code. All sentences shall run concurrently."*

2. Briefly stated facts necessary for adjudication of the present case are that on 31.3.2002, petitioner-accused Salender Pal was driving a mini bus bearing No. HR-37-8299 from Subathu to Panchkula. When bus reached near Thedpura at about 2.45pm, it went off the road and fell into a Nalah, as a result thereof, injuries were caused to children and women travelling in the bus and unfortunately two women and one boy died on the spot. After accident, injured were taken to the hospital at Nalagarh for medical aid. As per prosecution story, alleged accident took place due to rash and negligent driving of the accused-driver, who failed to control the vehicle in question and went out of road. Subsequent to the accident, matter was reported to the police and statement of Shri Hari Ram under Section 154 Cr.PC was recorded and on the basis of the same, FIR No. 46/02, Ext.PA was registered against the accused at Police Station Barotiwala under Sections 279,337,338 and 304-A Indian Penal Code.

3. During the investigation, police came to the conclusion that accident took place due to rash and negligent driving of the driver-accused as well as high speed. It was also found that due to negligent act of the accused three persons namely Shorya Sharma, Shashi Kashyap and Archana Bala died and simple and grievous injuries were caused to several other passengers travelling in the bus.

4. Police also got vehicle mechanically examined and procured mechanical report Ext.PW-7/A. Spot map/site plan Ext.PW-13/B, post-mortem reports of the deceased Ext.P1 to P3 were also procured. Injured namely Renu, Nitika, Mamla Saini, Sunita Chand, Pinki Thakur, Smt. Anju Gupta, Narayan Giri, Savita, Varun Sharma, Aman, Rewa Sharma, Munish Sharma, Sanyogita, Shaweta, Sangeeta Sharma and others were also got medically examined at Hospital and MLCs Ext. P4 to P13 were also procured. Photographs of the mini bus as well as of the deceased were clicked on the spot and were procured as Ext.PW-1 to P-36 along with negatives. After completion of the investigation, police filed challan in the competent court of law and

charged the accused for committing offences (supra). The petitioner- accused was charged for commission of offences (supra) by the court of learned Addl. Chief Judicial Magistrate, Kasauli, to which he pleaded not guilty and claimed trial. In order to prove its case, prosecution examined as many as 15 witnesses. The learned trial court after appreciating the evidence on record vide judgment dated 30.4.2007 convicted and sentenced the accused for committing the offences as per detail given above.

5. Feeling aggrieved with the judgment of conviction of learned trial Court, accused filed appeal under Section 374 Cr.PC before the learned Additional Sessions Judge, FTC, Solan, District Solan, HP, which was dismissed and judgment of learned trial court was upheld. Hence, the present criminal revision petition by the petitioner- accused.

6. Mr. Ajay Sood, Senior Advocate, duly assisted by Mr. Dheeraj K. Vashishat, Advocate, appearing for 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. Mr. Sood forcefully contended that none of the independent witness supported the version of the prosecution but despite that courts below reached to the conclusion that offence has been committed by the petitioner-accused. With a view to substantiate his statement, he invited attention of this Court to the statements made by the prosecution witnesses, especially, Pws No. 1 and 2, who have not supported the version of the prosecution, rather, they were declared hostile. Mr. Sood further submitted that conclusion drawn by the court below that accident had occurred due to rash and negligent driving of the driver-petitioner-accused, is not based on the material available on record because while taking the court through the statements made by the prosecution witnesses, he has pointed out that prosecution evidence is full of contradictions and infirmities and as such, both the courts below have committed a grave error in convicting the accused. He also argued that court below while examining the accused under Section313 Cr.PC has combined more than one fact in one question which caused confusion to the petitioner-accused and as such, great prejudice has been caused to the accused and hence, the conviction is liable to be set-aside. Mr. Sood, also while arguing on behalf of the petitioner-accused apart from making aforesaid statement, also invited attention of this Court to the various grounds taken by the petitioner-accused in his appeal, which are not reproduced here for the sake of brevity. 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. He further submitted that in case, if statements given by PWs-1 and 2 are ignored, who were declared hostile, despite that, there is overwhelming evidence adduced by the prosecution to prove its case beyond reasonable doubt. 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. Lastly, Mr. Thakur, contended that this Court cannot loose sight of the fact that offending vehicle was carrying children of school and as such accused was expected to drive more cautiously and carefully. But in the instant case, there is ample evidence available on record suggesting that he remained careless, rash and negligent while driving and accident occurred. 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 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 31.3.2002, while it was being plied between Subathu to Panchkula. It also remains undisputed that at that relevant time, vehicle was being driven by the 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.

13. Gopal Singh (PW1) and Hari Ram (PW2) stated in their statements that school bus had fallen down the road but they did not know as to how the accident actually occurred. Accordingly, they were declared hostile by the prosecution. Though, aforesaid witnesses deposed that bus had fallen down from the road but they did not know that on whose negligence the accident took place. But Rewa Ram (PW3), Kamal (PW4), Sunita (PW5) and PInki (PW6) who were travelling in the bus at that time of accident unequivocally stated that accused was driving the bus rashly and negligently and due to his negligence accident occurred as he lost control over the vehicle while overtaking another vehicle. It has also come in their statement that while trying to overtake the vehicle, it went off the road and fell down the road, as a result whereof, injuries were caused to the passengers. This Court while hearing the case had an occasion to peruse statements/depositions in their examination-in-chief as well as cross-examination but admittedly, counsel representing the accused has not been able to extract anything otherwise from these witnesses in their cross-examinations. Bare perusal of their depositions or

admissions made in the cross-examination suggests that they reiterated what they had stated in their examination-in-chief. They had been very very specific, candid and consistent and their testimonies appear to be confidence inspiring.

14. Pritam Chand (PW7) deposed with regard to the conducting of mechanical examination of the bus. PW8 C. Narinder Kumar proved rapat No.11 dated 31.3.2002 recorded at Police Station Barotiwala. HC Sewa Singh (PW9) deposed about the scribing of FIR Ex.PA. Ram Lok (PW10) proved the photographs Ext.P1 to P8 and negatives Ext.P19 to 36 whereas Prit Pal (PW11) admitted taking of the photographs on the spot. PW12 Jagjit Singh proved that Driving Licence was taken in possession vide memo Ext.PW12/A. SI Chaman Lal (PW13), who investigated the case, testified that he visited the spot and prepared the site plan Ext.13/B on the spot and spot map was not at all disputed by the accused because no suggestion worth the name with regard to the correctness of the spot map was put to him (PW-13). He also stated that on the spot, where accident took place, road was straight and it was 18 ft. wide. This factum of road being straight on the spot is also not disputed by the accused in cross-examination. Rather, there is nothing on record to dispute the correctness of the spot map as well as photographs.

15. Admittedly, in the preset case, PWs-1 and 2 have not supported the case of prosecution but they have stated that the bus had fallen down but they don't know as from whose negligence It had occurred. But remaining evidence PWs 3 to 6 who were admittedly travelling in the ill-fated bus at the time of accident have categorically stated in one voice that accident occurred due to negligence of the accused as he was trying to overtake another vehicle and lost control over the bus, which ultimately went off the road and fell down the road. As has been noticed above that defence has not been able to extract or elicit anything contrary from the cross-examination of PWs, which otherwise appears to be trust worthy, inspiring or worth lending credence. Version put forth by these PWs 3 to 6 cannot be brushed aside easily for the simple reason that they were only eye witnesses and victims of the accident because they were travelling in that ill fated vehicle at the time of accident. Defence has not been able to extract anything from these prosecution witnesses that they purposely with a view to implicate the accused falsely deposed against him. There is no evidence on record, which can even suggest that these witnesses had any prior animosity or ill will with the accused, which made them to depose against him.

16. Apart from above, this also remains fact that all these PWs were injured in the accident and being eye witnesses, their evidence cannot be overlooked, rather it requires to be given weightage . Moreover, the presence of these PWs at the time of accident has been not disputed at all by the accused. This court also carefully examined statements given by the prosecution under Section 313 Cr.PC, which reveals that accident has not been denied but only defence taken by accused is that " *who deposed against him are interested witnesses*." But as has been observed above, there is no material available on record to substantiate this plea of the accused that PWs No. 3 to 6 are interested witnesses. Moreover, it emerges from the record that ill fated bus was of the Springdale Public School, meaning thereby, accused as well as aforesaid alleged independent witnesses are/were the employees of the same school and there could be apprehension that PWs 3 to 6 depose in favour of the accused being employee of the same school to save the accused. Hence, any bald allegation to the effect that these are the interested witnesses cannot be accepted by the Court unless some specific evidence is led on record suggesting/indicating that they are interested witnesses. Careful reading of statement of these witnesses leaves no doubt tin the mind of the court that vehicle was being driven by the accused at that relevant time that too in the high speed. Perusal of photographs as well as spot map itself suggests that at the spot of accident, road was very wide and in normal speed, there is/was no possibility of the vehicle going down the road but as has come in the statement of PWs that accused tried to overtake the vehicle, he lost the control and met with an accident. Moreover, perusal of photographs available on record suggests that this was not proper site/place for accused to overtake the vehicle because on one side of the road there is gorge. Defence put by the counsel during arguments that tire of ill-fated bus had got stuck in the mud, as a result of

which, bus fell in the gorge. This aforesaid aspect put forth by the defence deserves to be rejected outrightly. After seeing the photographs Ext. Ext.P1 to P36 from where it can be safely inferred that there is no retaining wall, which as per version of the defence had sunk at the relevant time. Moreover, none of the PWs has admitted that aforesaid suggestion put forth by the defence during their cross-examination before the trial Court below.

17. True, it is that there is no specific method available to ascertain the speed of the vehicle at the time of the accident because certainly after accident speedometer springs back to zero but in the absence of some specific method to ascertain the actual speed, only safe and clear mode to know the speed of the offending vehicle, is the statement of eye witnesses, who actually saw the accident happening before their eyes. In the present case, PWs 3 to 6 were the occupants of the ill-fated bus and accident took place in front of their eye that too while overtaking another vehicle. Material available on record clearly establishes that accused lost control and fell down the road, as a result of which, occupants of the offending vehicle suffered injuries and three persons died. As has been noticed above, this ill fated bus belonged to school and at that relevant time school children along with teachers were being taken from Subathu to Panchkula. In this situation, it was bounden duty of the accused to drive very carefully and cautiously but as has emerged from the overwhelming evidence available on record that accused remained negligent and accident took place due to his negligence.

18. In the totality of the facts and circumstances of the case where there is ample evidence on record to suggest that offending vehicle was being driven rashly and negligently, this Court has no hesitation to conclude that prosecution has been able to prove its case beyond reasonable doubt and the judgments passed by the courts below deserve to be upheld as the same are based upon the correct appreciation of evidence available on record.

19. Mr. Ajay Sood, Sr. Advocate, also submitted that even the sentence imposed by the courts below while convicting the accused is very harsh and excessive in the facts and circumstances. He also contended that at the time of accident even the son of the accused was also travelling in the offending vehicle and from the aforesaid fact, it can be inferred that accused did not have intention to cause harm to the occupants of the ill fated bus, rather, it can be presumed that accused while driving the offending vehicle in which his son was also travelling, was driving carefully as he could not take any risk of rash and negligent driving as has been put forth by the prosecution. He also prayed that the 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 14 years have passed after occurrence of the accident dated 31.3.2002, whereby the accused was convicted and he is suffering continuous mental agony during the pendency of the appeal in the court of learned Additional Sessions Judge, Fast Track Court Solan, Himachal Pradesh, as well as in High Court of Himachal Pradesh. In support of the aforesaid arguments, Mr. Sood, also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh*** *versu****s 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.

20. Learned counsel also invited attention of this Court to the judgment passed by the Hon'ble Apex Court in ***S.Mahaboob Basha*** *versu***s State of Karnataka 2014 (10) SCC 244**. Perusal of the judgment cited by Mr. Sood shows that Hon'ble Apex Court while maintaining the Judgment passed by the court below observed in para-9 as under :-

"9. Interference by the Supreme Court with concurrent findings of fact by the courts below is not warranted, except where there is some serious infirmity in the appreciation of evidence and the findings are perverse. We see no infirmity in the concurrent findings of the learned courts below convicting the appellant under Section 498-A IPC. Insofar as conviction of the appellant under Sections 323 and 504 IPC is concerned, only fine was imposed on him. Insofar as the conviction under Section 506 IPC is concerned, the appellant was sentenced to undergo SI for six months by the trial court and the same was confirmed by the appellate court. The judgment of the High Court is silent about the conviction of the appellant under Section 506 IPC as confirmed by the appellate court and the sentence imposed on him for the said offence."

21. However, in the aforesaid case, the Hon'ble Apex Court in the totality of the facts and circumstances reduced the conviction of appellant to the period already undergone by him and imposed fine to the tune of Rs. 2,00,000/-. 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."

22. This Court cannot loose 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."

23. After giving my thoughtful consideration to the law cited by Mr. Sood, learned senior counsel representing the accused in the present case as well as observations made by Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182***, I am of the view that present case is not fit 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. Even in the judgment of the Hon'ble Apex Court titled as ***S.Mahaboob Basha*** *versus* ***State of Karnataka 2014 (10) SCC 244*** relied upon by Mr. Sood, while reducing the sentence, Court had awarded fine to the tune of Rs. 2,00,000/- payable in two installments. But now in view of the latest law i.e. 2015 (5) SCC 182, as referred above, this court sees no reasons or has power in given facts and circumstances of the case to set-aside the conviction and sentence imposed by the trial Court below.

24. However, in the facts and circumstances of the case, it appears to the Court that sentence imposed by the court below is on little higher side and same deserves to be modified accordingly. Accordingly, sentence imposed by the courts below qua the offences committed under Sections 279, 337, 338 and 304-A of Indian Penal Code are modified to six months only and to pay fine of Rs. 5,000/- and in default, simple imprisonment for one month.

25. In view of the above, judgments passed by both the courts below are upheld. However, conviction/sentence imposed upon the accused is modified to the aforesaid extent only. Order dated 1.1.2008, passed by this Court, whereby sentence imposed by the court below was suspended, is hereby vacated and the petitioner-accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by this Court vide this Judgment. Petition stands disposed of alongwith pending applications, if any.

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

Dharam Chand .....Petitioner.

Versus

Inderjeet Singh .....Respondent.

Cr. Revision No. 124 of 2015.
Date of Decision: 30.5.2016.

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque which was returned with the memo 'Stop payment' – payment was not made despite issuance of notice of demand- a complaint was filed against the accused which was ordered to be returned for filing the same before appropriate Court having jurisdiction- aggrieved from the order, a revision was preferred – held, in revision, that after enactment of Negotiable Instruments Act Amendment Second ordinance, 2015, complaint can be tried by a court within whose local jurisdiction, cheque is delivered for collection - the ordinance is deemed to have come into force with effect from 15.6.2015- thus, jurisdiction was to be determined in accordance with the provision of the Ordinance- cheque was issued by the accused from his account in State Bank of India Branch Transport Nagar Narwal, Jammu, J&K and the Magistrate had the jurisdiction- revision allowed. (Para-5 to 12)

For the petitioner: Mr. Parveen Chauhan, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral).*

The present criminal revision petition filed under Section 397 Cr.PC read with Section 401 Cr.PC, is directed against the order passed by the learned Judicial Magistrate, Ist Class, Dalhousie, District Chamba, H.P., passed in Complaint No. 10 of 2014 dated 21.3.2015, whereby the complaint filed by the petitioner (hereinafter referred to as the complainant) was returned for filing the same before the appropriate Court having jurisdiction to try the case.

2. Perusal of the records suggests that complainant filed complaint under Section 138 read with Section 142 of the Negotiable Instrument Act, 1881 as amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, before the learned Judicial Magistrate Ist Class Dalhousie, District Chamba, (HP), specifically alleging therein that in the discharge of liabilities, the accused issued a cheque dated 3.6.2014 bearing No. 219678 amounting to Rs.57,000/- of his account No. 30294165112 of State Bank of India Branch Transport Nagar Narwal, Jammu, J&K, in favour of the complainant, however, on depositing the aforesaid cheque with SBI Branch Dalhousie, District Chamba, HP, same was returned vide memo dated 4.6.2014 endorsing therein "Stop Payment". Accordingly, the complainant served a notice upon the accused on 20.6.2014 calling upon him to make the payment within 15 days from the receipt of notice but it appears that accused failed to make the payment and, as such,

complainant was compelled to file a complaint under Section 138 read with Section 421 Negotiable Instrument Act, as has been stated above.

3. Feeling aggrieved and dissatisfied with the order dated 21.3.2015 passed by learned trial Court, complainant approached this Court by way of revision petition.

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

5. It appears that learned trial Court issued notices to the respondents, which were not received back. But on 21.3.2015, court below taking cognizance of law laid down by Hon'ble Apex Court in case titled ***Dashrath Rupsingh Rathor V. State of Maharashtra & Anr.***, in Criminal Appeal No. 2287 of 2009 decided on 1.8.2014, returned the complaint to the complainant for filing the same before appropriate court having jurisdiction to try the case. It is pertinent to notice that Hon'ble Apex Court passing judgment referred in para supra passed following orders:-

> *"58. To sum up:*
>
> *58.1 An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.*
>
> *58.2 Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.*
>
> *58.3 The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if*
>
> > *(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.*
> >
> > *(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque, and*
> >
> > *(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.*
>
> *58.4 The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.*
>
> *58.5 The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.*
>
> *58.6 Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.*
>
> *58.7 The general rule stipulated under Section 177 CrPC applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof."*

6. Careful reading of the judgment referred supra leaves no doubt in the mind of the Court that order dated 21.3.2015 was passed correctly by the learned trial Court at that relevant time and, as such, same cannot be termed illegal in any manner. However, with the fresh enactment i.e. Negotiable Instruments Act Amendment Second ordinance, 2015 (hereinafter referred to as the "Ordinance"), position has changed and now the offence under Section 138 can be taken cognizance and tried by Court, within whose local jurisdiction, cheque is delivered for collection through an account. Perusal of Section 12 of ordinance reveals that ordinance would be deemed to have come into force with effect from 15.6.2015, meaning thereby, Ordinance is in force. By aforesaid amendment, original Section142 of the Negotiable Instrument Act 1881, has been amended and Section 142 (a) has been inserted into Negotiable Instrument Act. Sections 3 and 4 of Negotiable amendment Second ordinance 2015 are being re-extracted hereinafter:-

> *"**3**. In the principal Act, section 142 shall be numbered as sub- section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:-*
>
> *(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--*
>
> > *(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or*
> >
> > *(b) if the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.*
> >
> > *Explanation - For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."*
>
> ***4**. In the principal Act, after section 142, the following section shall be inserted, namely:-*
>
> ***142A.** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Ordinance, as if that sub-section had been in force at all material times.*
>
> *(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.*
>
> *(3) If, on the date of the commencement of this Ordinance, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times."*

7. Careful reading of amended Section 142 (2) reproduced above, especially in view of the explanation thereunder suggests that the place where cheque is delivered for collection that branch of the bank of the payee or holder in due course, where drawee maintains an account, would be determinative of the place of territorial jurisdiction.

8. The Hon'ble Apex Court while dealing with the similar proposition in M/s Bridgestone India Pvt. Ltd. v. Inderpal Singh in Criminal appeal No. 1557 of 2015 decided on 24.11.2015, as in the extant case, passed following orders:-

> *"12. We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that Section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia in the territorial jurisdiction of the Court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account). We are also satisfied, based on Section 142A(1) to the effect, that the judgment rendered by this Court in Dashrath Rupsingh Rathod's case, would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonor of the cheque in the present case arises.*
>
> *13. Since cheque No.1950, in the sum of Rs.26,958/-, drawn on the Union Bank of India, Chandigarh, dated 02.05.2006, was presented for encashment at the IDBI Bank, Indore, which intimated its dishonor to the appellant on 04.08.2006, we are of the view that the Judicial Magistrate, First Class, Indore, would have the territorial jurisdiction to take cognizance of the proceedings initiated by the appellant under Section 138 of the Negotiable Instruments Act, 1881, after the promulgation of the Negotiable Instruments (Amendment) Second Ordinance, 2015. The words "...as if that sub-section had been in force at all material times..." used with reference to Section 142(2), in Section 142A(1) gives retrospectivity to the provision."*

9. Accordingly, keeping in view the amendment carried out in the Act as well as law laid down by the Hon'ble Apex Court, this court is of the view that complainant is entitled to file/pursue its case in the court of learned Judicial Magistrate Ist Class, Dalhousie, HP. Since in the present case, the aforementioned cheque has been issued to the complainant by the respondent of his account No. 30294165112 of State Bank of India Branch Transport Nagar Narwal, Jammu, J&K Branch, I am of the view that learned Judicial Magistrate Ist Class has the territorial jurisdiction to take cognizance of the proceedings initiated by the complainant under Section 138 of Negotiable Instrument Act. Moreover, careful reading of 142A (1) clearly suggests that amendment carried out under Section 142 shall have retrospective effect.

10. Consequently in view of the aforesaid discussion as well as law laid down by the Hon'ble Supreme Court, present revision petition is allowed. Order dated 21.3.2015, passed by the learned trial Court in complaint No. 10 of 2014 is quashed and set-aside. Further learned trial Court is directed to decide the complaint No. 10 of 2014 afresh in accordance with law, as has been observed above. Needless to say that plea of limitation will not come in the way of complainant, as immediately after passing of the impugned order, complainant approached this Court and matter remained pending till its final disposal. Copy **dasti.**

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

Jhabe Ram ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 424/2015
Reserved on: May 27, 2016
Decided on: May 30, 2016

Indian Penal Code, 1860- Section 302- Ceremony was going on in the Village- children were playing in the courtyard – accused picked up coins of the children and threw them away- deceased objected to the same- a quarrel started between them- accused pushed the deceased due to which he fell down- deceased gave a firewood blow to the shoulder of the accused- accused inflicted a stick blow on the temple region of the head - deceased succumbed to the injuries- accused was convicted by the trial Court- held, in appeal that only one injury was noticed on the person of the deceased- deceased had given a blow on the shoulder of the accused and the accused had inflicted the blow in retaliation – there was no pre- meditation and incident started suddenly – accused had knowledge that blow on temple region of head would result in the death of the person, therefore, he is liable to be convicted of Section 304 (Part-II) instead of Section 302 of I.P.C.- Appeal partly accepted and judgment modified- accused convicted of Section 304 (Part-II) I.P.C. (Para-16 to 19)

For the Appellant: Mr. Anoop Chitkara, Advocate.
For the Respondent: Mr. Neeraj K. Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against Judgment/Order dated 2.9.2015/4.9.2015 rendered by the learned Additional Sessions Judge, Kullu, HP in Sessions Trial No. 58 of 2014 (2013), whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 302 of the Indian Penal Code, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/- under Section 302 of the Indian Penal Code and in case of default of payment of fine, to further undergo simple imprisonment for two years. Learned trial Court has also recommended the District Legal Services Authority Kullu for awarding the compensation under the HP (victim of Crimes) Compensation Scheme, 2012.

2. Prosecution case, in a nutshell, is that on 7.7.2013 at around 4.50 PM at Nathan in District Kullu, 'Ganga Jal Pujan' ceremony was going on. Children were playing in the courtyard. Accused picked up the coins of the children and threw them away. Deceased Tule Ram objected to it. A quarrel ensued between Tule Ram (deceased) and Jhabe Ram (accused). Accused pushed the deceased. Deceased fell in the courtyard. Tule Ram gave a firewood blow to the shoulder of the accused. Immediately thereafter, the accused came from behind and gave a *Danda* blow to the temple region of head of the deceased. Tule Ram became unconscious. He was shifted to a room. Deceased was then taken to Harihar Hospital for treatment. From there, he was shifted to Regional Hospital Kullu for further treatment. He was then referred to PGI Chandigarh. Tule Ram died at Thalot. Statement of Ghambu Ram under Section 154 CrPC was recorded vide Ext. PW-1/A. FIR Ext. PW-13/A was registered. Post-mortem examination was conducted. Statements of witnesses under Section 161 CrPC were recorded. Investigation was completed and challan was put up after completing all the codal formalities.

3. Prosecution has examined as many as eighteen witnesses to prove its case against the accused. Statement of accused was recorded under Section 313 of the Criminal Procedure Code. He pleaded innocence. Accused was convicted and sentenced as noticed above. Hence, this appeal.

4. Mr. Anoop Chitkara, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Neeraj K. Sharma, Deputy Advocate General has supported the judgment/order dated 2.9.2015/4.9.2015 passed by the learned trial Court.

6. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. PW-1 Ghambu Ram testified that on 7.7.2013, there was 'Ganga Jal Pujan' ceremony in their house on account of death of Puni Devi, wife of his younger brother Balak Ram. In the evening at about 4.50 PM, children were playing. Jhabe Ram picked up the coins and threw them away. His younger brother (deceased) objected to this. Thereafter both of them abused each other. Jhabe Ram pushed his brother (deceased). Deceased picked up a firewood and gave a blow to the left shoulder of the accused. After 10-15 minutes, when deceased was sitting, accused came from behind and gave *Danda* blow on the side of head of deceased. Deceased fell down. He was taken inside. He became unconscious. He was taken to the police post. His condition deteriorated. He was then taken to Harihar Hospital. From there he was taken to regional hospital Kullu and then he was referred to PGI Chandigarh. Deceased died at Thalot. In his cross-examination, he has admitted that he told the police that after 10-15 minutes when deceased was sitting, accused came from behind and gave *Danda* blow to the deceased. (Whereas it is not so recorded in the Ext. PW-1/A). He also told the police that deceased was taken to Sher Singh. (Whereas it is not so recorded in the statement Ext. PW-1/A) He has admitted that during 'Ganga Jal Pujan' ceremony, accused was given duty to cook and serve food. He also admitted that there were about 30-35 men, women and children on the spot.

8. PW-2 Lot Ram testified that at about 4 PM, he alongwith other boys was playing in the courtyard with coins. Accused picked up coins and threw them away. Deceased objected to this. There was a quarrel between accused and deceased. Accused pushed deceased due to which he fell down. Deceased gave a blow of firewood to the shoulder of accused. Accused picked up another fuel wood and gave a blow on the left portion of the head of the deceased. Deceased became unconscious and fell down in the courtyard. In his cross-examination, he has admitted that deceased was walking when he was being shifted to the hospital. Accused had hit the deceased on the temple portion of his head.

9. Statements of PW-1 Ghambu Ram and PW-2 Lot Ram have been corroborated by Gumat Ram PW-3. Accused picked up coins of the boys, which was objected to by the deceased. Deceased abused the accused. Accused pushed deceased Tule Ram. Tule Ram fell down. Tule Ram picked up firewood and gave blow on the shoulder of Jhabe Ram and asked him why he was misbehaving. Accused picked up big firewood and gave blow on the left portion of the head of Tule Ram. Tule Ram fell down. Deceased was taken inside.

10. PW-6 Ganga Ram testified that on 8.7.2013, Gumat Ram produced a piece of firewood Ext. P-2 before the police and told the police that said stick was used by accused in the commission of offence. It was seized vide seizure memo Ext. PW-3/A. In his cross-examination he admitted that no occurrence has taken place in his presence.

11. PW-7 Mohar Singh deposed that the quarrel has taken place between the accused and the deceased. Accused pushed the deceased. Deceased fell down. In the meantime, accused picked up a piece of firewood and hit on the head of the deceased. Deceased collapsed. He was shifted to a room. In his cross-examination, he admitted that on the day of occurrence, accused was cooking food for 'Ganga Jal Pujan' ceremony and was deputed by Balak Ram for

distributing the food. About 60-70 persons were there. He also admitted that the deceased went to the doctor on foot.

12. PW-8 Dr. Bharat Bhushan Bhardwaj deposed that the deceased was brought with the alleged history of assault. Patient was referred from Harihar Hospital, Kullu. CT Scan was done at Harihar Hospital. CT scan suggested extra-dural Hemotoma with intra-cerebral contusions with fracture of left paletal bone. Probable duration of injury was less than 24 hours and weapon used was blunt. He issued MLR Ext. PW-8/A. In his cross-examination, he admitted that the referring doctor did not make reference of history of assault on the person of deceased, rather the referral doctor had made reference of injury by fall.

13. PW-9 Dr. Kalyan Singh, has conducted post-mortem examination. He issued post-mortem report Ext. PW-9/A. Duration between injury and death was less than six hours and between death and post mortem was 12-24 hours. His final opinion is Ext. PW-9/B.

14. PW-15 SI Sanjeev Kumar testified that he received information on 8.7.2013. He visited the hospital and recorded statement of Ghambu Ram under Section 154 CrPC vide Ext. PW-1/A. Site map was prepared. In his cross-examination, he has admitted that it has come in the investigation that deceased sustained injury due to fall as stated by Dr. Ravinder Kumar and it was also told to the doctor by the attendant.

15. PW-17 Dr. Ravinder Kumar deposed that he was serving as a general surgeon at Harihar Hospital, Kullu from 4.6.2012 to 30.7.2013. On the night of 7.7.2013 at around 8.30 PM, he was called by the RMO who was on duty in the hospital as Tule Ram (deceased) was brought for medical treatment. When he reached in the hospital, he asked 4-5 persons who were with Tule Ram what had happened to him. One lady claiming herself to be the sister of Tule Ram informed that Tule Ram had fallen from stairs. One old person, claiming to be the father of Tule Ram was also with the deceased. He advised CT scan of the patient.

16. Case of the prosecution, precisely, is that on 7.7.2013, when 'Ganga Jal Pujan' ceremony was going on, an altercation between the accused and deceased took place. Accused was hit by the deceased on his shoulder. Thereafter, accused hit the deceased on the left portion of his head. Deceased collapsed. He was taken to Harihar Hospital, Kullu. Thereafter, he was referred to District Hospital Kullu and from there to PGI Chandigarh. Deceased died at Thalot. The cause of death of the deceased was head injury. Following injuries were noticed by PW-8 Dr. Bharat Bhushan Bhardwaj, on the person of the deceased:

> *"Cystic swelling (l) tempoparietal region of scalp measuring 5cm x 3cm, bluish in colour"*

17. Only one injury was noticed on the person of the deceased.

18. PW-1 Ghambu Ram has specifically deposed that a quarrel took place between the accused and the deceased. Deceased was pushed by the accused. Deceased had given a blow on the shoulder of the accused. After 10-15 minutes, when deceased was sitting, accused came from behind and gave a *Danda* blow on the head of the deceased. Deceased collapsed. PW-2 Lot Ram has also deposed that a quarrel has taken place between the deceased and the accused. First blow was given by the deceased to the accused on his shoulder. Thereafter in retaliation, he gave blow on the head of deceased. PW-3 Gumat Ram has also corroborated the statements of PW-1 Ghambu Ram and PW-2 Lot Ram about the manner in which quarrel has taken place which resulted into injury to the deceased. He has specifically deposed, in his cross-examination that the quarrel lasted for about 10-15 minutes and nobody intervened. PW-7 Mohar Singh has also deposed that the accused has given *Danda* blow on the left portion of the head of deceased. Accused was preparing food for the 'Ganga Jal Pujan' ceremony and he was also deputed by Balak Ram for distributing food to the visitors. Probable duration of injury and death was less than 24 hours and weapon used was blunt, as per the statement of PW-8 Dr. Bharat Bhushan Bhardwaj. It has also come on record that deceased went on foot to the Doctor. PW-17 Dr. Ravinder Kumar deposed that the attendants of deceased had told that the deceased had fallen

from stairs. However, fact of the matter is that accused has given *Danda* blow on the left portion of the head of the deceased resulting into head injury. Deceased was taken to Harihar Hospital and thereafter he died on the way to PGI Chandigarh. There was no pre-meditation in the commission of crime by the accused. Genesis of the incident is picking up the coins and throwing them away by the accused, which was objected by the deceased. The deceased firstly hit the accused on the shoulder. Accused has only retaliated by hitting on the head of the deceased. He had no intention to kill the deceased. The injury inflicted on the head of deceased proved fatal. However, he had the knowledge that if deceased was hit with *Danda* blow, with force, on temple region of head, it could result into his death. Assault on deceased can be said to be on account of sudden fight without pre-meditation in the heat of passion or sudden quarrel between the deceased and the accused (assailant). Quarrel has taken place at the spur of the moment. Thus, accused is liable to be convicted under Section 304-II IPC instead of Section 302 IPC.

19. Accordingly, the appeal is partly allowed. Judgment/Order dated 2.9.2015/4.9.2015 rendered by the learned Additional Sessions Judge, Kullu, HP in Sessions Trial No. 58 of 2014 (2013) is modified. Accused is convicted under Section 304 part II instead of Section 302 IPC. Accused to be heard on quantum of sentence on 20.6.2016.

20. Registry is directed to issue the production warrant.

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

M/s Sturdy Industries Ltd. .....Plaintiff/non-applicant.

Versus

M/s Isotech Electrical and Civil Projects (P) Ltd. and another .....Defendants/applicants.

OMP(M) No. 32 of 2014 in CS
No. 65 of 2012
Decided on : 30.5.2016

Code of Civil Procedure, 1908- Order 9 Rule 13- Ex-parte order was passed against the defendant on the basis of endorsement made by the postman that defendants had refused to accept delivery of the letter- defendants are residing outside the jurisdiction of the Court- therefore, it was not permissible to issue summons by way of registered post- their services were not proper and they were wrongly proceeded ex-parte- however, application for setting aside ex-parte decree was not filed within a period of one month from the date of knowledge nor the delay was properly explained- hence, application dismissed. (Para-3 to 8)

For the plaintiff/non-applicant: Mr. Dushyant Dadwal, Advocate.
For the defendants/applicants: Mr. Vijay Chaudhary and Mr.Vinod Thakur, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

The plaintiff/non-applicant (for short "the plaintiff) had instituted a suit against the defendants/applicants (for short "the defendants") for recovery of Rs.60,06,499.24 alongwith pendente lite and future interest @ 18% per annum. On service standing ordered to be effectuated upon the defendants through appropriate steps being taken by the plaintiff inclusive of the latter's filing RAD covers within a week therefrom, steps whereof on standing taken by the plaintiff the Registry of this Court further transmitted the relevant RAD covers besides the summons onwards to the agencies concerned, whereupon the process server concerned on receipt of the apposite summons recorded an endorsement thereon of on his concerting to effectuate service upon the defendants through ordinary mode comprised in his despite twice

visiting the premises of the defendants, his thereupon detecting their commercial premises being locked rendering hence his efforts to effectuate service upon them through ordinary mode to prove abortive. However, given the endorsement made by the postman concerned in the apposite RAD cover of the defendants refusing to accept service, this Court on 25.4.2013 construed of the endorsement recorded therein by the postman concerned of the defendants refusing to accept notice constituting a vivid display of theirs standing served whereas with the defendants not recording their appearance before this Court either in person or through their respective authorized representative besides through a counsel holding an apposite empowerment from them constraining it to hence direct of theirs being proceeded against ex-parte. In sequel to the defendants standing ordered to be proceeded against ex-parte, ex-parte evidence adduced by the plaintiff in support of the averments constituted in the plaint stood recorded. On strength of the ex-parte evidence adduced by the plaintiff an ex-parte decree was rendered by this Court on 2.7.2013. The defendants stand aggrieved by the ex-parte decree rendered by this Court on 2.7.2013.

2. The defendants have instituted two applications before this Court. One application under Order IX Rule 13 CPC for setting aside the ex-parte decree rendered by this Court on 2.7.2013 and another application accompanying it constituted under Section 5 of Limitation Act for condoning the delay as stands begotten in the purported belated institution of the application by the defendants under Order IX Rule 13 of the CPC for setting aside the ex-parte decree of this Court of 2.7.2013. The aforesaid applications stood replied by the plaintiff. On the contentious pleadings of the parties, this Court on 17.10.2014 struck the following issues for consideration:

> "(1) Whether the respondents were not served in Civil Suit No. 65 of 2012 on 31.12.2012 as alleged? OPR
>
> (2) Whether the applicants have shown sufficient cause which prevented it from filing the application within the prescribed period of limitation? OPR.
>
> (3) Relief. "

3. On the aforesaid apposite issues as had come to be struck by this Court on 17.10.2014, the witnesses of the applicants/defendants stepped into the witness box in support of the averments constituted in the apposite applications whereupon they rendered a deposition in tandem thereof. The deposition of the process server of the area concerned whereat the commercial establishment of the defendants was located has underscored therein of his on two occasions visiting the commercial establishment of the defendants his thereupon discovering their apposite establishments standing locked. The said deposition of the process server concerned constituted in his examination-in-chief remains un-concerted to be shred off its efficacy by the learned counsel for the plaintiff by subjecting him to a relevant cross-examination. In sequel it would be inapt to draw an inference therefrom of at the time when the process server concerned visited the commercial establishment of the defendants his thereupon detecting their apposite premises standing locked, standing stained with a vice of falsity. Obviously since service upon the defendants had not come to be effectuated through ordinary mode yet the process server concerned holding the summons recording thereon an apposite endorsement of his despite twice visiting the commercial establishment of the defendants of his thereupon detecting their apposite establishment being locked, apposite summons whereof when stood transmitted to this Court, yet no assay stood endeavored by the plaintiff for seeking from this Court on its apposite application preferred hereat for substituted service being ordered to be effectuated upon the defendants. Contrarily, this Court had on the anvil of an endorsement recorded on the RAD covers by the postman concerned of the defendants refusing to accept service, concluded therefrom of refusal of acceptance by the defendants of RAD covers from the postman concerned tantamounted to theirs standing served whereupon it concluded of when there was omission on the part of the defendants to either appear hereat in person or through their authorized representative besides through a counsel holding an apposite empowerment from them, it rendered an order of the defendants being proceeded against ex-parte. The construction

as made by this Court on the anchor of an endorsement made by the postman concerned of the area whereat the commercial establishment of the defendants stood located of the defendants refusing acceptance thereof whereupon it proceeded to hold of their refusal tantamounting to theirs standing served in accordance with law, further thereupon its holding of its omitting to record its appearance before this Court either in person or through their authorized representative besides through a counsel holding an apposite empowerment from them, hence enjoining it to render an order of theirs being directed to be proceeded against ex-parte, is palpably erroneous besides fallacious engendered by a gross misreading of the provisions of Order V Rule 8 of the C.P.C. The relevant provisions whereof stand extracted hereinafter.

> "(i) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.
>
> (2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him in such manner as the Court may direct.
>
> (3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:
>
> Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.
>
> (4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons a is referred to in sub-rule (3) (except by registered post acknowledgement due), the provisions of rule 21 shall not apply."

4. In other words the foisting of tenability by this Court to the apposite endorsement borne on the RAD covers especially when its adoption earlier by this Court for the reasons alluded hereinafter is not the statutorily approbated mode for the ordering by this Court qua effectuation of service upon defendants herein who uncontrovertedly reside outside the territorial jurisdiction of this Court hence is per se legally inapt, as a corollary the imputation of validity by this Court to the apposite endorsement made thereupon by the postman concerned whereupon this Court proceeded to, for omission on the part of the defendants to record their presence before this Court either in person or through their authorized representative besides a counsel holding an apposite empowerment from them, renders the apposite order of theirs being proceeded against ex-parte, being grossly erroneous. Preponderantly when the statutorily approbated mode of effectuation of service upon the defendants who undisputedly reside outside the territorial jurisdiction of this Court is through ordinary mode comprised in the engagement of the process serving agency of the Court concerned for hence completing service upon the apposite defendants whereas with the process server concerned not succeeding in his effort to serve the defendants through ordinary mode besides when no application despite his reporting to the Court of his concert to effectuate service of summons upon the defendants at their commercial establishment proving futile arising from his on two occasion on visiting their commercial establishment his thereupon detecting it to be locked, stood instituted hereat by the plaintiff for seeking an order herefrom for effectuating service upon the defendants through substituted mode does perse make

inroads qua the efficacy of the order of this Court whereby it directed the defendants being proceeded against ex-parte merely on the anvil of the statutorily inefficacious mode of service through RAD covers standing adopted by this Court for effectuating service upon the defendants who uncontrovertedly reside outside the territorial jurisdiction of this Court. Consequently, any reliance upon any endorsement borne on the apposite RAD covers by this Court for it thereupon construing of the defendants accepting service connoted by the apposite endorsement displaying their refusing to accept the apposite RAD covers whereupon it further for omission on their part to record their presence before this Court either in person or through their respective authorized representative besides through a counsel holding an apposite empowerment from them direct of theirs being proceeded against ex-parte is also palpably erroneous.

5. Preeminently the non-obstante clause occurring in sub rule (4) of Order 5 Rule 8 CPC unequivocally voices a statutory mandate of when the defendants reside outside the jurisdiction of the Court whereat a plaint stands instituted against it by the plaintiff, the apposite Court whereat the plaint stands instituted by the plaintiff standing enjoined to order for effectuation of service of summons upon the defendants residing outside its territorial jurisdiction through ordinary mode or in a manner enunciated in sub rule (3) of Order V Rule 8 CPC, besides the prime factum of the defendants residing outside the territorial jurisdiction of the Court whereat the plaint stands instituted against it/them by the plaintiff, the apposite Court given the relevant and germane exception carved therein qua the aforesaid prima-donna factum of when the defendants reside outside its jurisdiction its not holding any authority to order for effectuating service upon such defendants by RAD covers rendered the adoption by this Court of the excluded mode therein of service upon them standing permitted to strive by the postman concerned concerting to deliver the apposite RAD covers to them, to be a grossly, legally impermissible mode for adoption by this Court for effectuation of service upon them. Moreoso when the defendants uncontrovertedly hold commercial establishment outside the territorial jurisdiction of this Court whereupon with exclusion of their service being ordered to be effectuated by this court through RAD covers stands statutorily excepted. Consequently any reliance placed by this Court on the apposite endorsement made by the postman concerned on the RAD covers of the defendants refusing to accept service, furthermore its concluding of theirs despite standing served theirs omitting to record their appearance before this Court either in person or through their authorized representative besides through a counsel holding an apposite empowerment from them, to be grossly unwarranted. In other words the relevant provisions of the CPC with elaboration portray the modes which are available to be adopted by the Court concerned whereat the plaint stands instituted by the plaintiff for its in tandem thereupon ordering for effectuation of service upon the defendants who reside outside the territorial jurisdiction of the Court, modes whereof available for adoption by this Court when specifically exclude the adoption by this Court of service upon the apposite defendants being ordered to be effectuated through RAD, consequently with a specific embargo constituted in sub rule (4) of Order 5 Rule 8 against the Court whereat the plaint is instituted by the plaintiff ordering for procuring the presence of the defendants before it who reside outside the territorial jurisdiction of the apposite Court by theirs standing served through registered post acknowledgment does obviously nullify the effect if any of an endorsement made by the postman concerned on the RAD covers of the defendants refusing to accept service nor also it was legally apt for this Court to draw a conclusion therefrom of with the defendants refusing to accept service its tantamounting to their standing served in accordance with law besides it was also inapt for this Court given their non-appearance before this Court on 25.4.2013 either in person or through their respective authorized representative besides through a counsel holding an apposite empowerment from them to order for theirs being proceeded against ex-parte. Also reiteratedly when the Court whereat the plaint is instituted by the plaintiff against the defendants who reside outside its territorial jurisdiction it stands enjoined to excepting its adopting the specifically excluded mode therein of its ordering for effectuation of service upon the defendants through RAD covers its adopting the statutory mechanism alternative to it which stands enunciated in sub Rule (3) of order V Rule 8 CPC. Necessarily when the apposite non-obstante clause occurring in Order 5

Rule 8 CPC excludes the play or invocation by the Court concerned of the mechanism of effectuation of service through RAD covers upon the defendants residing outside the territorial jurisdiction of this Court besides excludes the workability of Order 5 Rule 21 CPC, as a corollary even the provisions of Rule 21 order 5 were unavailable for adoption by this Court when the defendants reside outside its territorial jurisdiction.

6. Be that as it may, even if the defendants had not come to be properly served in CS No. 65 of 2012 also when the order of this Court by which the defendants were directed tobe proceeded against ex-parte may be legally infirm. Nonetheless the defendants were under a solemn obligation to within a month of the date of its/theirs acquiring knowledge qua initiation of the apposite execution proceedings before this Court, institute an apposite application under order IX Rule 13 CPC for setting aside the ex-parte decree. The application under Order IX Rule 13 CPC stands accompanied by an application under Section 5 of Limitation Act, wherein the counsel for the defendant has made a vigorous effort to explain the delay as stands begotten in the belated institution of the application by him for setting aside the ex-parte decree. Undisputedly the apposite application under Order IX Rule 13 CPC for setting aside the ex-parte decree rendered against the defendants was enjoined to be instituted within a month from the date of acquisition of knowledge by the defendants qua this Court holding execution of the ex-parte decree rendered by it on 2.7.2013 against the defendants. The defendants have cast an averment in paragraph 6 of the application constituted under Section 5 of the Limitation Act, of service upon the defendants in the execution petition constituted before this Court at the instance of the plaintiff, standing strived to be served upon the defendant on 5.5.2014, in quick succession to the said averments constituted in paragraph 6 of the application under Section 5 of the Limitation Act, the defendants aver of theirs immediately thereafter contacting their counsel at Sikandrabad and instructing him to immediately proceed to Shimla for making an inquiry qua the matter. Even though the defendants portray in the apposite paragraph of the application qua theirs immediately subsequent to 5.5.2014 whereat they acquired knowledge of the launching of the execution petition against them by the plaintiff before this Court, theirs directing their/its counsel to proceed to Shimla yet thereafter the counsel for the defendants stands averred to arrive at Shimla belatedly on 15.6.2014 rendering hence a hiatus or gap to emerge from 5.5.2014 till 15.6.2014. The aforesaid period from 5.5.2014 till 15.6.2014 despite in quick succession to 5.5.2014 the defendants directing their counsel to proceed to Shimla, has not evinced any explanation from the defendants qua what prevented their counsel to from 5.5.2014 up to 15.6.2014 proceed to Shimla to inspect the record to gauge therefrom the reason for the process server concerned concerting to serve upon it a notice. Especially when the defendants secure an averment with forthrightness of in quick immediacy to 5.5.2014 theirs directing their counsel at Secundrabad to proceed to Shimla besides with the defendants through their authorized representative while rendering his testification hereat making echoings in tandem qua portrayals occurring therein of his acquiring knowledge on 5.5.2014 qua the initiation of the execution proceedings against them before this Court at the instance of the plaintiff whereas thereafter he has not echoed any explanation for the defendants since 5.5.2014 up till one month thereafter which constituted the apt period of limitation encapsulated in the apposite article of the Limitation Act for the defendants to impeach the ex-parte decree, omitting to institute a petition before this Court under Order IX Rule 13 CPC for setting aside the ex-parte decree, coaxes a conclusion from this Court of with the defendants not purveying any explanation qua theirs within one month to be reckoned from 5.5.2014 up to its expiry on 15.6.2014 omitting to institute an apposite application before this Court for setting aside the ex-parte decree nor hence when no sufficient cause stands purveyed by the defendants by theirs constituting therein germane, relevant and apposite averments in the application preferred by them for setting aside the ex-parte decree comprising the factors which precluded them from 5.5.2014 whereat they acquired knowledge qua the rendition of an ex-parte decree of 2.7.2013 by this Court upto 15.6.2014 within period whereof the apposite application was legally institute-able hereat, preponderantly the apposite omission on their part to within the aforesaid period institute the apposite petition before this Court stands un-explained. In aftermath, when qua the aforesaid

period of limitation which stood available in law for them to assail the exparte decree of this Court no forthright or candid explanation emanates from the defendants of any good cause deterring them to institute the apposite application hereat within one month computable from 5.5.2014 to 15.6.2014 fillips an inference of this Court of the apposite application being grossly time barred.

7. The learned counsel for the defendants has placed reliance upon a decision of the Hon'ble Supreme Court in (2013) 12 SCC 649 Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others, relevant paragraphs whereof stand extracted hereinafter.

> "[15] From the aforesaid authorities the principles that can broadly be culled out are:
>
> (i) There should be a liberal, pragmatic, justiceoriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
>
> (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
>
> (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
>
> (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
>
> (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
>
> (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.
>
> (vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.
>
> (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.
>
> (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.
>
> (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.
>
> (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.
>
> (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.
>
> (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.
>
> [16] To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

8. He also relied upon another judgment of the Hon'ble Apex Court in (2013)11 SCC 341 S. Ganesharau (dead) through LRs and another versus Narasamma (dead) through LRs and others, the relevant paragraphs whereof stand extracted hereinafter. The aforesaid pronouncements of the Hon'ble Apex Court do propound the parameters which are to be borne in mind by the Courts of law while rendering adjudication upon an application preferred therebefore for condonation of delay.

"[13] After giving our anxious and careful consideration to the whole matter, we are of the considered opinion that impugned order passed by the learned Single Judge cannot be sustained in law.

[14] The expression "sufficient cause" as appearing in Section 5 of the Indian Limitation Act. 1963, has to be given a liberal construction so as to advance substantial justice.

[15] Unless Respondents are able to show malafide in not approaching the court within the period of limitation, generally as a normal rule, delay should be condoned. The trend of the courts while dealing with the matter with regard to condonation of delay has tilted more towards condoning delay and directing the parties to contest the matter on merits, meaning thereby that such technicalities have been given a go-by.

[16] Rules of limitation are not meant to destroy or foreclose the right of parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly.

[17] We are aware of the fact that refusal to condone delay would result in foreclosing the suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate.

[18] In fact, it is always just, fair and appropriate that matters should be heard on merits rather than shutting the doors of justice at the threshold. Since sufficient cause has not been defined, thus, the courts are left to exercise a discretion to come to the conclusion whether circumstances exist establishing sufficient cause. The only guiding principle to be seen is whether a party has acted with reasonable diligence and had not been negligent and callous in the prosecution of the matter. In the instant case, we find that Appellants have shown sufficient cause seeking condonation of delay and same has been explained satisfactorily."

9. However the trite principle which is to be borne in mind for constraining Courts of law for condoning the delay as stands begotten on the part of the aggrieved to avail the appropriate remedy before the Courts of law is of theirs/its standing deterred by a genuine, satisfactory, abundant cause rather than of the delay standing engendered by gross indiligence or indolence on their/its part. Also the factum of the rights of the opposite party which stand embodied in the decree which it/he has received standing frustrated by the aggrieved concerting to by his inordinately procrastinating by sheer indiligence avail an appropriate remedy for assailing it, is also a germane and relevant factum to be borne in mind by Courts of law while

adjudicating upon an application preferred therebefore for condoning the delay at the instance of the aggrieved in preferring the apposite application before it. Necessarily hence it was incumbent upon the defendants to purvey a tangible and sound reason which prevented it/them to from the date of its/theirs acquiring knowledge on 5.5.2014 qua the pendency of the execution petition against it before this Court till 15.6.2014 within period whereof it stood enjoined to institute an application before this court for setting aside the ex-part decree, to institute an apposite application within the period aforesaid before this Court yet no explanation stands purveyed for the aforesaid period rather no good and sufficient cause emanates on a perusal of the apposite averments constituted in paragraph 6 of the application at hand whereupon it/they stood precluded to from 5.5.2014 till 15.6.2014 to institute an application hereat for setting aside its ex-parte decree rather with the defendants in the apposite paragraph 6 of the application unveiling the factum of it/theirs immediately on its/theirs acquiring knowledge qua the rendition of this Court on 5.5.2014 instructing its/their counsel to proceed to Shimla, which request remained un-acceded by their counsel whereas their counsel rather proceeded to Shimla on 15.6.2014 in its entirety effaces the effect if any of the submission of the learned counsel for the defendants of the period of one month mandated in the apposite article of the limitation Act for its/theirs preferring an apposite application before this court being reckonable from 5.5.2014 whereat their counsel inspected the records besides its being of no avail to it/them. Moreso when no plausible tangible explanation for reiteration stands purveyed by it/them qua omission on the part of its counsel to from 5.5.2014 whereat he was instructed by the defendants to proceed to Shimla to inspect the records and to gauge therefrom the reasons for this Court proceeding to issue a notice upon it upto 15.6.2014 to visit Shimla renders the said period from 5.5.2014 till 15.6.2014 to remain grossly un-explained. Accordingly, I find no merit in the application, the same is accordingly dismissed. Interim order, if any, stands vacated.

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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

Ajay Guleria and others ... Respondents

Cr. Appeal No. 518 of 2008
Reserved on: 03.05.2016
Date of decision: 30.05.2016

Indian Penal Code, 1860- Section 147, 148, 149, 307, 353, 352, 341, 395, 397 and 120-B- Police laid a Nakka on the basis of information - a Mahindra Jeep was intercepted - 2-3 persons who were inside the jeep fled away- another jeep came on the spot- 2-3 persons came out of the jeep who also ran away- the jeep was searched and was found loaded with cartons of country liquor - meanwhile a jeep being plied by one of the accused reached on the spot -occupants of the jeep attacked the police with the stones- one of the accused fired gunshot in the air- the police took the jeep with the liquor but one of the accused brought his jeep in front of the jeep carrying the liquor - they forced the driver of the vehicle out of the jeep and took it along with liquor- the accused were tried and acquitted by the Trial court - held in appeal that the complainant had made major improvements in his statement- he could not identify the accused due to darkness- other witnesses had also given contradictory versions- the court had elaborately dealt with all the evidence and had held the prosecution case was not proved beyond reasonable doubt- Appeal dismissed. (Para-27 to 31)

For the appellant: Mr. R.S. Verma, Addl. Advocate General with Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

For the respondents: Mr. K.B. Khajuria, Advocate, for respondents No. 2 to 8.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

The present appeal has been filed against judgment dated 07.04.2008 passed by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in S.C. No. 16-P/VII/2007, S.T. No. 18/08, vide which the accused have been acquitted of offences under Sections 147, 148, 149, 307, 353, 332, 341, 395, 397 and 120-B I.P.C.

2. The case of the prosecution was that on the intervening night of 09/10.09.2005 an information was provided by liquor contractors to the police that accused will be carrying 50 cartons of country liquor Lal Kila brand in a jeep. On the basis of this information, police laid a Naka at a place known as Pudva near Palampur. At the said Naka at about 01.00/1.300 A.M., a Mohindra Jeep bearing registration No. HP-37-0226 came which was stopped by the police personnel. However, 2-3 persons who were inside the said jeep fled away. Thereafter, another jeep with applied for number reached the spot. 2-3 persons came out of this jeep but they also ran away. When this jeep was searched by the police, it was found loaded with cartons of country liquor. Thereafter, a jeep being plied by one of the accused persons also reached the spot. The occupants of the said jeep attacked the police officials with stones. In these circumstances, the police tried to drive away the jeep loaded with liquor with the help of the driver of the liquor contractor and in the said process, the police party Incharge suffered injuries. Further, as per the prosecution one of the accused also fired shot in air. The police continued to proceed with the vehicle in which the liquor was there but when they reached near Manja one of the accused brought his jeep in front of said jeep and stopped the same by obstructing the passage. They forced the driver of the said vehicle out of it and thereafter, took the jeep in which the liquor was, with them away from that place. Police party Incharge sent a telephonic information to the Police Station and thereafter, reached the Police Station and got the FIR lodged. The accused were arrested and at their instance, bottles of liquor were recovered in carton boxes. The jeep involved in this incident was recovered and one sword with which one of the accused was found armed was also recovered.

3. Thus, the case made out by the prosecution was that the accused were apprehended by the police while transporting country liquor without any valid permit and in this process, the accused clashed with the police officials and caused injury to one of the police officials. They obstructed the police and also took away the liquor alongwith the vehicle. On these basis, investigation was carried out and a challan was prepared. The case was committed for trial. The accused appeared in the Court, pleaded not guilty and claimed to be tried.

4. The learned trial Court after hearing the parties has acquitted the accused of the offences alleged against them by concluding that there were doubts in the prosecution case.

5. Feeling aggrieved by the said judgment, State has filed the present appeal. Learned Additional Advocate General has vehemently argued that the judgment passed by the learned trial Court is perverse and not sustainable at all. He has argued that the learned trial Court has appreciated the evidence on record in a slipshod manner and has acquitted the accused persons on flimsy grounds. It is further the case of the State that the judgment under challenge is based on hypothetical reasoning, surmises and conjectures. As per the appellant, the learned trial Court has failed to correctly appreciate the prosecution evidence. The reasonings of the learned trial Court are manifestly unreasonable and unsustainable and rather no reasons whatsoever has been assigned for discarding the reliable version of the official

witnesses. The learned Additional Advocate General has strenuously argued that the learned trial Court had erred in discarding the testimony of the prosecution witnesses in the absence of any proof of animosity and enmity.

6. Mr. K.B. Khajuria, learned counsel for the respondents has supported the judgment passed by the learned trial Court. According to Mr. Khajuria, findings returned by the learned trial Court are based on the material which was available before the learned trial Court. According to him, the prosecution had failed to prove its case beyond reasonable doubt against the accused. He also argued that the case of the prosecution was full of contradictions and the prosecution had miserably failed to bring home the guilt of the accused.

7. We have heard learned counsel for the parties and have also gone through the records of the case as well as the judgment passed by the learned trial Court.

8. In order to prove its case, the prosecution examined 17 witnesses.

9. PW-1 ASI Gambhir Chand stated that on 10.09.2005 he was posted at Police Station Palampur and he alongwith HHC Parmeshwari and other police officials were on patrol at Pudva. At about 1.10 A.M. Onkar and Surinder came and told him that they had received information that liquor was being brought in a vehicle from Khundian side and that Sampuran @ Fina, Ajay Guleria and Shiv Karan Sanju etc. were coming in that vehicle. In the meanwhile, one Mohindra Jeep reached there. In the said jeep, one person was sitting alongwith driver. When the said vehicle was stopped, its driver made a phone call informing someone that they should not come ahead. Thereafter, the said driver and the person sitting alongwith him fled away in the dark. When the vehicle was searched, it was found to be empty. After sometime, another Mohindra vehicle with "A/F" also reached the spot. Three persons were sitting in the said vehicle. Its driver disclosed his name as Ajay. These persons ran away when the police started checking the vehicle. This vehicle was found loaded with country liquor. When the police was conducting codal formalities, one Indica Car also reached on spot, in which 5-6 persons were sitting. When this car was stopped, the persons in the car started pelting stones on the police officials. He suffered injuries on his left eye and right hand finger. He has further deposed that when the police tried to drive the jeep with the help of the driver of the liquor contractor Onkar, Ajay and Shiv Kumar came, who were armed with gun, shot at them. Fina was armed with sword. He has further deposed that the police was proceeding towards Palampur and these persons chased them and when the police reached near Mehnja link road near Paror, the accused stopped their Indica car ahead of the police team and blocked the road. Thereafter, they dragged out the driver from the jeep and at gun point took away the jeep which was loaded with liquor. He sent information from his mobile Cell to Police Station Palampur and returned to the Police Station alongwith other police officials. He also stated that FIR Ext. PW1/A was registered, which bears his signatures and he was got medically examined at SDH Palampur.

10. PW-2 Suinder Singh Rana has deposed that he was working as liquor contractor for the last 10-15 years and on 11.09.2005 he received telephonic message that liquor was being carried from Jawalamukhi side via Khundia. He was accompanied by Onkar Rana, who made a telephonic call at Police Station on which he was informed that the police had already laid Naka at Pudva. They reached at Pudva at around 12/12.30 A.M. informed the police official that liquor was being carried by Ajay and Sampuran, who had been accompanied by 3-4 boys. He has further deposed that they were also accompanied by 2-3 other boys. At about 1.00/1.30A.M. a jeep came from the side of Khundian i.e. Mohindra jeep bearing registration number HP-37-B-226, which was stopped by the police. As soon as the vehicle stopped, the occupants of the same who were 2-3 in number ran away. The said vehicle was empty. Thereafter, another jeep reached there which was A/F from which also 2-3 persons came out who ran away. He has further deposed that thereafter someone started throwing stones and nothing else happened in his presence. He was declared as a hostile witness.

11. PW-3 HHC Piar Chand has deposed that on 20.11.2005 MHC Kehar Singh gave six bottles of country liquor Lal Kila duly sealed to be taken to CTL, Kandaghat, which he had deposited on 21.11.2005 at CTL Kandaghat.

12. PW-4 Ramesh Chand has deposed that he was running Amar Studio at Pudva Bazar and at the instance of the police, he had taken the photographs, which were Ext. PW4/A to Ext. PW4/C.

13. PW-5 Dr. S. Chakerverty has deposed that on the application moved by Investigating Officer he had examined Gambhir Chand son of Harida Ram with alleged history of assault. On examination, a lacerated wound over left eye brow measuring 2x1x1 cms was found. The wound was bleeding. Besides there was bruise over tip of right index finger. According to him, nature of injuries was simple caused within probable duration of 1-2 hours and the same were caused with blunt weapon.

14. PW-6 Randhir Singh has deposed that about two years back he was working as sales man at liquor vend at Palampur. He was called by the police officials from the liquor vend and was told that liquor had been recovered. He was made to affix his signatures on one paper. He was also declared as a hostile witness.

15. PW-7 ASI Kehar Singh has deposed that on 11.09.2005 Inspector Sanjay Sharma handed over one parcel which was sealed with seal-A and another parcel sealed with seal-A, the entries of which were made in the Malkhana Register. On 18.09.2005 he had sent both the parcels through constable Raj Kumar to FSL Junga. On 22.09.2005 ASI Ashok Kumar had deposited 31 boxes of country liquor Lal Kila out of which three bottles were sealed with seal-A. On 25.09.2005 ASI Ashok Kumar had deposited 19 boxes of country liquor Lal Kila excluding three bottles which were sealed with seal-K and he had made entries in Register No. 19. All the aforesaid six bottles were sent through HHC Piar Chand to CTL, Kandaghat. On receipt of the said parcels at FSL Junga and Kandaghat, receipts were given by constable Raj Kumar and Piar Chand respectively. He has further deposed that on 25.09.2005 sword Ext. P-4 was deposited with him by ASI Ashok Kumar.

16. PW-8 S.I. Gurbachan Singh has deposed that in the year 2005 he was posted at Police Station Palampur as Investigating Officer. At 2.25 A.M. on 11.09.2005 ASI Gambhir Chand came to the Police Station and registered FIR, which was signed by him. He has further deposed that FIR was written by MHC.

17. PW-9 S.I. Ashok Kumar has stated that in between 2003 to 2007 he was posted at Police Station Palampur as Sub Inspector. According to him, on 22.09.2005 he received the file of the case and partly investigated the same.

18. PW-10 Inspector Sanjay Sharma has deposed that in the year 2005 he was posted as S.H.O. Police Station Palampur and on 11.09.2005 he had conducted partly investigation of the case.

19. PW-11 Inspector Sanjeev Chouhan had prepared the challan and presented it in the Court.

20. PW11/A Yogesh Jaswal has deposed that he was posted as Additional Chief Judicial Magistrate, Palampur, in the year 2006. On 23.06.2006 an application Ext. PW11/A for recording the statements of witnesses Onkar Singh Rana and Surinder Singh Rana under Section 164 Cr.P.C. was moved by the S.H.O. Police Station, Palampur. These witnesses were identified by Ajit Kumar Baghla, who was President of Municipal Council, Palampur. Thereafter, he recorded the statement of Ajit Kumar Baghla to the effect that he knows and identifies the above named witnesses. According to him, these witnesses were made aware of the fact that they were not bound to make any statement. The application was passed over for sometime and thereafter when the case was called again, the witnesses were again asked to express their free will and volition without any fear or threat from any corner, and after he was satisfied that

these witnesses were ready and willing to give their statements on their own free will and volition without any fear or threat or undue influence upon them he recorded the statements of Suridner Rana and Onkar Singh Rana.

21. PW-12 Onkar Singh has deposed that he was proprietor of Onkar Wine Agency at Palampur. On 11.09.2005 at 1.00 A.M. he received a telephonic call from Jawali that a jeep loaded with liquor was coming via Khundian and he passed on this information to the police. He has further stated that he was not told who was bringing the vehicle. He has further stated that he alongwith Surinder and 3-4 other persons accompanied by police personnel reached at Pudva. The police team was headed by ASI Gambhir Chand. The vehicle was stopped and on checking it was found empty. Then another vehicle came from the side of Khundian which was Mohindra jeep having applied for written and the first vehicle was having two occupants but he did not know them. The first vehicle left and thereafter they proceeded ahead. He has further stated that he has not mentioned the names of any persons who were bringing alleged liquor without permit. He was also declared as a hostile witness.

22. PW-13 Rakesh Kumar has stated that he was working on a liquor vend of Surinder Rana and Onkar Rana. He had not participated in any investigation nor anything happened in his presence. He was declared as a hostile witness.

23. PW-14 HHC Parmeshwsari Lal has deposed that he was posted at Police Station Palampur. On 10.09.2005 he accompanied ASI Gambhir alongwith other police officials to Dheera Naura on patrol. At about 1.10 A.M. when they were present on road Pudva to Khundian, Surinder and Onkar Rana informed that liquor was being transported in a vehicle. In the meantime, a Mohindra Jeep HP-37A-0226 came and this vehicle was checked and two persons were sitting in it. Nothing incriminating was found in the jeep. However, driver and other persons ran away. Thereafter, a Maxi Cab white colour also reached in which one driver and two persons were sitting. One was Ajay Guleria and other Sampuran. This vehicle was found loaded with country liquor Lal Kila brand. Driver disclosed his name as Ajay. In the meantime, a Indica car came in which 3-4 persons were sitting and they all started pelting stones on the police. Three persons in the vehicle, which was loaded with liquor ran away. One person from Indica car took out gun whose name was Ajay Guleria and accused Sampuran was armed with sword. Gun was fired. Driver of liquor contractor was asked to drive the vehicle loaded with liquor at Paraur and the police stopped their Indica car but they parked their Indica car in front of their vehicle. The driver was taken out of the vehicle and beaten and thus took away the vehicle towards Paraur at gun point. Thereafter, ASI made report at Police Station through his mobile and they proceeded to the Police Station Palampur. At Pudva ASI Gambhir had suffered injuries while stones were thrown by the accused and after registration of the FIR, he accompanied the police party to Pudva etc. i.e. Paraur

24. PW-15 HC Ramesh Chand has stated that in the year 2006 he was posted in the office of S.P. Kangra at Dharamshala as Assistant and on 01.05.2006 ASI Gambhir Chand was ordered to be posted at Police Station Palampur from P.L. Dharamshala.

25. PW-16 Constable Raj Kumar has deposed that on 18.09.2005 MHC Kehar Singh had given two parcels which were duly sealed with seal-A alongwith impression of seal to be handed over at FSL Junga alongwith envelope which he deposited at FSL Junga and on return receipt was handed over to the MHC.

26. PW-17 Vikash has deposed that he was working as Salesman with Onkar Wine Agency at Palampur. He has further stated that he accompanied nobody and he knew nothing about the case in hand. He was declared as a hostile witness.

27. According to the prosecution, liquor contractors had provided an information on the intervening night of 9th/10th September, 2005 with regard to the illicit transportation of country liquor by the accused. The complainant in the present case is ASI Gambhir Chand. The mode and manner in which the case of the prosecution unfolds itself is very interesting. As per

the complainant, the police party was having information which was provided by liquor contractors that the accused will be carrying 50 cartons of country Lal Kila in a jeep and on the basis of said information they laid a Naka at a place known as Pudva near Palampur. At about 01.00/1.30 A.M., a Mohindra Jeep bearing registration No. HP-37-0226 came which was stopped by the police personnel. 2-3 persons who were inside the jeep fled away. Thereafter, another jeep comes which had no registration number and on which 'applied for' was written and from this jeep also 2-3 persons jumped out and ran away. According to the police, the search of this jeep revealed that the same was loaded with cartons of country liquor. Further, as per the prosecution, thereafter, another jeep comes to the spot, which was being plied by one of the accused person. The occupants of this jeep i.e. third jeep attacked the police personnel with stones. Thereafter, there case is that with the help of the driver of the contractor, they tied to take the jeep in which the liquor was loaded towards the Police Station. However, one of the accused fired in air and near Manja, they over took the vehicle of the police party as well as the jeep in which the police party was taking liquor to the Police Station and they forced the driver of the said vehicle out of the jeep and drove away with the jeep in which the liquor was there. When PW-1 has been confronted with his statement made under Section 154 Cr.P.C., it is revealed that he has made major improvements while deposing in the Court and what he has stated in the Court was not recorded in his statement under Section 154 Cr.P.C. The entire incident has taken place in the intervening night between 09/10.09.2005.

28. According to the complainant, he did'nt know the accused. He could not identify them due to darkness in the night. Further, in case, his statement made under Section 154 Cr.P.C., the contents of FIR and his statement made in the Court are seen together, then it is apparent that his subsequent version is not corroborating the contents of the First Information Report. This casts a serious doubt over the trustworthiness of the deposition of the said witness, who also happens to be the complainant. The story which he has narrated in the Court is that the first vehicle which came and whose occupants fled away was found empty on being checked. The second vehicle which came with applied for number was having three occupants including driver, who disclosed his name as Ajay and other two persons were Ajay and Shiv Karan. These persons also fled away when the police started checking the vehicle. This vehicle was loaded with country liquor. Thereafter, a third vehicle came, which was a Indica car in which 5-6 persons were sitting. This car was stopped and the persons sitting in the said car started pelting stones on the police personnel.

29. On the other hand, PW-2 Surinder Singh Rana, who is a liquor contractor, who allegedly provided information to the police about the transportation of the liquor, has stated that pelting of stones took place after the occupants of the second vehicle fled away. He has denied that Indica car came in which 5-6 persons were sitting, who started pelting stones. He has also denied that his driver plied the jeep loaded with liquor or that they were chased in Indica car. He has also denied that Indica car over took them and blocked the road at Paror, took away loaded vehicle at the gunpoint in which the liquor was loaded. Though, this witness was declared as a hostile witness but this Court cannot over look his statement especially in view of the fact that the police were acting on the basis of the alleged complaint of the liquor contractor itself.

30. These major contradictions in the manner in which the incident unfolds in the statements of PW-1 and PW-2 shroud the case of the prosecution with lot of suspicion. PW-6 Randhir Singh who works as a salesman at liquor vend Palampur, has also not supported the story of the prosecution at all. PW-17 Vikash has also not supported the version of the prosecution. PW-9 has deposed that accused Daljit made a disclosure statement in presence of Randhir and Rakesh Kumar to the effect that he can get Max jeep recovered. This statement Ext. PW6/D was recorded in presence of the said witnesses and the accused led the police to the forest and the vehicle in issue was recovered. The said vehicle was taken into consideration in the presence of witnesses and accused Daljit also affixed his signatures on the seizure memo. Randhir and Rakesh Kumar have been examined as PW-6 and PW-13. PW-6 Randhir Singh has, however, denied that any such disclosure statement was made in his presence or any seizure

memo was made on the basis of said disclosure statement in his presence. Similarly, PW-13 Rakesh Kumar has also denied that Daljit gave a disclosure statement or that any recovery of the vehicle was effected on the basis of said disclosure statement of Rakesh Kumar.

31. Further, a perusal of the judgment passed by the learned trial Court will demonstrate that it has elaborately dealt with all the evidence placed on record by the prosecution and after correct appreciation of the same, it has come to the conclusion that the prosecution has not been able to prove its case beyond reasonable doubt. In our considered view, the said conclusion arrived at by the learned trial Court cannot be faulted. There are too many discrepancies in the case of the prosecution. The independent witnesses have not supported the story of the prosecution and the testimony of the police witnesses does not inspire confidence because there are too many contradictions in the same and too many improvements in the statements of the said witnesses. At the best, the story of the prosecution can be a indicator that the things might have happened in the manner which the prosecution have demonstrated, however, the fact still remains that the prosecution has not been able to bring home the guilt of the accused beyond reasonable doubt. The material on record does not directly connect the accused with the commission of the alleged charges levelled against them. 'Preponderance of probability' cannot be a substitute for 'proof' and the same cannot be made basis for convicting a person. The judgment passed by the learned trial Court is neither cryptic nor it can be said that the conclusions arrived at by the learned trial Court are not borne out from the record of the case. Therefore, we uphold the findings returned by the learned trial Court in view of the fact that there is no merit in the present appeal, the same is dismissed. Bail bonds, if any, furnished by the accused are discharged.

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

Ankit Hire Purchase (P) Ltd. .....Petitioner.

Versus

Smt. Neelam Kumari and others .....Respondents.

CMPMO No. 115 of 2016

Date of decision: 31st May, 2016

Indian Evidence Act, 1872- Section 67 and 73- Application was filed for comparison of admitted signatures with the disputed signatures on the counterfoils of check books, which was dismissed by the trial Court- held, that loan was sanctioned by the plaintiff in favour of the predecessor-in-interest of the defendants- defendant No. 2 was a guarantor, counterfoils bear the signatures of Rakesh- name of defendant No. 2 is Rohit- no useful purpose will be served by comparing signatures- this would lead to the delay – petition dismissed. (Para-8)

For the petitioner: Mr. Umesh Kanwar, Advocate.

For the respondents: Mr. Dheeraj K. Verma, Advocate.

The following judgment of the Court was delivered:

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

Aggrieved by an order passed by learned Civil Judge (Senior Division), Court No. I, Ghumarwin, District Bilaspur in an application under Sections 67 and 73 of the Indian Evidence Act registered as CMA No. (Civil Suit No. 293 of 2004) 150/6/2015, the petitioner-Company (hereinafter referred to as the plaintiff) has filed this petition with a prayer to quash and set aside the same and by allowing the application to send the admitted signatures of respondent-

defendant No. 2 Rohit with the disputed signatures on the counterfoils of cheques-book mark 'A' and 'B'.

2. On going through the record the plaintiff's case, in a nut-shell, is that deceased Surender Bhalla had obtained a loan amounting to Rs.1,00,000/- from the plaintiff. The plaintiff had issued two cheques and released the payment of loan amount to deceased Surender Bhalla amounting to Rs.70,000/- and Rs.30,000/- thereby. Said Sh. Surender Bhalla got both the cheques and counter-foils thereof signed from respondent-defendant No. 2. Said Surender Bhalla has failed to re-pay the loan amount as the cheques he issued in advance when presented for clearance were got bounced as by that time, he had already expired. This has led in filing the suit for recovery of the suit amount together with interest against his legal representatives, the respondents-defendants.

3. It is during the course of recording plaintiff's evidence, respondent-defendant No. 2 has denied his signatures on the counterfoils of cheques mark 'A' and 'B'. This has led in filing the application as aforesaid with a prayer that the admitted signatures of respondent-defendant No. 2 be sent to handwriting expert for comparison with disputed signatures on mark 'A' and 'B'.

4. The application was resisted and contested on the grounds *inter-alia* that respondent No. 2 has not obtained the loan and as such, he has nothing to do with the so called transaction of loan between his father and the plaintiff-Company. Also that, his name is Rohit Kumar and not Rakesh. The application was sought to be dismissed.

5. Learned trial Judge while arriving at a conclusion that respondent-defendant No. 2 has nothing to do with the transaction of loan and that there is no need of comparison of his signatures has dismissed the application vide order under challenge in this petition.

6. Mr. Umesh Kanwar, learned counsel representing the petitioner-plaintiff has urged that name of respondent-defendant No. 2 is Rakesh Kumar. The said defendant, according to him, has also been called as Rohit. Now, in order to avoid the liability to repay the outstanding loan amount, the plea that he has nothing to do with the transaction of loan, has been raised.

7. Mr. Dheeraj K. Verma, learned counsel while repelling the arguments addressed on behalf of the petitioner-plaintiff has strenuously contended that the suit has simply been filed to grab money from the defendants. Respondent-defendant No. 2 is neither a loanee nor the guarantor and the so called signatures on mark 'A' and 'B' are not of his signatures and, therefore, the application is without any merits.

8. Admittedly, the loan, if any, was sanctioned by the plaintiff-Company in favour of Sh. Surender Bhalla, the predecessor-in-interest of the defendants. Respondent-defendant No. 2 was neither a loanee nor it is the case of the petitioner-plaintiff that he was guarantor, therefore, it is not understandable as to why his signatures were required on the cheques or counterfoils thereof. Above all, the counterfoils bear the signatures of Mr. Rakesh Kumar. The name of respondent-defendant No. 2 is, however, Rohit Kumar. No doubt, it is canvassed that said defendant is also called as Rakesh Kumar, however, without any basis, because nothing suggestive of that the name of defendant No. 2 is Rakesh Kumar @ Rohit Kumar has come on record. Therefore, no useful purpose is likely to be served in case the application is allowed and the signatures of defendant No. 2 are sent for comparison to handwriting expert with the disputed signatures on the counterfoils mark 'A' and 'B'. Allowing such a prayer would amount to abuse of process of law, besides delaying the proceedings in the suit, that too, without any justification.

9. The petition, therefore, being devoid of any merits is dismissed. Pending application(s), if any, shall also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Mrs. Neelam Rana ...Petitioner.
Versus
Mrs. Meera Dewan. . ..Respondents.

Civil Revision No. 54 of 2015
Reserved on: 19.05.2016.
Date of Decision: May 31,2016

Indian Evidence Act, 1872- Section 45- Defendant filed an application for comparison of his signatures on the disputed documents, verify tampering/removal of original photographs and removal/ pasting of photograph as well as the life of the ink used in the documents- the application was dismissed by the court- held, that power of Revision can be exercised where no appeal lies and the order passed by the court attains finality- High court has to satisfy itself whether the order of the Subordinate Court is within jurisdiction and whether the Court has acted in breach of provisions of law or with material irregularities – Revisional Court cannot substitute its view in place of the view of the trial court -when the case was listed for recording defendant's evidence, it was found that no steps had been taken for summoning the witnesses and the witnesses were also not present – the application was filed when the evidence of the defendant was being recorded- signatures were admitted by the husband of the defendant- the conduct of the defendant shows that she was procrastinating the proceedings- The court had not acted with material irregularity and the application was rightly rejected by the Trial court- Revision dismissed with costs of Rs. 25,000/-. (Para 2 to 30).

Cases referred:
N.S. Venkatagiri Ayyangar and another Versus The Hindu Religious Endowments Board, Madras, A.I.R. (36) 1949, Privy Council 156
Pandurang Dhondi Chougule and others Vs Maruti Hari Jadhav and others, AIR 1966 SC 153
M/S. D.L.F. Housing and Construction Company (P.) Ltd., New Delhi, 1969(3) SCC 807
Hindustan Petroleum Corporation Limited Versus Dilbahar Singh, (2014) 9 SCC 78.
Johri Singh Versus Sukh Pal Singh and others, (1989) 4 SCC 403
Jagdamba Prasad (Dead) through Legal Representatives and others v. Kripa Shankar (Dead) through Legal Representatives and others, (2014) 5 SCC 707;
John Kennedy and another v. Ranjana and others, (2014) 15 SCC 785
Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee, AIR 1964 SC 529
Fakhruddin v. The State of Madhya Pradesh, AIR 1967 SC 1326; and Ram Narain v. State of Uttar Pradesh, (1973) 2 SCC 86
K. Nanjappa (Dead) by Legal Representatives v. R.A. Hameed alias Ameersab (Dead) by Legal Representatives and another, (2016) 1 SCC 762

For the Petitioner: Mr. G.C. Gupta, Sr. Advocate with Ms.Meera Devi, Advocate, for the petitioner.
For the Respondents: Mr. R.L. Sood, Sr. Advocate with Mr.Sanjeev Kumar, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this petition, filed under Section 115 of the Code of Civil Procedure (hereinafter referred to as CPC), challenge is laid to the order dated 25.03.2015, passed by learned District Judge, Solan, H.P., in Case No. 1-S/1 of 14/07, titled as *Meena Dewan Versus Neelam Rana.*

2. In terms of the impugned order, defendant's (petitioner herein) application, so filed under Section 45 of the Indian Evidence Act, 1872, praying for the following relief, came to be dismissed:-

> "It is, therefore, very humbly prayed that the application may kindly be allowed and the alleged Supplementary agreement dated 01.10.2004 containing the signatures of the defendant except signature on last page on approval of cutting by taking the specimen signature of the defendant and also to take the disputed signature of the author as well as the signatures of the attesting witnesses to verify the genuineness of the signatures And Also the power of attorney dated 01.10.2004 alleged to be executed by defendant in favour of Kishore Singh son of Shri Abhrai Singh son of Shri Rumel Singh, resident of Village Gathot, Tehsil Indora, District Kangra, H.P. registered as document NHo. 258 on 01.10.2004 before Sub-Registrar Kasauli to verify the tampering / removal of original photograph and removal/pasting of photograph of executant and attorney holder and also the life of the ink used in signatures as well as in the documents, may kindly be sent to FSL Junga for examination by handwriting expert and for his opinion, in the interest of justice."

3. The scope of Section 115 of CPC needs to be examined first.

4. In *N.S. Venkatagiri Ayyangar and another Versus The Hindu Religious Endowments Board, Madras,* A.I.R. (36) 1949, Privy Council 156, the Court after examining the legislative intent of Section 115 of CPC, held the same to apply only in cases where no appeal lies. The manifest intention, in passing of the order of the trial Court, whether right or wrong, attaches finality. This Section empowers the High Court to satisfy itself as to whether (a) order of the Subordinate Court is within its jurisdiction; (b) that the Court could have exercised its jurisdiction; (c) that in exercise of such jurisdiction, Court has acted illegally, that is, in breach of some provisions of law, or with material irregularity, that is, by committing some error of procedure in the course of trial, which is material in that it may have affected the ultimate decision. With the High Court being satisfied with regard to the same, it would have no power to interfere only if it were to differ, howsoever, profoundly from the conclusion of the Subordinate Court upon questions of fact or law.

5. A five-Judge Bench of the Apex Court in *Pandurang Dhondi Chougule and others Versus Maruti Hari Jadhav and others,* AIR 1966 SC 153, has further elaborated on the scope of interference by this Court. It is only in cases, where the Subordinate Court has exercised the jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked.

6. A two-Judge Bench of the Apex Court in *M/S. D.L.F. Housing and Construction Company (P.) Ltd., New Delhi,* 1969(3) SCC 807, further held that:-

> "5. The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses *(a)* and *(b)* of this section on their plain reading quite clearly do not cover the present case. it was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause *(c)* also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision

> arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal" (Emphasis supplied)

7. The principle stands reiterated by another five-Judge Bench of the Apex Court in *Hindustan Petroleum Corporation Limited Versus Dilbahar Singh,* (2014) 9 SCC 78.

8. The Apex Court in *Johri Singh Versus Sukh Pal Singh and others,* (1989) 4 SCC 403, has further held that:-

> "23. Consequently, the High Court had jurisdiction to interfere with the order of the Senior Subordinate Judge only –(i) if the said Judge had no jurisdiction to make the order it has made, and (ii) had acted in breach of any provision of law or committed any error of procedure which was material and may have affected the ultimate decision. If neither of these conditions was met the High Court had no power to interfere, however profoundly it may have differed from the conclusion of the Senior Subordinate Judge on questions of fact or law. ....."

9. To similar effect is the ratio of law laid down in *Jagdamba Prasad (Dead) through Legal Representatives and others v. Kripa Shankar (Dead) through Legal Representatives and others,* (2014) 5 SCC 707; and *John Kennedy and another v. Ranjana and others,* (2014) 15 SCC 785.

10. In view of the aforesaid discussion, one now proceeds to examine the jurisdictional error or irregularity/material irregularity, if any, committed by the Court below, in passing the impugned order. For proper appreciation and determination of the controversy in issue, it would be profitable to extract the relevant portion thereof:-

> "5. Be it noted that disputed Power of Attorney has been placed on record as Ex.PW7/A by the plaintiff and the same has been exhibited and the copy of the same Ex.PW1/A has been proved by Deepak Kumar (PW-1) Registration Clerk in the office of Sub Registrar, Kasauli. Brig. Bikram Rana (DW-1), who is GPA of the defendant in his cross-examination has specifically admitted that the signatures in circle A, B, C, D. E and F on Power of Attorney Ex.PW7/A are that of the defendant, who is his wife though he has further stated that such signatures were obtained on many papers by the plaintiff and lateron he misused these papers. Not only this it further admitted by DW-1 that the finger prints on Power of Attorney is that of his wife, though he has again stated that such finger prints were obtained by mis-representation. Thus DW-1 who appeared on behalf of the defendant as her Power of Attorney has not denied the signatures of the defendant on disputed Power of Attorney but on the other hand he has admitted the same. Thus in view of such admission made by DW-1 in his cross-examination it appears that the present application has been moved by the defendant just to wriggle out of such admission made by DW-1 in cross-examination. In such circumstances I am of the considered opinion that no

useful purpose is likely to be served by sending the Power of Attorney in question for comparison to some expert as prayed by the defendant.

6. Supplementary agreement dated 1.10.2004 has placed on record as Ex.PW5/B which has been exhibited in the statement of the plaintiff while appearing as PW-5. On perusal of said agreement it is clear that at the time of admission and denial, the defendant has admitted her signatures upon such agreement though contents of the said agreement have been denied by the defendant. Thus in view of such admission having been made by the defendant at the time of admission and denial of the documents, it is clear that the defendant has also not disputed her signatures upon supplementary agreement dated 1.04.2004 which is Ex.PW5/B.

7. On perusal of written statement filed by the defendant it is clear that the plea of the defendant is that her signatures were obtained by the plaintiff on some blank non judicial papers and other papers on the pretext that permission to purchase the land has to be obtained from State Government and it appears that the said signatures have been misused by the plaintiff No.1 which plea of the defendant can be decided only on merits after the parties have adduced their evidence. Since the defendant at the time of admission and denial of the documents has admitted her signatures upon disputed supplementary agreement dated 1.10.2004 no useful purpose is again likely to be served by sending the said document to Handwriting Expert for comparison with signatures of the defendant and signatures of author and signatures of the witnesses and it appears to me that the defendant has filed the present application just to wriggle out of the admissions already made by her in her pleadings and also in the evidence.

8. It is further to be noted that the case is pending for cross-examination of DW-1 since 10.07.2013 and the cross-examination of DW-1 has still not been concluded as he did not appear in the court on 26.07.2014, 2.08.2014, 27.09.2014 and 22.11.2014 and it is thereafter that the present application was moved on behalf of the defendant under section 45 of the Indian Evidence Act and thus it also appears that the present application has been moved by the defendant just to linger on the proceedings of the case." (Emphasis supplied)

11. Order is self-explanatory. It cannot be said that the Court below exceeded its jurisdiction in passing such order. It is not that, in law, Court below was not vested with any jurisdiction to do so. It also cannot be said that the Court below failed to exercise the jurisdiction, so vested in it. The only question which needs to be examined is as to whether in exercise of such jurisdiction, the Court below committed any illegality or material irregularity. What is that "illegality" and "material irregularity" already stands explained by the Apex Court in *D.L.F. Housing* (supra).

12. On the strength of agreement to sell dated 09.05.2004 (Ex.PW.5/A) and supplementary agreement dated 01.10.2004 (Ex.PW/5B), on 07.05.2007, plaintiffs Mrs.Meera Dewan and Shri Ashok Chopra (respondents herein) filed a suit for Specific Performance against defendant Mrs.Neelam Rana (petitioner herein).

13. In the written statement, so filed by defendant, duly affirmed by her husband as her Special Power of Attorney, she admitted having signed certain blank stamp and other papers. Allegedly she never executed the agreements/documents, set up by the plaintiffs, which according to her are nothing, but an act of manipulation and forgery.

14. Noticeably, on the strength of the pleadings of the parties, during trial, on 07.01.2008, following issues came to be framed:-

"1. Whether the defendant executed agreement of sale on May 9, 2004 and supplementary agreement dated 1st October, 2004? OPP

2. In case issue No.1 is proved, whether the plaintiffs were and are ready and willing to perform their part of contract, as alleged? OPP

3. Whether the power of attorney executed in favour of Kishore Singh is forged, as alleged, if so, its effect? OPD

4. Whether the defendant never executed any power of attorney in favour of Shri Tikkar Ram? OPD

5. Whether the plaintiff No.1 failed to perform his part of contract and the amount paid to defendant stood mutually adjusted, if so, its effect? OPD

6. Whether the suit, as framed, is not maintainable? OPD

7. Whether the suit is barred by limitation? OPD

8. If issue No.1 is proved, whether the agreement is void ab initio and is hit by provision of Section 118 of H.P. Tenancy and Land Reforms Act? OPD (framing of issue is objected to by the learned counsel for the plaintiffs).

9. Whether the plaintiffs have no locus standi to file the present suit? OPD

10. Relief."

15. It is a matter of record that in the year 2012 itself, plaintiffs led their entire evidence, when opportunity to lead evidence was afforded to the defendant. In fact, on 30.05.2012, the Court itself fixed the date for recording of evidence. Now on such date i.e. 12.10.2012, it came to be observed that the defendant had neither filed any list of witnesses nor taken any steps for summoning them. By way of indulgence, defendant was permitted to do the needful and matter was adjourned for 26.12.2012, for recording the evidence. Record reveals that even on this date, while expressing its anguish for not complying with the earlier orders, on the request of the husband of the defendant, Court adjourned the matter for 09.01.2013, on which date, his statement as General Power of Attorney of the defendant was to be recorded. But even on that date, witness was not present. Record further reveals that repeatedly, defendant came to be accommodated and only on 24.05.2013 statement of the Special Power of Attorney came to be partly recorded. However, before this witness could be further examined, in the interregnum, on account of enhancement of the pecuniary jurisdiction, of this Court, transferred the suit to the Court of District Judge, Solan, a Court having competent jurisdiction. Record also reveals that even before that Court, defendant continued to seek adjournments and on 29.03.2014 even cost of Rs.5000/- was imposed. The fact of the matter being that even thereafter, for one reason or the other, this witness could be cross-examined only in part.

16. Now during this process, on 10.12.2014, defendant filed the application in question.

17. Significantly, in his examination-in-chief, defendant's husband, admits signatures on the Power of Attorney (Ex.PW.7/A) as also finger prints there upon, to be that of his wife. According to the learned Senior Counsel appearing on behalf of the plaintiff, this witness has taken a self-contradictory and vacillating stand. At this stage, this Court is not required to go into this aspect, but then from the bare perusal of his testimony, it is quite apparent that signatures as also finger prints on the Power of Attorney (Ex.PW.7/A) are admitted to be that of the defendant. Such admission came to be made on 06.06.2014, a date much prior to the filing of the application in question.

18. In the application dated 10.12.2014, none of these facts came to be mentioned by the defendant. Why so? Remains unexplained.

19. Through the application, defendant only wants the authenticity of her signatures on the supplementary agreement dated 01.10.2004 (Ex.PW.5/B) and Power of Attorney (Ex.PW.7/A) to be verified and ascertained. But then such fact stands admitted.

20. In the light of admissions made by the defendant herself, having admitted her signatures also at the time of admission and denial of the documents, instant application being highly misconceived, rightly stands rejected and as is so held by the Court below, filed only to linger on the proceedings.

21. There is the limit to which a party can misuse or abuse the process of law. Since 2012, Court had been more than indulgent towards the defendant, perhaps for the reason that she is a lady, but then she continued to take undue advantage of such discretion and by taking the Court for granted filed a totally misconceived application with a *malafide* intent. The sole object being to procrastinate the proceedings. Her conduct is absolutely contumacious and contemptuous, for if at all such application was to be filed, it had to be done at the first opportune moment and definitely not after having admitted her signatures on the documents.

22. It is a matter of record that the entire sale consideration, amounting to Rs.27,00,000/-, stood paid by the plaintiffs and received by the defendant, way back in the year 2003 itself. Whether thereafter petitioner turned dishonest, as is so alleged by the plaintiffs, in terms of the agreement, rightly forfeited the said amount, as is so claimed by her, is a question which the trial Court is required to examine. But, the fact of the matter is that the trial stands delayed by her. There is neither any procedural error nor any error of fact or law.

23. During trial, Court specifically framed the issue of the documents being forged. This was so done way back in January 2008. Defendant chose only to examine one witness, whose testimony also, for one reason or the other, could not be recorded for more than three years.

24. Can it be said that Court below erred in correctly exercising its jurisdiction? Can it be said, in exercise of its jurisdiction, Court below committed an illegality or material irregularity? In the backdrop of the aforesaid discussion and keeping in view the principle laid down by the Apex Court in *Pandurang Dhondi Chougule* and *D.L.F. Housing* (supra), most certainly not. There is no error of law in appreciation of facts or application of law.

25. A five-Judge Bench of the apex Court in *Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee,* AIR 1964 SC 529, has clearly held that the expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence.

26. To similar effect are the decisions rendered in *Fakhruddin v. The State of Madhya Pradesh,* AIR 1967 SC 1326; and *Ram Narain v. State of Uttar Pradesh,* (1973) 2 SCC 86.

27. Significantly, there is substantive evidence on record to prove the issues framed by the Court. Hence, the trial Court rightly rejected the application, more so in the absence of any name of the author having been mentioned in the application.

28. It is a settled position of law that the onus to prove the contract of sale of immoveable property is on the plaintiff. Whether there was consensus or they were *ad idem*, on the issue of contract being concluded, is a question which the trial Court is to consider. (See: *K. Nanjappa (Dead) by Legal Representatives v. R.A. Hameed alias Ameersab (Dead) by Legal Representatives and another,* (2016) 1 SCC 762).

29. As already observed, the impugned order being self-explanatory, the application rightly stands rejected by the Court below. But the defendant cannot be allowed to go scot-free, for she invoked the jurisdiction of this Court and the instant petition has been pending for more than one year. She has wasted valuable time of this Court. Also only on her asking, proceedings before the trial Court, came to be stalled.

30. As such, present petition, to meet the ends of justice, is disposed of in the following terms:-

(a) Impugned order dated 25.03.2015, passed by learned District Judge, Solan, H.P., in Case No. 1-S/1 of 14/07, titled as *Meena Dewan Versus Neelam Rana*, is affirmed;

(b) Petitioner shall pay costs quantified at Rs.25,000/- to the plaintiffs;

(c) Trial is expedited;

(d) Parties are directed to appear before the Court below on 15.06.2016, on which date the trial Court shall fix a date/date(s) for appearance of the only witness of the defendant left to be cross-examined;

(e) On such date(s), this witness shall be cross-examined;

(f) If the witness fails to make himself available, his entire testimony shall be struck off from the record and not read as evidence;

(g) In such event the defendant's evidence shall be presumed to have been closed and the trial Court shall decide the suit on the basis of material on record; and

(h) Parties shall fully cooperate and not take any un-necessary adjournments;

In view of the above, present petition stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ramesh Chand ....Petitioner.

Versus

State of H.P. & others. ...Respondents.

CWP No.2343 of 2014.
Reserved on : 24.5.2016
Decided on: 31st May, 2016.

Constitution of India, 1950- Article 226- Petitioner was selected for the post of Mid Day Meal Worker - however, the appointment letter was not issued to her- she filed a writ petition seeking direction to issue the appointment letter to her- held, that the petitioner was appointed on the resignation of existing occupant - however, the existing occupant had withdrawn his resignation - therefore no post is lying vacant – the petitioner has no right to claim appointment- petition dismissed. (Para-6 to 9)

For the petitioner : Mr. P.P. Chauhan, Advocate.
For the respondents No.1 to 5 : Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner for issuance of appropriate writ, order or direction to the respondents directing them to appoint the petitioner as Mid Day Meal Worker.

2. As per the petitioner, he was not being given appointment letter by the respondents for the post of Mid Day Meal Worker in Government Primary School, Mana, despite having been selected by a duly constituted selection committee. The case of the petitioner is that on 5.6.2013 one Shri Rattan Singh tendered his resignation from the post of Mid Day Meal Worker in Government Primary School, Mana, Sub Tehsil Kamroo, District Sirmour, which was

duly considered in the meeting of School Management Committee held on 5.6.2013 and a decision was also taken to fill up the said post. Notices were published and duly placed at conspicuous places simultaneously with a view to give wider publicity to fill up the said post by calling for the applications from prospective candidates. Petitioner as well as other two candidates applied for the said post and the meeting of selection committee was convened on 12.6.2013 at 10:00 am and selection proceedings were drawn. The other two candidates being overage could not qualify and the petitioner was selected for the said post vide selection proceedings dated 12.6.2013. The minutes of selection proceedings were drawn on the same day and it is very categorically mentioned that President of School Management Committee, Shri Ramesh Chand, due to personal animosity, is objecting to the selection of the petitioner, therefore, the said selection was subjected to the voting by the present members of the School Management Committee and it was unanimously resolved that the petitioner be selected and appointed as a Mid Day Meal worker for Government Primary School, Mana. Despite this, an appointment letter has not been issued to the petitioner till date.

3. Reply to the writ petition was filed by respondents No.1 to 5. It is averred in the reply that Government has decided to start Hot Cook Meal programme in all the Govt./Govt. Aided Primary Schools of Tribal area of the State in 1st phase w.e.f. May, 2003 and the Govt. vide letter No. EDN-C.B (2)2001-5 (Loose) dated 2.8.2004 has started this programme in Non-Tribal Area of the State in 2nd phase w.e.f. 1.9.2004. In order to start the programme the replying respondent as per the directions of the Govt. dated 12.8.2004 directed all the Deputy Directors of Elementary Education to ensure implementation of cooked meal scheme (Mid Day Meal) in Primary Schools of their area. It is further averred that vide clause 6.1 of the letter dated 12.8.2004, it was required that committee has to be framed for implementation of the cooked meal in the school comprising for the following members :

1.	President of Concerned Committee or any active member Nominated for the purpose.	Member
2.	President of MTA/PTA or any Active Member nominated for the purpose	Member
3.	C.H.T/H.T/Senior Teacher of the School.	Coordinator/ Member Secretary.

4. It is further averred that Committee is responsible to make arrangement for hiring the services of the helper/cook at the honorarium as per the guidelines of the project. It is further averred that the replying respondents have no role to play in the engagement of a cook or helper under the Mid Day Meal Scheme. This matter is, at best, between the said Mid Day Meal Committee and the petitioner. The present writ filed by the petitioner against the replying respondents is not maintainable because, as per the information received from the Block Elementary Education Officer, Sataun, District Sirmour, after the resignation of one Shri Rattan Singh, post of cook/helper was advertised in Govt. Primary School, Mana. The President of School Management Committee, Mana, invited the applications for filling up the post of cook/helper in the Govt. Primary School, Mana and three persons appeared in the interview on 12.6.2013. On this day, President of the concerned Committee was not present in the interview due to this reason appointment could not be given to the petitioner as Mid Day Meal worker in Govt. Primary School, Mana. It is further averred that Shri Rattan Singh, Ex. Mid Day Meal Worker represented to respondent No.3 on 16.9.2013 stating therein that he is illiterate and cannot write the resignation from the post of Mid Day Meal Worker. So, he may be re-engaged as Mid Day Meal Worker in Govt. Primary School, Mana. Thereafter, Shri Rattan Singh, was re-appointed as Mid Day Meal Worker in Govt. Primary School, Mana, by the President, School Management Committee, Mana and joined there on 29.10.2013 and now the post of Mid Day Meal Worker is not vacant in Govt. Primary School, Mana. On merits, it is submitted by the respondents that, as per the information received from Block Elementary Education Officer,

Sataun, District Sirmour, after the resignation of one Shri Rattan Singh, post of cook/helper was advertised in Govt. Primary School, Mana. The President of School Management Committee, Mana, invited applications for filling up the post of cook/helper in Govt. Primary School, Mana and three persons appeared in the interview on 12.6.2013. On this day, President of the concerned Committee was not present in the interview due to this reason appointment could not be given to the petitioner as Mid Day Meal Worker in Govt. Primary School, Mana. It is further submitted that Shri Rattan Singh Ex. Mid Day Meal Worker represented to respondent No.3 on 16.9.2013 stating therein that he is illiterate and cannot write the resignation from the post of Mid Day Meal Worker. Therefore, he may be re-engaged as Mid Day Meal Worker in Govt. Primary School, Mana. Thereafter, Shri Rattan Singh was re-appointed as Mid Day Meal Worker in Govt. Primary School, Mana by the President, School Management Committee, Mana and joined there on 29.10.2013 and now post of Mid Day Meal Worker is not vacant in Govt. Primary School, Mana. Respondents have prayed that as the post is not vacant, writ petition be dismissed.

5. Heard. Mr. P.P. Chauhan, learned counsel appearing on behalf of the petitioner and Mr. Virender Kumar Verma, Addl. Advocate General for respondents No.1 to 5.

6. Vide clause 6.1 of the letter dated 12.8.2004, the Committee has been framed for implementation of the cooked meal in the School comprising for the following members :

1.	President of Concerned Committee or any active member Nominated for the purpose.	Member
2.	President of MTA/PTA or any Active Member nominated for the purpose	Member
3.	C.H.T/H.T/Senior Teacher of the School.	Coordinator/ Member Secretary.

7. From the above, it is clear that Committee is responsible for arrangement for hiring the services of the helper/cook at the honorarium as per the guidelines of the project. It is further averred that the replying respondents have no role to play in the engagement of a cook or helper under the Mid Day Meal Scheme. This matter is, at best, between the said Mid Day Meal Committee and the petitioner. The present writ filed by the petitioner against the replying respondents is not maintainable because, as per the information received from the Block Elementary Education Officer, Sataun, District Sirmour, after the resignation of one Shri Rattan Singh, post of cook/helper was advertised in Govt. Primary School, Mana. The President of School Management Committee, Mana, invited the applications for filling up the post of cook/helper in the Govt. Primary School, Mana and three persons appeared in the interview on 12.6.2013. On this day, President of the concerned Committee was not present in the interview due to this reason appointment could not be given to the petitioner as Mid Day Meal worker in Govt. Primary School, Mana. The present President was not present at the time of interview, Shri Rattan Singh has withdrawn his resignation. Consequently, he was engaged again as Mid Day Meal Worker in Govt. Primary School, Mana, as there is no post lying vacant and further as the petitioner was never offered appointment merely on the basis of selection, if any, he cannot claim appointment to the post and especially when the person who has resigned has already withdrawn his resignation and was re-appointed on the post.

8. As neither the post is lying vacant nor the petitioner was ever offered appointment, he has no right to the post. The action of the respondents in re-appointing Shri Rattan Singh after withdrawing his resignation is as per law and so the claim of petitioner is without merit.

9. In view of the above discussion, the petition is devoid of any merit and the same is dismissed. No order as to costs. Pending application (s), if any shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ... Appellant
Versus
Om Parkash and others ... Respondents

Cr. Appeal No. 472 of 2009
Reserved on: 17.05.2016
Date of decision: 31.05.2016

Indian Penal Code, 1860- Section 341, 323, 326 & 34**-** Complainant, his wife, son and brother were thrashing their wheat crop- The complainant asked the owner of thrasher to remove the same on completion of thrashing - the accused objected to the same and an altercation started between complainant and the accused- accused went to his house, came out with darat and inflicted a blow on the left wrist -when brother of the complainant tried to save the complainant, the accused inflicted a darat blow on his right thumb- other accused came armed with stick and started beating the complainant party- the accused were tried and convicted by the trial court – an appeal was preferred which was allowed- held in appeal, that it was undisputed that there is animosity between the complainant and the accused - the bone of contention was the location where the thrasher was placed – there are major contradictions in the testimonies of witnesses- Recovery of the weapon of the offence was also not satisfactorily proved- Both the parties had suffered injuries and it was not proved which party was aggressor – the prosecution case was not proved beyond reasonable doubt and the accused were rightly acquitted by the court- Appeal dismissed. (Para-25 to 31)

Case referred:
Mehboob Ali & Another Vs. State of Rajasthan, (2015) 9 J.T. 512,

For the appellant: Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General.
For the respondents: Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

The present appeal has been filed against judgment dated 12.02.2009 passed by learned Sessions Judge, Hamirpur, in Criminal Appeal No. 107 of 2008, vide which, learned Appellate Court has set aside the judgment of conviction and sentence imposed upon the accused persons by the Court of learned Judicial Magistrate First Class, Barsar, in Cr. Case No.74-II-2005 dated 19.11.2008.

2. The case of the prosecution was that on 26.04.2005 at around 6/6.30 P.M. complainant Puran Chand, his wife Nirmala Devi, son Banku Ram and brother of the complainant Banarsi Dass were thrashing their wheat crop with the thrasher of one Mehar Singh at village Jajri, Tehsil Barsar, District Hamirpur. On the completion of said thrashing, Banarsi Dass asked the owner of the thrasher to remove the same and to install the thrasher at some distance. However, accused Om Parkash objected to it and thereafter, an altercation started between Banarsi Dass and accused Om Parkash. Accused Om Parkash went to his house and when Banarsi Dass was about to leave the spot, accused Om Parkash came there with Drat in his hand and he was hurling abuses and he wrongfully restrained Banarsi Dass and inflicted a blow of Drat on the wrist of his left arm. Banku Ram proceeded to save Banarsi Dass from accused Om Parkash, however, accused Om Parkash gave Drat blow on the right

hand thumb of said Banku Ram also. In these circumstances, wife of complainant Nirmala Devi and his mother Prabhi Devi tried to save both Banarsi Dass and Banku Ram from the accused Om Parkash. When accused Suman Kumari, Ruhansu Devi and Sarwan Singh came at the place of the occurrence with Danda and started giving beatings to the complainant party by means of said Danda. The complainant party was saved by one Joginder and Shakar Dass from the accused persons. The complainant party sustained injuries on their person due to the beatings given to them by the accused persons and they were taken to CHC Barsar for treatment by local inhabitants from where Medical Officer informed the police of Police Station Barsar about the incident and police entered rapat Ext. PW10/A and proceeded to the hospital. Thereafter, the police recorded statement of complainant Puran Chand under Section 154 Cr.P.C. Ext. PW1/A and on the basis of the same, FIR Ext. PW13/A was registered against the accused. During the course of investigation, the police visited the spot and prepared site plan and also recorded disclosure statement of accused Om Parkash under Section 27 of Indian Evidence Act, which has been exhibited as Ext. PW9/A. On the basis of this disclosure statement, they recovered Drat Ext. P-7. The police also prepared the sketch of weapon of offence i.e. Drat and also took into possession Danda vide separate recovery memos. They also took into possession the blood stained shirt, pant and underwear Ext.P-1 to P-4 of injured Banarsi Dass. During the investigation, the police moved applications to the Medical Officer, CHC Barsar and got conducted the medical examination of the injured persons and x-rays of some of their were also taken. During medical examination of injured Banarsi Dass and Banku Ram, they were referred to Regional Hospital Hamirpur and from there, they were referred to IGMC Shimla. After obtaining the final opinion from Medical Officer, the police came to the conclusion that on the aforesaid date, time and place all the accused in furtherance of their common intention wrongfully restrained the complainant party from proceeding further where they had right to proceed and assaulted them with drat and Danda and voluntarily caused simple as well as grievous injuries to the complainant party. On these basis, challan for the commission of offences punishable under Sections 341, 323, 326 read with Section 34 I.P.C. was presented against the accused before the learned trial Court.

3. In order to substantiate its case, the prosecuting in all examined 16 witnesses.

4. PW-1 complainant Puran Chand narrated the incident in his deposition and corroborated as was stated by him in the statement under Section 154 Cr.P.C. In his cross-examination, he denied that he was doing the work of slaughtering the goats and that Banarsi Dass used to prepare ammunition. He also denied the suggestion that due to the explosion of ammunition, Banarsi Dass lost fingers of his hand. He also denied that Banarsi Dass had kept bomb in the grass of accused Sarwan and to this effect there was news clipping also. He deposed that Banarsi Dass had lost his two fingers while he was burning crackers. He admitted that after completing of the thrashing of their crop, they were coming with tractor to thrash the wheat crop of Joginder Singh and that wheat crop of Joginder Singh was stacked on the back side of the cow-shed of accused Om Parkash. He also stated that Joginder Singh was not related to him and denied the suggestion that the land where wheat crop of Joginder was thrashed, belonged to accused Sarwan. He has self stated that the same belonged to Subedar Dhani Ram. He denied the suggestion that accused Om Parkash asked Joginder Singh to move the outlet of the thrasher to other side, so that the wheat husk should not enter into his house. He also denied the suggestion that he is doing the work of 'Kasai' and attacked accused Om Parkash with drat Ext. P-7. He also denied the suggestion that Banku Ram tried to snatch Drat from him and in this process Banku Ram and Banarsi Dass sustained injuries. He also denied the suggestion that his wife Nirmala Devi and mother Prabhi Devi came with Danda and started giving beatings to accused Om Parkash and the other accused had come to rescue of accused Om Parkash. He admitted that they were having litigations with accused party which was pending before the Panchayat.

5. PW-2 Nirmala Devi, wife of the complainant, deposed that on the fateful day at around 6.30 P.M. he had gone to her house after completing their thrashing, then accused Om

Parkash started hurling abuses to Banarsi Dass and thereafter, he rushed to his house and brought Drat with him and inflicted the blow of drat on the hand of Banarsi Dass. She further deposed that when Banku Ram came to rescue Banarsi Dass, accused Om Parkash attacked him also with Drat and thereafter, she and her mother-in-law Prabhi Devi came to the spot and accused Sarwan, Ruhansu and Suman Kumari gave Danda blow to her also. She has deposed that Joginder Singh and Shankar Dass were present on the spot and they saved them from the accused. She has denied the suggestion that her husband refused to move the outlet of the thrasher or that her husband attacked on Om Parkash with Drat. She also denied the suggestion that Banku Ram and Banarsi Dass sustained injuries in the process while they were snatching Drat from her husband.

6. PW-3 Banarsi Dass has corroborated the story of the prosecution. According to him, accused Om Parkash gave Drat blow on his left hand and thereafter accused Sarwan Singh gave Danda blow on his head and he became unconscious. According to him, he was brought to Barsar hospital from where he was referred to Hamirpur and from there was referred to Shimla and thereafter, he was discharged after about 9-10 days. He has admitted that they were not having cordial relations with the accused persons. He has denied the suggestion that his hand and hand of Banku Ram had been cut while they were snatching Drat from complainant Puran Chand.

7. PW-6 Prabhi Devi, mother of the complainant, has also deposed about the incident and stated that accused Om Parkash was asking not to install thrasher and was also hurling abuses. She also deposed that accused Om Parkash brought Drat and inflicted blow from the same on the hand of Banarsi Dasss and when she tried to rescue Banarsi Dass, then accused Suman and Ruhansu Devi inflicted Danda blow on her head. She has admitted that accused Om Parkash asked Joginder to thrash his wheat at some other place as wheat husk will enter into his house and Joginder agreed to that.

8. PW-7 Banku Ram has stated that on 26.04.2005 at around 6.30 P.M. when they were thrashing their wheat crop and wheat crop of Joginder Singh was to be thrashed, accused Om Parkash came there and started hurling abuses by saying not to thrash wheat crop there. Thereafter, accused Om Parkash rushed to his house and brought Drat with him and other accused Suman Kumari, Ruhansu Devi and Sarwan Singh also came there. Accused Om Parkash inflicted Drat blow on the hand of his uncle and when he tried to rescue his uncle, accused Om Parkash inflicted Drat blow on his thumb also. He also deposed that thereafter all the accused assaulted them and accused Suman Kumari gave Danda blow on the head of his grand-mother Prabhi Devi. He stated that Joginder Singh and Shankar Dass saved them from the clutches of the accused. He has denied the suggestion that Puran Chand was holding Drat in his hand and that Puran Chand assaulted accused Om Parkash with Drat and when he along Banarsi Dass were stopping him, then in that process they sustained injuries.

9. PW-8 Shankar Dass has deposed that on the fateful day at around 5/6 P.M. he had kept his wheat crop for thrashing on the spot, which fell down when the tractor struck the same. When they were collecting wheat crop, he saw that accused Om Parkash was quarreling with Puran Chand and Banarsi Dass. Thereafter, accused Om Parkash rushed to his house and brought a Drat and gave Drat blow to Banarsi Dass. He has further stated that accused Sarwan Singh came there and inflicted Danda blow to Puran Chand and ladies. He also stated that wife of accused Om Parkash and his mother also came there with Danda and gave beatings to the complainant party. He has further stated that on this, he cried for help.

10. PW-12 Joginder Singh, the other independent witness has depose that on the fateful day they had kept their wheat crop near cow-shed of Sarwan and they were adjusting thrasher there, then their wheat crop had fallen and while he alongwith his father Shankar Dass were collecting the same, there was altercation between accused Om Parkash and complainant Puran Chand. Accused Om Parkash was asking not to install thrasher there and quarrel took place between them. Accused Om Parkash went to his house and brought Drat and

inflicted Drat blow on the neck of Banarsi Dass as a result of which his hand was cut. He has also deposed that accused Sarwan Singh came there with Danda and inflicted Danda blow on the head of complainant Accused Suman and Ruhansu were having Danda with them who also gave beatings to the complainant party. He also deposed that Banku Ram also sustained injuries with Drat.

11. PW-9 Ram Krishan and PW-11 Vishan Dutt are the witnesses of recovery in whose presence the police recovered weapons of offence i.e. sticks Ext. P-1 to P-4 and Drat Ext.P-7. PW-9 has deposed that the police interrogated accused in his presence and in the presence of Pradhan and during interrogation, accused Om Parkash disclosed to the police that he had hidden drat Ext.P-7 in the cow-shed of accused Sarwan and police recorded his disclosure statement Ext. PW9/A. On the basis of said disclosure statement, the police recovered Drat. In his cross-examination, he was confronted with his statement recorded by the police to the effect that he has disclosed that accused Om Parkash had disclosed that he had kept Drtat in the cow-shed of Sarwan, wherein it is not so recorded.

12. PW-4 Dr. Lavnish has stated that he medically examined Banku Ram on 26.04.2005 and found multiple lacerated wound over right thumb with restricted movement. The patient was referred to Regional Hospital Hamirpur from where he was referred to IGMC Shimla. He has also mentioned that on the same day he also examined Nirmala Devi and found simple injuries on her person caused with blunt weapon within the duration of less than 24 hours. He has also stated that on the same day he also examined Banarsi Dass, who was suffering from lacerated wound over occipital region and lacerated wound over left writs joint extending from lateral dorsal surface of forearm. Banarsi Dass was referred to Regional Hospital Hamirpur, from where he was referred to IGMC Shimla.

13. PW-5 Dr. Lokendar Sharma, Registrar, Department of Patholoy, IGMC Shimla, has deposed that patient Banarsi Dass was referred to IGMC Shimla from Regional Hospital Hamirpur and he was operated upon ORIF with K-wires and tendon repair was done on 28.04.2005. In his cross-examination, he has admitted the suggestion that the injuries were possible with Drat.

14. PW-14 Dr. Rajesh Sood, Registrar, Department of Ortho, IGMC, Shimla, has deposed that on 27.04.2005 Banku Ram was admitted in the casualty under Ortho in IGMC Shimla and was found to have cut injury over right thumb alongwith other injuries. The patient was operated with tailetting and K-Wire fixation and extension expansion repair was done on 28.04.2005.

15. Investigating Officer of the case S.L.Sharma has appeared as PW-14. He has stated that on the spot, on the identification of complainant he prepared site plan and has also recorded the statements of the witnesses. He had also taken into possession the clothes of Banarsi Dass and he had handed over the case file for further investigation to ASI Parkash Chand.

16. Investigating Officer Parkash Chand PW-16 conducted the remaining investigation and he has stated that he recorded the statement of Puran Chand and sent the same through HHC Chatter Singh to Police Station for registration of the case and on the basis of which FIR was registered. He also recorded the statement of accused Om Parkash Ext. PW9/A in the presence of witness Vishan Dutt and Ram Krishan and that accused Om Parkash got recovered Drat Ext. P-7.

17. In defence, the accused examined two witnesses. DW-1 H.C. Baldev Raj has sated that no rapat has been recorded at the instance of the accused. DW-2 Suresh Kumar has stated that he knows the parties and on 26th of the month which he does not remember in the year 2005, he visited the house of Chhonki and Om Parkash and that nothing had happened in his presence.

18. On the basis of the deposition of the prosecution witnesses and the material placed on record by the prosecution, learned trial Court concluded that it was duly established on record that accused Om Parkash assaulted injured Banarsi Dass and Banku Ram with drat, whereas the other accused assaulted injured Puran Chand, Nirmala Devi, Prabhi Devi as well as injured Banarsi Dass with. Therefore, according to learned trial Court, offence under Section 326 I.P.C. was committed by accused Om Prakash. It further held that there was no actual participation of other accused for the commission of offence under Section 326 I.P.C. except accused Om Parkash. It further held that all the accused in furtherance of their common intention wrongfully restrained complainant party and caused simple hurt to them by means of Danda, hence the offence under Sections 341 and 323 read with Section 34 I.P.C. was made out against all the accused persons, though offence under Section 326 I.P.C. was made out only against accused Om Parkash. The learned trial Court convicted accused Om Parkash for the commission of offence punishable under Section 326 I.P.C. and he was also convicted for the offences under Sections 341, 323 read with Section 34 I.P.C. Accused Sarwan Singh, Suman Kumari and Ruhansu were convicted for the commission of offences punishable under Sections 341, 323 read with Section 34 I.P.C.

19. Feeling aggrieved by the said conviction and imposition of sentence by the learned trial Court, the accused persons preferred an appeal before the learned Sessions Judge. The learned Appellate Court vide its judgment dated 12.02.2009 accepted the appeal and set aside the judgment of conviction and sentence imposed upon the accused persons and acquitted of the charges framed against them.

20. Learned Appellate Court came to the conclusion that the case as set-forth by the prosecution made it clear that after the wheat of Puran Chand had been thrashed, then they wanted to thrash the wheat of Joginder. For this purpose, the thrasher was placed by the side of house of the accused Om Parkash, who objected to the same because the husk of the wheat would enter the house, which was detrimental to human life as well as to the property. As the complainant party was not agreeable to remove the thrasher to a different place, a quarrel took place between the parties. In the said quarrel, injuries had been caused to PWs Banku Ram, Nirmala Devi, Puran Chand, Banarsi Dass and Prabhi Devi and injuries had also been caused to the accused persons as per the copies of Medico Legal Certificates Ext. D1 to Ext.D4. On these basis, learned Appellate Court concluded that the apple of discord between the parties was the location where the thrasher was placed for thrashing the wheat of Joginder by the complainant party. It was apparent that it was the complainant party, who gave rise to the quarrel and, therefore, it cannot be said that the accused persons were in fact the aggressors. It further held that the wheat husk is detrimental to human life and it can cause serious problems. Therefore, if the complainant party was adamant in thrashing the wheat of Joginder in close vicinity to the house of accused Om Parkash, then they were obviously endangering the human life as well as there was a likelihood of danger being caused to the property, because the dust would settle inside the house. In such situation, aggressor would be the complainant party and the accused party would be having right of private defence of person as well as property. Therefore, on these basis, learned Appellate Court accepted the appeal and judgment of conviction and sentence imposed upon the accused by the learned trial Court was set aside.

21. Feeling aggrieved by the judgment passed by the learned Appellate Court, the State has filed the present appeal.

22. Mr. V.S. Chauhnan, learned Additional Advocate General has argued that the judgment passed by the learned Appellate Court is perverse and not sustainable in the eyes of law as the learned Appellate Court has committed grave illegality by ignoring the cogent and trustworthy statements of the injured witnesses i.e. PW-1 Puran Chand, PW-2 Nirmala Devi, PW-3 Banarsi Dass, PW-6 Prabhi Devi and PW-7 Banku Ram. According to him, the said witnesses had fully corroborated the prosecution storey and the statements of the injured persons were fully corroborated by the statements of the eye witnesses i.e. PW-8 Shankar Dass

and PW-12 Joginder Singh. However, ignoring the said statements, the learned Appellate Court has set aside the judgment of conviction without any reason as to why the version of the said prosecution witnesses was being disbelieved. He has further argued that the learned Appellate court has also over looked and ignored both the statements of the medical experts as well as the medical evidence produced on record by the prosecution. According to Mr. Chauhan, the MLCs clearly prove that the injured had suffered injuries which had resulted from the quarrel which took place between the complainant party and the accused party and which injuries were caused by Drat blows and Danda blows inflicted upon the complainant party by the accused party. All these aspects of the matter had been minutely gone into by the learned trial Court which had correctly returned the findings of guilt against the accused. However, the said judgment has been set aside by the learned Appellate Court on erroneous findings which are totally contrary to the record. Therefore, on these basis, it was contended on behalf of the appellant/State that the judgment passed by the learned Appellate Court was bad and the same was liable to be set aside.

23. Mr. Lovneesh Kanwar, learned counsel appearing for the respondents has argued that the learned Appellate Court has rightly set aside the judgment of conviction passed by the learned trial Court because the judgment of conviction was not based on the material produced on record by the prosecution. According to him, the prosecution had not been able to bring home the guilt of the accused and it had not proved its case beyond reasonable doubt. Mr. Lovneesh Kanwar argued that the learned trial court had erred in coming to the conclusion that it was the accused party which was the aggressor, whereas the facts on record clearly indicate that the aggressors were the complainant party and the accused had rather acted in self defence. He has further argued that the learned Appellate Court had rightly set aside the judgment of conviction. According to him, the respondents are innocent and had the learned Appellate Court not set aside the judgment of conviction then it would have been travesty of justice that the innocent persons would have been convicted for offence(s) not committed by them. Accordingly, he submitted that there was no merit in the appeal and the same be dismissed.

24. We have heard learned counsel for the parties and have perused the records of the case.

25. In our considered view, in the present case, it is not a disputed fact that there is animosity and enmity between the complainant party and the accused party. Even according to the complainant party, the bone of contention was the location where the thrasher was placed for thrashing wheat of Joginder by the complainant party. In other words, the origin of the clash commenced from the act of the complainant party of placing thrasher close to the house of Om Parkash, who objected the same on the ground that the dust arising out of the same would settle in his house. We have already taken note of the statements made by the prosecution witnesses including those of the injured persons and the eye witnesses. PW-1 Puran Chand though in his cross-examination has denied that he had outraged the modesty of accused Suman but he has admitted that accused Om Parkash has filed an application regarding same in the Panchayat against the complainant. According to him, the matter stood compromised and he denied that he had begged pardon on the said issue. He has also admitted in his cross-examination that there are land disputes going on between the complainant party and the accused party. Similarly, it is also borne out from the record that the quarrel started by the act of the complainant of placing thrasher in close vicinity to the house of accused Om Parkash which was objected by him. Similarly, PW-2 Nirmala Devi, who is a witness to Farad Ext. PW2/A, has stated that accused Om Prakash got the same recovered from the Taldi of his house, whereas a perusal of the said Farad will demonstrate that it is mentioned therein that the same was recovered from the Taldi of the cow-shed of accused Om Parkash. Disclosure statement of accused Om Paraksh is Ext. PW9/A, which has been witnessed by Vishan Dutt and Ram Krishan. In his cross-examination, he has stated that he had got it reported to the police that accused Om Parkash disclosed that he had kept Drat in the Taldi of gow-shala of Sarwan.

He has been confronted with his statement made under Section 161 Cr.P.C. in which it was mentioned that accused Om Parkash has disclosed that he had hidden Drat in the Taldi of his gow-shala.

26. In our considered view, there are major contradictions in the statements of PW-2 Nirmala Devi, who is a part of the complainant party and PW-9 Ram Krishan, who is one of the witnesses to the disclosure statement, on the basis of which, the alleged weapon of offence was discovered.

27. Even otherwise, it is settled principle of law that no confession made to a police officer shall be proved as against a person accused of any offence. This is provided in Section 25 of the Evidence Act. Section 26 of the said Act further lays that no confession made by any person while he is in the custody of a police officer, shall be proved as against such person unless it be made in the immediate presence of a Magistrate. Section 27 of the said Act provides how much of an information received from accused may be proved.

28. The Hon'ble Supreme Court in ***Mehboob Ali & Another Vs. State of Rajasthan***, ***(2015) 9 J.T. 512***, has held as under:-

> "**[13]** For application of section 27 of Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the Police before disclosure statement of the accused is recorded, is admissible in the evidence.
>
> **[14]** Section 27 of Evidence Act refers when any "fact" is deposed. Fact has been defined in section 3 of the Act. Same is quoted below :
>
> "Fact" means and includes'
>
> (1) any thing, state of things, or relation of things, capable of being by the senses;
>
> (2) any mental condition of which any person is conscious. Illustrations:
>
> (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
>
> (b) That a man heard or saw something, is a fact.
>
> (c) That a man said certain words, is a fact.
>
> (d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
>
> (e) That a man has a certain reputation, is a fact. "Relevant". "One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."
>
> **[16]** This Court in State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru, 2005 11 SCC 600 has considered the question of discovery of a fact referred to in section 27. This Court has considered plethora of decisions and explained the decision in Pulukuri Kottaya & Ors. V. Emperor, 1947 AIR(PC) 67 and held thus :
>
> "125. We are of the view that Kottaya case, 1947 AIR(PC) 67 is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused

exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of Kottaya case. The ratio of the decision in Kottaya case reflected in the underlined passage extractedwas highlighted in several decisions of this Court.

127. The crux of the ratio in Kottaya case was explained by this Court in State of Maharashtra v. Damu. Thomas J. observed that: (SCC p. 283, para 35)

"The decision of the Privy Council in Pulukuri Kottaya v. Emperor is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In Mohd. Inayatullah v. State of Maharashtra, 1976 1 SCC 828, Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in Pulukuri Kottaya case . The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)

"Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kottaya v. Emperor ; Udai Bhan v. State of U. P., 1962 Supp2 SCR 830)."

[17] In State of Maharashtra v. Damu Gopinath Shinde & Ors., 2000 AIR(SC) 1691 the statement made by the accused that the dead body of the child was carried up to a particular spot and a broken glass piece recovered from the spot was found to be part of the tail lamp of the motorcycle of co-accused alleged to be used for the said purpose. The statement leading to the discovery of a fact that accused had carried dead body by a particular motorcycle up to the said spot would be admissible in evidence. This Court has laid down thus :

"36. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor, 1947 AIR(PC) 67 is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

37. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly

relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. In this case, the fact discovered by PW 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

38. How did the particular information led to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the Investigating Officer discovered the fact that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot.

39. In view of the said discovery of the fact, we are inclined to hold that the information supplied by A-2 Guruji that the dead body of Dipak was carried on the motorcycle up to the particular spot is admissible in evidence. That information, therefore, proves the prosecution case to the abovementioned extent."

[18] In Ismail v. Emperor,1946 AIR(Sind) 43 it was held that where as a result of information given by the accused another co-accused was found by the police the statement by the accused made to the Police as to the whereabouts of the co-accused was held to be admissible under section 27 as evidence against the accused.

[19] In Subedar & Ors. v. King-Emperor,1924 AIR(All) 207 it was held that a statement made by the accused implicating himself and others cannot be called "first information report". However it was held that though it could not be treated as first information report but could be used as information furnished under section 27 of Evidence Act. It was held thus :

"The approver and one of the appellants were arrested practically red- handed. They made statements to the officer who arrested them involving admissions of guilt. They went further and gave a list of the other members of the gang. Thereupon the officer made a report in writing to his superior, containing the information which he had received, including the names of those other persons received from the two men arrested. Somehow or other, the learned Judge has described this police report, which is merely the report of a confession, as "the first information report." Now the first information report is a well known technical description of a report under section 154, Criminal Procedure Code, giving first information of a cognizable crime. This is usually made by the complainant, or by some one on his behalf. The language is inapplicable to a statement made by the accused. The novelty of a statement by an accused person being called the first information report was to me so strange, that when counsel for the appellants addressed the argument to me attacking the Judge's use of the first information report, I took no notice of the argument. The learned Judge realized that he was dealing with a confession, but he momentarily failed to appreciate that the document itself was inadmissible, and that the only way in which the information relied upon could be used was by section 27. That is to say, with regard to the other accused, the officer giving evidence

> might say : "I arrested them in consequence of information received from Narain and Thakuri. When I arrested them they made a statement to me which caused me to arrest these people". The use which can legitimately be made of such information is merely this, that when direct evidence is given against the accused at the trial and there was evidence against the accused, it is open to the defence to check such evidence by asking whether the name of a particular accused was mentioned or not at the time?"

29. Here is a case where there are major discrepancies with regard to the recovery of the alleged weapon of offence in the statements of PW-2 Nirmala Devi and PW-9 Ram Krishan, which casts a cloud on the trustworthiness and truthfulness on the depositions of said witnesses. Therefore, it cannot be said that the recovery of weapon of offence i.e. Drat has been proved in accordance with law. Therefore, in the present case, there is a major break in the chain of events as has been portraited by the prosecution linking the accused with the alleged offence. The case which has been put up by the defence is that the complainant party was trying to install thrasher behind the back of the cow-shed of the accused, which would have cause inconvenience to the accused and when the accused objected to the said act of the complainant, the complainant took up quarrel with the accused. As per the accused party, it is not they who have given beatings to the complainant party but to the contrary, they have been beaten up by the complainant party. PW-12 Jogidner Singh whose wheat was allegedly to be thrashed now has also stated in his deposition that he saw quarrel between the complainant party and the accused party.

30. Injuries have been sustained by the complainant party as well as by the accused party. The prosecution has not been able to establish by way of testimony of any independent reliable witness that in fact it was the accused party which was the aggressor and the injuries which have been sustained by the complainants are a direct result of that aggression and the same have not been sustained by the complainant party in the course of preventing Puran Chand from hitting Om Parkash with the Drat. Here it is relevant to refer to the statement of PW-6 Prabhi Devi. She has stated in her cross-examination as under:-

> ***"PURAN KE HATH ME DRAT THA AUR OM PARKASH KO MARNE LAGA IS PER BANARSI DASS VA BANKU RAM PURAN KO ROKNE LAGA TO US VAJAH SE BANARSI KO CHOTEIN AAIE."***

This deposition of PW-6, who happens to be the mother of complainant Puran Chand creates doubts over the credibility of the story of the prosecution that the injuries which have been sustained by the complainant party were actually inflicted upon them by the accused party. In our considered view, these factors create doubt in the mind of this Court with regard to the credibility of the story of the prosecution. All this becomes very important and relevant keeping in view the fact that the complainant and the accused are neighbours and admittedly there is a land dispute going on between the two. Further, the story of the prosecution has not been corroborated by a reliable witness. This Court is not oblivious to the facts that it is not necessary that in each and every case the story of the prosecution can be believed only if it is substantiated by independent witnesses but in the peculiar facts and circumstances of the present case, the statements of the prosecution witnesses do not inspire any confidence. Further, a perusal of the judgment passed by the learned Appellate Court will demonstrate that the said Court has also taken all these facts into consideration and thereafter, it has come to the conclusion that the prosecution has failed to establish its case beyond reasonable doubt.

31. According to us also, the prosecution has not been able to bring home the guilt of the accused. It has not been able to establish beyond reasonable doubt that the accused are guilty of the offences alleged against them. Therefore, according to us, there is neither any infirmity or perversity in the findings which have been returned by the learned Appellate Court on the basis of the appreciation of material placed before it by the prosecution. Therefore, we uphold

the judgment passed by the learned Appellate Court and dismiss the appeal being without merit. Bail bonds, if any, furnished by the accused are discharged.

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

The State of H.P. and another .....Appellants.
versus
Yashpal Dhiman .....Respondent.

LPA No.86 of 2016
Decided on: May 31, 2016.

Contempt of Courts Act, 1971- Section 12- Appellants/contemnors had not complied with direction passed by the Court - they have not taken into consideration the recommendations made by the review Departmental Promotion Committee - in these circumstances, they were rightly held guilty of contempt- Petition dismissed.(Para-3)

For the Appellants: Mr.Shrawan Dogra, Advocate General, with Mr. Mr.Anup Rattan & Mr.Romesh Verma, Addl.A.Gs., & Mr.J.K. Verma, Dy.A.G.
For the Respondent: Mr.Surender Saklani, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

CMP(M) No.1410 of 2015 & LPA No.86 of 2016

The applicants/appellants have filed the application for condonation of delay of 2 years, 9 months and 27 days, which has crept-in, in filing the Letters Patent Appeal, on the grounds taken in the memo of limitation petition.

2. The applicants/appellants have not given any explanation as to how the delay of almost three years has occurred in filing the appeal. It appears that the concerned Department remained in deep slumber and filed the instant application without any explanation.

3. However, we have gone through the impugned judgment. It appears that the writ respondents (appellants herein) were in contempt for the reason that they had not complied with the directions passed by this Court vide judgment dated 23rd December, 2010. It has been observed by the learned Single Judge in paragraph 2 of the impugned judgment that the writ respondents had not taken into consideration the recommendations made by the review Departmental Promotion Committee read with the said judgment. It appears that the appellants have filed the instant appeal just to give a slip to the said facts. The learned Single Judge has rightly made discussion in paragraphs 2 to 4 of the impugned judgment, requires no interference.

4. Having said so, there is no merit in the limitation petition as also the Letters Patent Appeal. Viewed thus, the limitation petition is dismissed and consequently, the Letters Patent Appeal is also dismissed as time barred. Pending CMPs, if any, also stand dismissed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Shri Ashok Kumar and others .....Petitioners.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No. 5514 of 2010 a/w CWP Nos. 5677, 5741, 5817, 6017, 6025, and 6718 of 2010, 599 of 2011, 4567 and 8293 of 2012
Reserved on: 13.05.2016
Date of Decision: 01.06.2016

Constitution of India, 1950- Article 226- Petitioners prayed that the respondents be directed to frame policy to deal with the problems of hawkers, Rehari and Khoka holders in accordance with the aims and objective of National Hawkers Policy, 2004 framed by the Central Government and to resettle the petitioners by allotting them small stalls on suitable terms and conditions – held, that the land of the petitioners was not acquired for the construction of Bhakara Dam- State has formulated a proposal for rehabilitation of the persons like petitioners- Petitioners have encroached upon public places including public paths and pavements in Bilaspur town and around it - the petitioners cannot claim themselves to be hawkers/street vendors as the hawkers/street vendors do not have a permanent structure / place for their activities, whereas petitioners have constructed permanent structures by encroaching upon the govt. land - Notices have been served upon the petitioners under HP Road Infrastructure Protection Act, 2002- Petitioners have alternative remedy of appeal/revision which was not availed by them- Petitioners have encroached upon the existing road of the bus stand and surrounding area - public interest demands that encroachment be removed at the earliest – The petitioners being rank encroachers cannot be permitted to ask the State to formulate a policy for protecting their interest- Petition disposed of with liberty to the petitioner to move appropriate application for their resettlement which shall be considered by the authorities in accordance with law- liberty granted to the respondents to take appropriate steps to remove unauthorized encroachments made by the petitioners. (Para-21-28)

Cases referred:

Maharashtra Ekta Hawkers Union and another Vs. Municipal Corporation, Greater Mumbai and others (2014) 1 Supreme Court Cases 490

Maharashtra Ekta Hawkers Union Vs. Municipal Corporation, Greater Mumbai and others (2009) 17 Supreme Court Cases 151

For the petitioners: Mr. Rajiv Rai & Mr. Lalit Sehgal, Advocates, for the respective petitioners.

For the respondents: Mr. V.S. Chauhan, Additional Advocate General, with Ms. Parul Negi, Dy. Advocate General, for respondent-State.

Mr. N.K. Thakur, Sr. Advocate, with Ms. Jamuna Thakur, Advocate, for the respective respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. **:**

These petitions are being disposed of by a common judgment as the issue involved in all the petitions is the same.

2. With the consent of the parties, CWP No. 5514 of 2010 is being treated as the principal petition and for the purposes of adjudication of these petitions, the pleadings in the said case shall be referred to. Learned counsel for the respondents have submitted that the replies

filed in CWP No. 5514 of 2010 be treated as responses on behalf of the respondents in those petitions also in which replies have not been filed. No rejoinder was intended to be filed to the replies so filed, hence, this Court proceeded with the adjudication of the petitions on the basis of the material on record.

3. The petitioners in all these cases have prayed for directions to the effect that the respondents be directed to frame policy to deal with the problems of *Rehri* and *Khokha* holders or hawkers in consonance with the aims and objectives of the National Hawker's Policy, 2004 framed by the Central Government and they have also prayed that this Court may direct the respondents to identify the hawkers zone at or near Bus Stand Bilaspur where large area is available and further to resettle the petitioners by allotting them small stalls on suitable terms and conditions so that the issue pertaining to the livelihood of the petitioners can be solved.

4. The petitioners claim themselves to be permanent residents of District Bilaspur and their grievance is against the act of the respondents who allegedly are forcibly removing and evicting them from the place of their business and livelihood without providing them alternative arrangements despite the fact that the petitioners had been assured by the respondents time and again that a policy shall be framed to settle them.

5. It is the case of the petitioners that new Bilaspur town was set up in the year, 1971 for rehabilitating the Bhakra Dam Oustees. For the purpose of construction of Bhakra Dam, large area of the public was acquired which disturbed and dislodged these people as their source of livelihood by way of traditional occupation was snatched away and they were compelled to leave their traditional occupation. In these circumstances, the petitioners were compelled to look for new employment because persons displaced on account of construction of Bhakra Dam were not provided any proper employment and the policies framed by the Government for rehabilitation of the Oustees were not implemented properly.

6. Petitioners are carrying out the business of hawking and have been granted licences for carrying out the said business from time to time. They are paying *Tehbazari* charges to respondent No. 7 and the business so carried out by them is neither illegal nor unauthorized. They are carrying out the said business for the last more than 35 years, which is in the knowledge of the respondents and on various occasions they have raised grievance with the respondents and have been given assurance by the Government from time to time that the State shall formulate some policy for settling the petitioners by constructing stalls near bus stand and the same shall be allotted to the petitioners.

7. Further, their case is that on 5th April, 2010 in CWP No. 968 of 2006, this Court has passed orders directing the respondents to finalize the steps in respect of all encroachments in Bilaspur town and to evict all the encroachers. In this back ground, the petitioners have been issued notices under Sub-rule 4(1)(b) of the Himachal Pradesh Road Infrastructure Protection Rules, 2004 by respondent No. 3, whereby the respondents have been directed to stop their business of hawking at the place where they have been carrying out the said business for the last more than last 35 years.

8. It is further their case that on the basis of the directions issued by the Hon'ble Supreme Court from time to time, the Central Government had framed a policy, i.e. National Hawkers Policy, 2004, wherein certain guidelines have been framed for running the hawking business. Further, as per the petitioners, the Hon'ble Supreme Court in its judgment dated 12th February, 2007 in **Maharashtra Ekta Hawkers Union** Vs. **Municipal Corporation, Greater Mumbai and others** {reported in (2009) 17 Supreme Court Cases 151} has *inter alia* directed the State Governments to frame policy in order to solve the problems of hawkers.

9. Therefore, in this background, when the notices under the Himachal Pradesh Road Infrastructure Protection Rule, 2004 were served upon them, as the petitioners

apprehended that they can be thrown out from their place of business at any time, they approached this Court by filing present petitions.

10. As per the respondent-State, the petitioners are not Bhakhra Dam Oustees. According to respondents, Bilaspur town has become haven for unscrupulous elements to encroach upon public places within the town and thereafter claim permanent rehabilitation on the pretext of being Bhakhra Dam Oustees and the petitioners in these cases also fall in the said category.

11. Further, according to the State, Bhakhra Dam Oustees have been allotted cultivable land, residential accommodation as well as commercial plots which provided them employment and most of the persons who have encroached upon roads were not oustees. It is mentioned in the reply that the existing road of bus stand has been encroached upon by the petitioners to such a large extent that the bus drivers face difficulty in negotiating smoothly through this stretch of road and the commuters which include senior citizens, old and disabled persons, ladies and school children etc. find it extremely difficult to walk through this stretch and many accidents of commuters being crushed by vehicles have occurred in this particular area because there is virtually no space left for the commuters on either side of the road as the same is encroached upon by the petitioners.

12. It is further the case of the respondent-State that the petitioners loose no opportunity to quarrel, mishandle and manhandle the bus operators as well as other vehicle operators whenever these vehicles come in contact with the projections which have unauthorizedly been raised by the petitioners over their *Rehris* which have been permanently fixed on both sides of the existing road of bus stand. It is mentioned in the reply that because of the encroachments done by the petitioners, no space is left even for the consumers to stand safely on the road. As per the State, the licences issued by the Municipal Committee do not allow the petitioners or so called hawkers to raise permanent structures on public roads, but the petitioners have raised permanent structures and have encroached upon public roads and their act is totally illegal and unauthorized.

13. Even the factum of the petitioners being doing the job of hawking for more than 35 years is refuted by the replying respondent-State. It is further the case of the State that the petitioners cannot be allowed to continue their illegal encroachments on the road side indefinitely for want of formulation of any policy for rehabilitation, especially in view of the fact that there was no material on record to substantiate that the petitioners in fact are Bhakhra Dam Oustees. According to the State, they are not eligible for any benefits under the rehabilitation scheme framed by the State for Bhakhra Dam Oustees. It is further mentioned in the reply that the issuance of notices to the petitioners was in fact an act done in the performance of its statutory duty by the authority concerned.

14. It is further mentioned in the reply that after the issuance of the said notices, the petitioners had the right to file objections with the authority concerned within the time period prescribed. However, as the petitioners did not file any objections to the said notices within the prescribed period, as such, the said eviction order stand confirmed. It is further stated in the reply that the directions issued by the Hon'ble Supreme Court in the judgment relied upon by the petitioners are in the context of street hawkers and not encroachers like petitioners who have raised permanent structures on busy roads of the town. It is further the case of the State that on one hand the petitioners are claiming to be licenced to do trade of hawking and on the other hand they want to continue their trade along road side where they have raised stationery (non-movable) encroachments by fixing their *Rehris* and *Khokhas.* As per the State, there is no need to frame any policy for rehabilitation of hawkers because there is no such ban for carrying regulated hawking trade in Bilaspur town without causing any public nuisance and threat to the general public. Accordingly, the respondent-State prayed that the petition being devoid of any merit be dismissed.

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

16. At the very out set, this Court called upon the learned counsel for the petitioners to meet with the objection raised by the respondent-State that the petitioners were in fact not the Bhakhra Dam Oustees and they were unscrupulous elements who had encroached upon public places and were causing nuisance to the public at large and in this view of the matter, the petition deserved dismissal on this ground alone.

17. Mr. Rajiv Rai, learned counsel for the petitioners fairly submitted that the petitioners are not Bhakhra Dam Oustees in the sense that they are not the persons whose land has been acquired for the purpose of construction of Bhakhra Dam and who have been rendered homeless. However, he refuted the contention of the State that the petitioners were unscrupulous elements. According to him, the petitioners were carrying out their trade of hawking in order to earn their livelihood. The petitioners were law abiding citizens and they were not interested to cause any nuisance either to the public at large or in the functioning of the Government machinery.

18. During the course of arguments, it was pointed out by the learned Additional Advocate General that in fact many of the petitioners had been rehabilitated by way of allotment of *Khokhas* etc. to them. As per affidavit on record filed by Deputy Commissioner, District Bilaspur, H.P. dated 24th December, 2012, a proposal had been formulated for rehabilitation of persons like the petitioners over the roof of Agriculture Marketing Committee Building, Bilaspur and in continuation of efforts made in the past, meetings had been held with *Rehri/Khokha* holders, wherein said *Rehri/Khokha* holders had been informed by the SDM about 27 new shopping booths constructed for their relocation on the top of the said building. According to the learned Additional Advocate General, few of the petitioners had already been rehabilitated by the respondents and some of the petitioners have in fact refused to be rehabilitated on one pretext or the other.

19. At this stage, Mr. Rajiv Rai, learned counsel for the petitioners has submitted that the petitioners shall be satisfied in case this Court permits the petitioners to approach the concerned authorities again with the request to rehabilitate them and this request of theirs is re-considered by the appropriate authority uninfluenced by the fact whether earlier their cases have been rejected by the authority or the petitioners have refused the offer of rehabilitation given to them.

20. Learned Additional Advocate General submitted that the State was not averse to this, provided the petitioners agree to vacate the area encroached upon by them in a time bound manner so that larger public interest of having the area in and around District Bilaspur bus stand free from any unauthorized encroachment is met and the buses and vehicles ply in and around the Bilaspur bus stand with free ingress and egress to the bus stand area unhindered by unauthorized encroachments/structures temporary or permanent.

21. In **Maharashtra Ekta Hawkers Union and another** Vs. **Municipal Corporation, Greater Mumbai and others** (2014) 1 Supreme Court Cases 490, the Hon'ble Supreme Court has defined/described a street vendor/hawker as under:

> *"A street vendor/hawker is a person who offers goods for sale to the public at large without having a permanent structure/place for his activities. Some street vendors/hawkers are stationary in the sense that they occupy space on the pavements or other public/private places while others are mobile in the sense that they move from place to place carrying their wares on pushcarts or in baskets on their heads."*

22. In my considered view, the petitioners herein strictly cannot be termed to be street vendors/hawkers because it is not their case that they offer goods for sale to the public at

large without having a permanent structure/ place for their activities. They are rank encroachers, who have encroached upon public places including public paths and pavements in Bilaspur town in general and in and around Bilaspur bus stand in particular. Therefore, by no stretch of imagination, these petitioners can claim themselves to be hawkers/street vendors. It is not their case that the authorities are not permitting them to carry out their trade, which is being conducted by them without having permanent structure/place for activities. It is also not their case that though they are occupying place on pavements or public place, but they are not having any structures on the pavements/public places.

23. Incidentally, in the present case, the petitioners have approached this Court after they were served upon statutory notices under the provisions of the Himachal Pradesh Road Infrastructure Protection Act, 2002 (hereinafter referred to as 'the Act') and Rules framed thereunder. The eviction of the petitioners has been protected by this Court vide its order dated 06.09.2010. The Himachal Pradesh Road Infrastructure Protection Act, 2002 read with the Himachal Pradesh Road Infrastructure Protection Rule, 2004 is both substantive as well as procedural law. In the body of the petition, the petitioners have challenged the notices which have been issued to them under the abovementioned Act/Rules. The order passed by the prescribed authority under the above Act is appealable under Section 9 of the said Act. The order passed in appeal by the appellate authority under Section 9 of the Act is further amenable to the power of Revision of the Government under the provisions of Section 10 of the said Act. However, the petitioners have not availed these alternative remedies and in order to save themselves from the proceedings which have been initiated against them under the abovementioned Act/Rules, they have filed these petitions, wherein *inter alia* a prayer is made for direction to the respondent-State to frame a policy to deal with the problems of *Rehri* and *Khokha* holders or hawkers and direction is also sought to the respondents not to evict the petitioners from their place of business without framing any policy regarding the settlement of *Rehri* and *Khokha* holders.

24. The jurisdiction of this Court has been invoked by pleading that the petitioners are Bhakra Dam Oustees, whose lands were acquired for the purpose of construction of Bhakhra Dam and who have thus loss their business and livelihood on account of their lands being acquired for Bhakhra Dam. This contention of the petitioners has been found to be incorrect because the petitioners are not Bhakhra Dam Oustees, as has been admitted by the learned counsel for the petitioners also. Therefore, it is evident that in the garb of portraying themselves as Bhakhra Dam Oustees, the petitioners have attempted to mislead this Court.

25. This Court can also not loose site of the fact that the petitioners in fact have encroached upon the public roads and paths in and around Bilaspur Bus Stand to such a large extent that the bus drivers face great difficulty in smoothly negotiating the buses through this stretch. Further, on account of the said encroachments of the petitioners, the commuters as well as local residents including senior citizens, old and disabled persons, ladies and school going children find it extremely difficult even to walk through this stretch and many accidents have occurred in this area because there is virtually no space left for the commuters to walk on either side of the road as the same has been encroached upon by the petitioners. Further, the licences which have been issued to some of the petitioners also do not permit them to raise permanent structures on these roads. But, the fact is that the petitioners have raised permanent structures and have encroached upon public roads by their illegal and unauthorized acts. Therefore, as the encroachments by the petitioners are mainly on the existing road of Bus Stand of Bilaspur and surrounding areas, larger public interest demands that such encroachments should be removed at the earliest.

26. Keeping in view the fact that the petitioners are rank encroachers and the present petitions have been filed by them just to evade the process of issuance of notices initiated against them under the 2002 Act/Rules, in my considered view, the petitioners do not have any locus to call upon this Court to direct the State to frame policy to deal with problems of *Rehri/Khokha* holders or hawkers as per National Hawkers Policy, 2004 framed by the Central

Government. Even otherwise, persons like the present petitioners who are rank encroachers cannot be permitted to hoodwink the process of eviction initiated against them in the guise of espousing a public cause.

27. Therefore, in my considered view, in the present petitions, no directions can be issued to the respondent-State either to frame a policy to deal with the problems of *Rehri/Khokha* holders on the asking of the present petitioners nor the State can be directed not to evict the petitioners from the alleged places of business without framing any policy regarding settlement of *Rehri* and *Khokha holders*.

27. However, in view of the fair stand taken by the learned counsel for the petitioners that the petitioners shall be satisfied in case this Court permits them to approach the concerned authorities with the request to rehabilitate them similarly as some of the petitioners have been rehabilitated, in my considered view, the interest of justice will be served in case those petitioners, who have not yet been rehabilitated, are permitted to approach the concerned authorities to consider their cases for rehabilitation in accordance with law within a time bound period.

28. Accordingly, the petitions are disposed of with the following directions:

"(1) All the petitioners who have not yet been rehabilitated by the respondents, shall be at liberty to move appropriate applications in this regard to the respondents/competent authorities on or before ***31st July, 2016.***

(2) The concerned authorities shall take appropriate decision on the said applications of the petitioners uninfluenced by any previous decision, if any, taken on their application and make all endeavour to rehabilitate the petitioners at suitable places.

(3) The decision by the authority shall be taken on the applications filed by the petitioners on or before ***31st October, 2016*** and till then, the petitioners shall not be evicted from their respective possessions**.**

(4) Thereafter, the respondents/authorities shall be at liberty to take appropriate steps to remove unauthorized encroachments by way of temporary or permanent structures/ *Rehris-Khokhas* etc. in and around the Bus Stand in Bilaspur as well as in Bilaspur town of petitioners, as expeditiously as possible, strictly in accordance with law.

29. Interim orders, if any, accordingly stand vacated and all pending applications stand disposed of. No order as to costs.

****

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

Baba Kyalu Ji Maharaj Chhinjh Mela ...Petitioner

Versus

Sub Divisional Magistrate, Nurpur & anr ...Respondents

Cr. Revision No.122 of 2016
Reserved on 30.5.2016
Date of decision:1.6.2016

Code of Criminal Procedure, 1973- Section 144**-** A fair is being organized by the devotees of Baba Kyalu Ji Maharaj along with local inhabitants and surrounding Gram panchayats- a dispute regarding organizing the Mela arose in the year 2016 because one new committee was formed, which started collecting membership fee and even published advertisement regarding management of the Mela- applications were filed before SDM, Nurpur who issued the prohibitory

orders under Section 144- held, that the order under Section 144 can be passed by the officer if there is need for immediate prevention and there are sufficient grounds for passing the order - the perception of the officer recording the desired satisfaction has to be reasonable, least invasive and bonafide- further the restraint should not be allowed to exceed the constraints of the particular situation either in nature or in duration- the perception of threat to public peace and tranquility should be real and not quandary, imaginary or a mere likely possibility- the Court will not normally interfere with the matters relating to law and order- the petitioners had stated in the application that they apprehended a problem of law and order and it cannot be said that power was exercised on imaginary grounds- there was no infirmity, illegality or perversity in the order- Petition dismissed. (Para 14-22)

Cases referred:

Ramlila Maidan Incident Vs. Home Secretary & ors, (2012) 5 SCC 1
State of Karnataka & anr Vs. Dr. Praveen Bhai Thogadia (2004) 4 SCC 684
Babulal Parate Vs. State of Maharashtra, AIR 1961 SC 884

For the Petitioner:	Mr.Mr. Suneel Awasthi, Advocate.
For the Respondent:	Ms. Meenakshi Sharma, Addl. AG with Mr. J.S. Guleria, Assistant Advocate General for respondent No.1. Mr. Ajay Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This Criminal revision under Section 397/401 of the Code of Criminal Procedure is directed against the order dated 9.5.2016 passed by learned Sub Divisional Magistrate, Nurpur, District Kangra, whereby prohibitory orders under Section 144 Cr.PC (for short the 'impugned order') has been passed.

2. Baba Kyalu Dangal Mela from times immemorial is organized every year in the first week of June by the devotees of Baba Kyalu along with local inhabitants of Gram Panchayat Gangath and surrounding Gram panchayats.

3. Dispute in relation to organizing the Mela has arisen this year (2016) because in addition to old committee constituted for the management of the Mela, one new committee (petitioner) was formed, which started collecting membership and even published advertisement regarding the conduct of management of the Mela.

4. As per reply-affidavit filed by the SDM, Nurpur, it was respondent No.2 which had been organizing the Mela for the last many years, whereas petitioner had recently got itself registered under the Societies Registration Act. Both the parties, i.e. petitioner and respondent No.2 started polarizing the people and started quarreling with each other regarding taking over of the management of the Mela. They separately presented applications to the Gram Panchayat, Gangath as also to the SDM, Nurpur for obtaining various permission regarding conduct of Mela. Petitioner thereafter even applied for cancellation of registration of respondent No.2 society on the ground that it had been registered earlier. That apart, Presidents of both the parties along with their supporters had earlier met respondent No.1 and explained the situation and were directed to remain present alongwith the Pradhans of Gram Panchayat Gangath and Rappad on 9.5.2016 together with their claims and objections in this regard. Respondent No.1 heard both the parties along with the Pradhans and thereafter passed the impugned order.

5. The main contention put forth by the petitioner was that respondent No.2 (old committee) was not recording the earnings and expenditure and had misappropriated the funds.

Whereas, on the other hand, respondent No.2 had produced photocopies of the earnings and expenditures and the other related records, which convinced respondent No.1 that the records were being properly maintained.

6. Respondent No.1, further came to the conclusion that since there were only few days remaining for the conduct of Mela, the petitioner was not in a position to conduct the management in such a short time. In such circumstances, if the Mela was not held with in the prescribed time, then because of warring groups, this would hurt the religious sentiments of the devotees of Baba Kyalu as well as those of the local inhabitants. Therefore, in his wisdom, he ordered handing over of the management to the old committee, i.e. respondent No.2, who, according to him, had been handling the affairs since last 30 years.

7. In the reply-affidavit, respondent No.1 has categorically stated that aggressiveness of both the parties to take over the Mela management lead him towards the conclusion that in this struggle there is every likelihood of apprehension of breach of peace in the area and this fact weighed with him while passing the impugned order.

I have heard the learned counsel for the parties and have gone through the records of the case, which were produced before me pursuant to the directions issued to this effect on 27.4.2016.

8. Section 144 of the Code of Criminal Procedure reads as follows:

> ***"S.144. Power to issue order in urgent cases of nuisance of apprehended danger.***
>
> *(1) In cases where, in the opinion of a District Magistrate, a Sub- divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, of an affray.*
>
> *(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.*
>
> *(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.*
>
> *(4) No order under this section shall remain in force for more than two months from the making thereof:*
>
> *Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.*
>
> *(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section,*

by himself or any Magistrate subordinate to him or by his predecessor- in-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub- section (4).

(7) Where an application under sub- section (5) or sub- section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing."

9. The scope of aforesaid section has elaborately been dealt with by the Hon'ble Supreme Court in ***Ramlila Maidan Incident Vs. Home Secretary & ors, (2012) 5 SCC 1*** and it has been held as under:

"49 Section 144 Cr.P.C. is intended to serve public purpose and protect public order. This power vested in the executive is to be invoked after the satisfaction of the authority that there is need for immediate prevention or that speedy remedy is desirable and directions as contemplated are necessary to protect the interest of others or to prevent danger to human life, health or safety or disturbance of public tranquility or a riot or an affray. These features must co-exist at a given point of time in order to enable the authority concerned to pass appropriate orders. The expression `law and order' is a comprehensive expression which may include not merely `public order' but also matters such as `public peace', `public tranquility' and `orderliness' in a locality or a local area and perhaps some other matters of public concern too. `Public order' is something distinct from order or orderliness in a local area. Public order, if disturbed, must lead to public disorder whereas every breach of peace may not always lead to public disorder.

50.This concept came to be illustratively explained in the judgment of this Court in the case of Dr. Ram Manohar Lohia Vs. State of Bihar, AIR 1966 SC 740: 1966 Cri LJ 608, wherein it was held that (AIR p.758, para 51)

"51……When two drunkards quarrel and fight, there is `disorder' but not `public disorder'. They can be dealt with under the powers to maintain `law and order' but cannot be detained on the ground that they were disturbing `public order'.

However, where the two persons fighting were of rival communities and one of them tried to raise communal passions, the problem is still one of `law and order' but it raises the apprehension of public disorder. The main distinction is that where it affects the community or public at large, it will be an issue relatable to `public order'. Section 144 Cr.P.C empowers passing of such order in the interest of public order equitable to public safety and tranquility. The provisions of Section 144 Cr.P.C. empowering the authorities to pass orders to tend to or to prevent the disturbances of public tranquility is not ultra vires the Constitution.

51. In the case of State of Karnataka v. Dr. Praveen Bhai Thogadia, [(2004) 4 SCC 684],: (SCC p.691, para 6), this Court, while observing that each person, whatever be his religion, must get the assurance from the State that he has the protection of law freely to profess, practice and propagate his religion and the freedom of conscience, held more emphatically that the

"courts should not normally interfere with matters relating to law and order which is primarily the domain of the concerned administrative authorities. They are by and large the best to assess and handle the

situation depending upon the peculiar needs and necessities within their special knowledge."

52. The scope of Section 144 Cr.P.C. enumerates the principles and declares the situations where exercise of rights recognized by law, by one or few, may conflict with other rights of the public or tend to endanger the public peace, tranquility and/or harmony. The orders passed under Section 144 Cr.P.C. are attempted to serve larger public interest and purpose. As already noticed, under the provisions of the Cr.P.C. complete procedural mechanism is provided for examining the need and merits of an order passed under Section 144 Cr.P.C. If one reads the provisions of Section 144 Cr.P.C. along with other constitutional provisions and the judicial pronouncements of this Court, it can undisputedly be stated that Section 144 Cr.P.C. is a power to be exercised by the specified authority to prevent disturbance of public order, tranquility and harmony by taking immediate steps and when desirable, to take such preventive measures. Further, when there exists freedom of rights which are subject to reasonable restrictions, there are contemporaneous duties cast upon the citizens too. The duty to maintain law and order lies on the concerned authority and, thus, there is nothing unreasonable in making it the initial judge of the emergency. All this is coupled with a fundamental duty upon the citizens to obey such lawful orders as well as to extend their full cooperation in maintaining public order and tranquility.

56. Moreover, an order under Section 144 Cr.P.C. being an order which has a direct consequence of placing a restriction on the right to freedom of speech and expression and right to assemble peaceably, should be an order in writing and based upon material facts of the case. This would be the requirement of law for more than one reason. Firstly, it is an order placing a restriction upon the fundamental rights of a citizen and, thus, may adversely affect the interests of the parties, and secondly, under the provisions of the Cr.P.C., such an order is revisable and is subject to judicial review. Therefore, it will be appropriate that it must be an order in writing, referring to the facts and stating the reasons for imposition of such restriction. In the case of Dr. Praveen Bhai Thogadia (supra), this Court took the view that the Court, while dealing with such orders, does not act like an appellate authority over the decision of the official concerned. It would interfere only where the order is patently illegal and without jurisdiction or with ulterior motive and on extraneous consideration of political victimization by those in power. Normally, interference should be the exception and not the rule.

10. A bare reading of Section 144 Cr.P.C. shows that :

(1) It is an executive power vested in the officer so empowered;

(2) There must exist sufficient ground for proceeding;

(3) Immediate prevention or speedy remedy is desirable; and (4) An order, in writing, should be passed stating the material facts and be served the same upon the concerned person.

11. These are the basic requirements for passing an order under Section 144 Cr.P.C. Such an order can be passed against an individual or persons residing in a particular place or area or even against the public in general. Such an order can remain in force, not in excess of two months. The Government has the power to revoke such an order and wherever any person moves the Government for revoking such an order, the State Government is empowered to pass an appropriate order, after hearing the person in accordance with Sub-section (7) of Section 144 Cr.P.C.

12. Out of the above requirements, the requirements of existence of sufficient ground and need for immediate prevention or speedy remedy are of prime significance. In this context, the perception of the officer recording the desired/contemplated satisfaction has to be reasonable,

least invasive and bona fide. The restraint has to be reasonable and further must be minimal. Such restraint should not be allowed to exceed the constraints of the particular situation either in nature or in duration. The most onerous duty that is cast upon the empowered officer by the legislature is that the perception of threat to public peace and tranquility should be real and not quandary, imaginary or a mere likely possibility.

13. Mr. Suneel Awasthi, learned counsel for the petitioner has vehemently contended that the impugned order is not sustainable in the eyes of law as it does not record any satisfaction regarding the breach of public peace or tranquility and further the respondent No.1 clearly appears to be oblivious to the fact that power under section 144 Cr.PC is required to be exercised only when immediate and speedy intervention is required. He would also contend that the learned Magistrate while passing impugned order has virtually exercised powers of Civil court by holding the respondent No.2 to be the society which had been conducting Mela and this essentially means that they would continue to do so for all times to come.

14. Before, I deal with this contention of the petitioner, it needs to be observed that the court should not normally interfere with the matters relating to the law and order which is primarily the domain of the administrative concern as they are by and large best to assess the only situation depending upon the peculiar needs and necessities within their special knowledge. This was so observed by the Hon'ble Supreme Court in ***State of Karnataka & anr*** *Vs.* ***Dr. Praveen Bhai Thogadia*** **(2004) 4 SCC 684.** The relevant paras read thus:

> *"7.Communal harmony should not be made to suffer and be made dependent upon will of an individual or a group of individuals, whatever be their religion be it of minority or that of the majority. Persons belonging to different religions must feel assured that they can live in peace with persons belonging to other religions. While permitting holding of a meeting organised by groups or an individual, which is likely to disturb public peace, tranquility and orderliness, irrespective of the name, cover and methodology it may assume and adopt, the administration has a duty to find out who are the speakers and participants and also take into account previous instances and the antecedents involving or concerning those persons. If they feel that the presence or participation of any person in the meeting or congregation would be objectionable, for some patent or latent reasons as well as past track record of such happenings in other places involving such participants necessary prohibitory orders can be passed. Quick decisions and swift as well as effective action necessitated in such cases may not justify or permit the authorities to give prior opportunity or consideration at length of the pros and cons. The imminent need to intervene instantly having regard to the sensitivity and perniciously perilous consequences it may result in, if not prevented forthwith cannot be lost sight of . The valuable and cherished right of freedom of expression and speech may at times have to be subjected to reasonable subordination of social interests, needs and necessities to preserve the very chore of democratic life - preservation of public order and rule of law. At some such grave situation at least the decision as to the need and necessity to take prohibitory actions must be left to the discretion of those entrusted with the duty of maintaining law and order, and interposition of Courts - unless a concrete case of abuse or exercise of such sweeping powers for extraneous considerations by the authority concerned or that such authority was shown to act at the behest of those in power, and interference as a matter of course and as though adjudicating an appeal, will defeat the very purpose of legislation and legislative intent. It is useful to notice at this stage the following observations of this Court in the decision reported in Madu Limaye v. Sub Divisional Magistrate, Monghyr and others (1970 (3) SCC 746): (SCC p.757, para 24).*
>
> > *"The gist of action under Section 144 is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences. As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequences*

sufficiently grave. Without it the exercise of power would have no justification. It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order under Section 144, Criminal Procedure Code cannot be passed without taking evidence: see Mst. Jagrupa Kumari v. Chobey Narain Singh (1936) 37 Cri .LJ.95, which in our opinion is correct in laying down this proposition. These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of public tranquility, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. We are, however, not concerned with this part of the section and the validity of this part need not be decided here. In so far as the other parts of the section are concerned the key-note of the power is to free society from menace of serious disturbances of a grave character. The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. If that be so the matter must fall within the restriction which the Constitution itself visualizes as permissible in the interest of public order, or in the interest of the general public. We may say, however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order."

8.The High Court in our view should not have glossed over these basic requirements, by saying that the people of the locality where the meeting was to be organized were sensible and not fickle minded to be swayed by the presence of any person in their amidst or by his speeches. Such presumptive and wishful approaches at times may do greater damage than any real benefit to individual rights as also the need to protect and preserve law and order. The Court was not acting as an appellate authority over the decision of the official concerned. Unless the order passed is patently illegal and without jurisdiction or with ulterior motives and on extraneous considerations of political victimisation of those in power, normally interference should be the exception and not the rule. The Court cannot in such matters substitute its view for that of the competent authority.

16. During the course of hearing, learned counsel for the parties submitted that the prohibitory orders should not be allowed to be passed at the ipse dixit of the concerned executive officials. There must be transparent guidelines applicable. Since different fact situations warrant different approaches, no hard and fast guidelines which can have universal application can be laid down or envisaged. The situation peculiar to a particular place or locality vis-a-vis particular individual or group behaving or expecting to behave in a particular manner at a particular point of time may not the same in all such or other eventualities in another part of the country or locality or place even in the same State. The scheme underlying the very provisions carry sufficient inbuilt safeguards and the avenue of remedies available under the Code itself as well as by way of judicial review are sufficient safeguards to control and check any unwarranted exercise or abuse in any given case and Courts should ordinarily give utmost importance and primacy to the view of the Competent Authority, expressed objectively also, in this case without approaching the issue, as though considering the same on an appeal, as of routine, keeping in view the fact that orders of the nature are more preventive in nature and not punitive in their effect and consequences."

15. The order under Section 144 Cr.PC has been placed as annexure P-6 with the petition and the relevant portion thereof reads thus:

"*Whereas, it has made to appear to me in my court on 9th May, 2016 through records/facts presented and placed on file that traditionally this famous '**Baba Kyalu Dangal Mela (Chhinj Mela) of Gangath Main Bazar**" of Gangath has been organized by members belonging to the group namely "**Sidhh Peeth Baba Kyhalu Ji Maharaj Dangal Gangath 21-22-23 Pravishth Jyeshth Mas".***

***I Rakesh Kumar Prajapati, IAS** do hereby order that the group namely**, "Sidhh Peeth Baba Kyalu Ji Maharaj Dangal Gangath 21-22-23 Pravishth Jyeshth Mas**" will conduct the famous Baba Kyali Dangal Mela (Chhinjh Mela) of Gangath. They will be the only group involved with the management of the event in the months of May and June, 2016. They will have exclusive control over the preparation, organization, conduct, collection of donations, expenditure from the collections, maintenance of records and every other aspect of the famous **"Baba Kyalu Dangal Mela (Chhinjh Mela) of Gangath Main Bazar"** of Gangath.*

*I do hereby prohibit all the members of the group namely, **"Sri Baba Kyalu Ji Maharaj Chhinj Mela Evam Nirman Prabandhak Committee Gangath"** from causing any obstruction of any kind whatsoever in the conduct of famous Baba Kyalu Dangal Mela (Chhinjh Mela) of Gangath and also cancel any permissions accorded to the group in past.*

*I hereby order Tehsildar, Nurpur and SHO, Nurpur to ensure the compliance of this order in letter and spirit. Following "Observer Committee" is hereby appointed to ensure smooth and transparent conduct of famour **"Baba Kyalu Dangal Mela (Chhinjh Mela) of Gangath Main Bazar"** Gangath:*

1. *Tehsildar, Nurpur (Chairman)*
2. *SHO, Nurpur (Member)*
3. *Pradhan GP Gangath(Member)*
4. *Pradhan GPRappad (Member)."*

16. Coming to the first submission of the petitioners, it would be noticed that in the application filed by the petitioner for cancellation of registration certificate issued in favour of respondent No.2, they themselves had apprehended a problem of law and order in case certificate in favour of respondent No.2 was not cancelled. Thus, it cannot be said that respondent No.2 has exercised powers on imaginary grounds.

17. Adverting to the second contention regarding respondent No.2 having virtually exercised the powers of civil court, suffice it to say, that while passing order under Section 144 Cr.PC, the Executive magistrate does not adjudicate upon any of the rights of the parties and even otherwise the order passed by the Magistrate ordinarily remains operative only for a period of two months. This power is exercised looking into the urgency of the situation and the power therein is intended to be availed for preventing disorder, obstruction and annoyance with a view to secure the public weal by maintaining public peace and tranquility.

18. An order under Section 144 Cr.PC though primarily empowers the executive authorities to pass prohibitory orders vis-à-vis particular facet, but is intended to serve larger public interest. The legislative intention has clearly preserved the public peace and tranquility without lapse of time, acting urgently, if warranted, giving thereby paramount importance to the social needs by even overriding temporarily, private rights, keeping in view the public interest, which is patently inbuilt in the provisions under Section 144 Cr.P.C.

19. The Constitution Bench of the Hon'ble Supreme Court in ***Babulal Parate Vs. State of Maharashtra*, AIR 1961 SC 884** has observed that power under Section 144 Cr.PC are attracted only in an emergency. When it is necessary to counteract danger to public safety etc, the power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger.

20. Learned counsel would lastly make a feeble attempt to canvass that instead of vesting respondent No.2 with excessive control over the preparation, organization, conduct etc of the Mela, the same should have been directed to be conducted by the Panchayats of Gangath and Rappad.

21. I am afraid that even this submission of the petitioner cannot be acceded to, more particularly, when it has come on record that it was the respondent No.2, which had been managing the affairs of the Mela for the past 30 years. That apart, it has also come on record that Pradhans of both the Panchayats have their own axe to grind and being interested parties they cannot, therefore, be entrusted with the affairs of Mela.

22. In view of the aforesaid discussion as also the exposition of law laid down in the judgments cited above, I do not find any illegality, infirmity or perversity in the impugned order passed by the respondent No.1. Even otherwise, this court cannot act as an appellate authority over the decision of respondent No.1 unless order passed is patently illegal and without jurisdiction or with ulterior motives and on extraneous considerations so as to call for interference. This court cannot in such matters substitute its views for that of respondent No.1. The power and wisdom has, under Section 144 or Cr.PC, been given to respondent No.1 to take note of the situation and it was, therefore, open to him to take into account the situation prevailing there and pass an order including prohibitory orders in case the situation so warranted. The perception of the respondent No.2 in passing of the impugned order is reasonable, invasive and bonafide.

Consequently there is no merit in this petition and the same is dismissed. However, dismissal of this petition shall not come in the way of either of the parties in establishing their right before a competent court/authority of law, as the case may be.

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

HP State Electricity Board Ltd & Ors .....Appellants

Versus

Sh. Ram Dass .....Respondent.

LPA No. 87 of 2016

Date of decision: 1st June, 2016.

Indian Limitation Act, 1963- Section 5- There is a delay of 298 days in filing the appeal- it was not explained as to what steps were taken from the passing of judgment till the filing of the appeal- the delay was not explained - application dismissed. (Para-2)

For the appellants: Advocate.

For the respondent: Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma,

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

CMP(M) No. 115/2016 & LPA No. 87/2016.

This application has been filed for condonation of 298 days' delay which has crept-in in filing the present appeal, on the grounds taken in the memo of application. Alongwith the limitation application, LPA has been filed which is registered as LPA No. 87 of 2016.

2. It is apt to record herein that the applicants/appellants have not mentioned what steps they have taken right from the passing of the impugned judgment till the filing of the limitation application. The limitation application is bereft of reasons and the applicants have not shown cause for one day, not to speak of 298 days, i.e, almost a year. Only on this count, the limitation petition merits to be dismissed. However, we have gone through the impugned judgment. The impugned judgment is well reasoned, needs no interference, as the rights and interests of a workman are involved.

3. Law leans in favour of the laborers, unless it is shown that the Writ Court has fallen in an error.

4. Having said so, there is no merit in the appeal also. Accordingly, the limitation petition is dismissed. Consequently, the LPA is dismissed as time barred alongwith pending applications.

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

Khem Singh s/o Sh. Dile Ram .....Petitioner

Versus

State of H.P. and another .....Non-petitioners

Cr.MMO No. 279 of 2015
Order Reserved on 28.04.2016
Date of Order: 1st June, 2016

Indian Forest Act, 1927- Section 52-A- Two vehicles were found to be transporting walnut bark and scants of deodar without any permit- the vehicles were seized by the Authorized Officer-cum-D.F.O. - an application for release of the vehicle was filed which was rejected – an appeal was preferred before Sessions Judge which was dismissed- held, in revision that it was prima facie proved that son of the petitioner was driving the vehicle – the vehicle was not stopped despite directions by the police official- there were no hammer/property marks on the forest timber and upon bags of walnut bark which were carried in vehicle- felling of trees from forest area disrupts ecological balance ehicle seized for committing forest offence should not normally be returned to party till culmination of proceedings- the release for vehicle will not be expedient at this stage- revision petition dismissed. (Para 6 to 11)

Case referred:

State of Karnataka vs. K. Krishnan, AIR 2000 Apex Court 2729

For petitioner : Mr. Surender Verma, Advocate
For Non-petitioners : Mr. M. L. Chauhan, Addl. A.G. and Mr. R. K. Sharma, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Section 482 Cr.PC read with Article 227 of Constitution of India against the order of learned Sessions Judge-cum-District Judge Mandi (H.P.) announced in Cr. Appeal No. 22/2014 title Khem Singh vs. State of Himachal Pradesh.

Brief facts of the case:

2. On dated 23.01.2014 naka was operated on National Highway at Saulikhad and at about 6.30 AM vehicle No.HP-65-2910 and vehicle No. HP-33-B-4952 came from Kullu side

and when police officials directed drivers of the vehicles to stop the vehicles then drivers of the vehicles did not stop the vehicles and broken the forest barrier and driven the vehicles and thereafter vehicles were chased and vehicles were taken into possession. After search of the vehicles 16 bags of walnut bark and 3 scants of deodar were found kept in vehicle HP-65-2910 and four bags were loaded in vehicle No. HP-33-B-4952. Drivers of the vehicles could not produce the valid documents regarding source of forest timber kept in the vehicles and forest timber was illegally transported in the vehicles which took into possession. Authorized Officer-cum-Divisional Forest Officer Mandi seized the vehicles. Sh. Khem Singh petitioner filed application for release of vehicle No. HP-65-2910 before learned Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.) under Forest Act which was rejected by the Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.).

3. Feeling aggrieved against the order passed by Authorized Officer-cum-Divisional Forest Officer Mandi, Sh. Khem Singh petitioner filed appeal before learned Sessions Judge-cum-District Judge Mandi (H.P.) and learned Sessions Judge-cum-District Judge Mandi (H.P.) dismissed the appeal on dated 22.07.2015 under Indian Forest Act and affirmed the order of Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.).

4. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioners. Court also perused the entire record carefully.

5. Following points arise for determination in the present petition:

(1) Whether petition filed under Section 482 Cr.PC 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.

6. Submission of learned Advocate appearing on behalf of petitioner that vehicle was hired by third person with whom petitioner had no concern at all and petitioner was totally unaware about the forest timber which were found in vehicle No.HP-65-2910 and petitioner was not having the knowledge that the vehicle was plied for illegal activities relating to forest produce and on this ground petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. In the present case it is prima facie proved on record that vehicle was driven by Sh. Virender Singh who is son of Sh. Khem Singh. There is prima facie no evidence on record that Sh. Virender Singh is residing separately from his father Sh. Khem Singh as of today. Forest produce was carried in vehicle No.HP-65-2910 and driver of the vehicle did not stop the vehicle despite directions by the police officials. There were no hammer/property marks on the forest timber and upon bags of walnut bark which were carried in vehicle No.HP-65-2910. In view of the above stated facts it is not expedient in the ends of justice to release the vehicle involved in the commission of offence under Indian Forest Act at this stage of case.

7. Submission of learned Advocate appearing on behalf of petitioner that vehicle was not driven by his son and his son has been wrongly implicated in the present case and on this ground petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Fact whether son of petitioner is involved in the commission of forest offence or not cannot be decided at this stage of the case. Same fact will be decided by competent authority of law after giving due opportunities to both parties to produce evidence in support of their case because same fact is complicated issue of fact and cannot be decided in proceedings under Section 482 Code of Criminal Procedure 1973.

8. Submission of learned Advocate appearing on behalf of petitioner that petitioner has purchased the vehicle to earn his livelihood by way of financing the vehicle from the bank and almost eighteen months lapsed and vehicle is lying seized with the Forest Department and on this ground petition be accepted is also rejected being devoid of any force for the reasons

hereinafter mentioned. It is well settled law that felling of trees from forest area disrupts balance of ecological environment. It was held in case reported in AIR 2000 Apex Court 2729 title **State of Karnataka** vs. **K. Krishnan** that vehicle seized for committing forest offence should not normally be returned to party till culmination of proceedings in respect of forest offence. It is well settled law that ruling given by Apex Court is binding upon all Courts throughout India as per Article 141 of Constitution of India.

9. Submission of learned Advocate appearing on behalf of petitioner that earlier an order was passed for release of vehicle by predecessor of Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.) wherein a direction was issued to petitioner to submit security amount to the tune of Rs.2,00,000/- (Rupees Two lac) in the shape of FDR and in pursuance to the directions FDR has been prepared by the petitioner and on this ground petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner did not place on record any order of Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.) wherein a direction was issued to petitioner to submit security amount to the tune of Rs.2,00,000/- (Rupees Two lac) for release of vehicle. Plea of petitioner that earlier order of Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.) for release of vehicle on furnishing security amount to the tune of Rs.2,00,000/- (Rupees Two lac) was passed is defeated on the concept of ipse dixit. (An assertion made without proof). Court has carefully perused the original file of Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.) and there is no order in the original file relating to release of vehicle No.HP-65-2910 on furnishing security amount to the tune of Rs.2,00,000/- (Rupees Two lac).

10. Submission of learned Advocate appearing on behalf of petitioner that petitioner is dependent on the said vehicle for earning his livelihood and petitioner will produce the vehicle whenever and wherever directed by the Court and on this ground petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is prima facie proved on record that petitioner is owner of vehicle No.HP-65-2910 and it is also prima facie proved on record that 16 bags of walnut stem bark and 3 scants i.e. 0.14m3 of deodar were found in vehicle No.HP-65-2910 on dated 23.01.2014 at 6.30 A.M. at place Sauli Khad. In view of the above stated serious allegations relating to carriage of forest produce in vehicle No.HP-65-2910 it is held that it is not expedient in the ends of justice to release the vehicle at this stage of case. Point No.1 is answered in negative.

Point No.2 (Final order).

11. In view of findings on point No.1 above present petition is dismissed. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of the present petition. Record of learned Authorized Officer-cum-Divisional Forest Officer Mandi (H.P.) and record of learned Sessions Judge-cum-District Judge Mandi (H.P.) be sent back forthwith alongwith certified copy of the order. Cr.MMO No.279/2015 is disposed of. Pending application if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Krishan Chand ....Appellant/Plaintiff.

Versus

Amar Nath & others. ....Respondents/Defendants.

RSA No. 121 of 2007.
Reserved on 13.5.2016.
Decided on: 01.06.2016.

Specific Relief Act, 1963- Section 34- Plaintiff filed a Civil suit pleading that his father was in exclusive possession of suit land - defendants never objected to the possession of the plaintiff- defendants raised a dispute in Oct., 1990 stating that the suit land was granted as Nautaur to their predecessor- they tried to forcibly plough the land but this attempt was defeated - the plaintiff is in adverse possession and has become owner on the expiry of period of limitation - the suit was decreed by the Trial Court- an appeal was preferred which was allowed and the judgment of trial court was set-aside- held, in second appeal, that onus to prove the adverse possession was upon the plaintiff- plaintiff asserted that he had become the owner by virtue of his possession in the year 2002- he had not asserted about the adverse possession of his father- in these circumstances, the plaintiff had failed to prove the adverse possession- moreover, the suit cannot be filed on the basis of adverse possession and the plea of adverse possession has to be taken in defence- Appeal dismissed. (Para-14 to 20)

Cases referred:

Premji Rattansav Shah Vs. Union of India, 1994 (5) Supreme Court Cases 547

Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another, (2014) 1 Supreme Court Cases 669

Chatti Konati Rao and others Vs. Palle Venkata Subba Rao, (2010) 14 Supreme Court Cases 316,

For the appellant . : Mr. G.R. Palsra, Advocate.
For the 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 learned District Judge, Mandi dated 5.3.2007 in Civil Appeal No. 72 of 2006, vide which judgment the learned First Appellate Court accepted the appeal filed by the present respondents/defendants and set aside the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Jogindernagar, Distt. Mandi dated 1.6.2006 in Civil Suit No. 179 of 2004.

2. Brief facts necessary for adjudication of the present case are that appellant/plaintiff had filed a suit for declaration and injunction against respondents/defendants with regard to the suit land, on the pleadings that his father was coming in exclusive possession of the suit land since April, 1970 and his father used to consider this land to be his own land being situated adjoining to other land owned by him and respondents/defendants never objected to his such possession. It was further averred that the suit land was under cultivable possession of the father of the plaintiff. According to the plaintiff, in October, 1990 defendants created dispute with his father on the plea that the suit land and remaining land comprised in khasra No. 563 had been granted by the Government by way of 'Nautaur' to the predecessor-in-interest of defendants and called upon the father of the plaintiff to part with the possession of the suit land in their favour. It was further pleaded in the plaint that respondents/defendants tried to forcibly plough the suit land but father of the plaintiff foiled their attempts. After the death of his father, plaintiff continued in possession and cultivates the same. He further stated in the plaint that even if possession is reckoned from 15th October, 1990, the possession over the suit land of his father was open, peaceful, exclusive and hostile to the knowledge of the defendants and said possession had ripened into absolute title on 15th October, 2002. The possession of the father of plaintiff matured into adverse possession and after the death of his father, plaintiff had stepped into the footstep of his father and was in possession of the suit land. It was further his case that by taking undue advantage of the wrong and incorrect revenue entries defendants, since 20.6.2004, were threatening to forcibly dispossess the plaintiff from the suit land. On these bases, the plaintiff filed the suit, wherein he prayed that he be declared as owner of the suit land

by way of adverse possession and existing revenue entries be corrected in his favour and defendants be restrained from causing any interference in the peaceful enjoinment possession of the suit land.

3. In written statement, the defendants therein denied the case of the plaintiff. According to the defendants, the plaintiff was of quarrelsome nature and he forcibly grabed the suit land and on 20.7.2004 he and his mother had attacked defendant No.5 which had also resulted into filing of FIR. It was denied in written statement that the suit land was under the possession of the plaintiff.

4. On the basis of the pleadings of the parties, the learned trial court framed the following issues:-

"1. Whether plaintiff is in possession of the suit land and has become its owner by way of adverse possession? OPP.

2. If issue No.2 is proved in affirmative, whether plaintiff is entitled for permanent injunction as prayed for? OPP.

3. Whether plaintiff has cause of action to file present suit? OPP.

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

5. Whether this court has no jurisdiction to try and decide the present suit? OPD.

6. Whether suit is barred by limitation? OPD.

7. Relief.

5. On the basis of the evidence led by respective parties, the learned trial court returned the following findings against the said issues:-

" Issue No.1	**Yes.**
Issue No.2	**Yes.**
Issue No.3	**Yes.**
Issue No.4	**No.**
Issue No.5	**No.**
Issue No.6	**No.**
Relief :	**The suit of the plaintiff is decreed per operative part of the judgment."**

6. Accordingly, the suit of the plaintiff was decreed in the following term:-

"The suit of the plaintiff is decreed. The plaintiff is declared to have become owner in possession of the suit land comprised in Khewat No. 33min, Khatauni No. 81min, Khasra No. 563/1 measuring 0-3-9 bighas as specifically shown in tatima prepared by Patwari Ex.PW2/A. The defendants are permanently restrained from causing interference over this Khasra No. 563/1 as shown in tatima. This tatima Ex.PW2/A shall form part of the decree sheet. No order as to costs."

7. Thus, the plaintiff was declared to have become owner in possession of the suit land by way of adverse possession and defendants were permanently restrained from causing interference over the suit land.

8. This judgment was challenged by the respondents before the Learned First Appellate Court and the Learned First Appellate Court, vide its judgment dated 5.3.2007 in Civil Appeal No. 72 of 2006 set aside the judgment and decree passed by Learned Trial Court and dismissed the suit of the plaintiff with costs. The Learned First Appellate Court came to the conclusion that the requirement of adverse possession enjoins upon the plaintiff to have

necessary animus at the time of entering into the possession upon the suit land. However, this animus in the present case could have started from April, 1970 when father of the plaintiff entered upon the suit land as was evident from the averments made in para 2 of the plaint. Thus, the same would not start from 15.10.1990 merely because the defendant made attempt to take possession which was permissive in nature prior to 15.10.1990. The Learned First Appellate Court further held that in law, permissive possession is legally required to be relinquished. It is only thereafter that the same can be termed adverse possession in the eyes of law. It further held that any attempt made by defendants to take forcible possession of the suit land would rather militate against the plea of adverse possession, as this possession then cannot be termed to be peaceful in nature. It further held that this subtle distinction had not been appreciated by the learned trial Judge while considering the plea of adverse possession qua the suit land. It further held that the adverse possession even otherwise is mixed question of law and fact and simply because the plaintiff was not cross-examined on material point that would not necessarily mean that defendants had admitted the entire case of the plaintiff. It further held that it was not a case where plaintiff had done overt act over the suit land by raising some kind of construction etc. which was so ostensible in nature so as to give rise to the presumption that possession of the plaintiff throughout has been hostile. Thus, the Learned First Appellate Court concluded that the findings returned by the Learned Trial Court regarding plea of adverse possession cannot be legally sustained. It further held that, even if it is assumed that the plaintiff is in possession of the suit land, in that eventuality also, no relief of injunction can be granted to the plaintiff against the true owner. It further held that though even a trespasser is entitled to protect his possession and cannot be evicted from any parcel of land except in due course of law, however, the object of law is to discourage the people from taking law in their own hand irrespective of their title. It further held by relying upon the judgment of Hon'ble Supreme Court in **Premji Rattansav Shah Vs. Union of India**, 1994 (5) Supreme Court Cases 547 that injunction would not be issued against the true owner.

9. Feeling aggrieved by the said judgment, appellant/plaintiff filed this appeal.

10. The present appeal was admitted on the following substantial question of law on 2.7.2008:-

"Whether the appellate court below has misread, misinterpreted and misconstrued the oral as well as documentary evidence including pleading of the parties especially statement of PW1 and Ex.PW2/A, which has materially prejudiced the case of the appellant?

11. I have heard Mr. G.R. Palsra, learned counsel for the appellant and also gone through the records of the case minutely.

12. Mr. G.R. Palsra, learned counsel for the appellant argued that the judgment passed by Learned Appellate Court was not sustainable in law, as the same was a result of total misreading of the testimonies of PW1 and PW2. He further argued that, in fact, the statement of PW1 had remained unrebutted and this important aspect of the matter has not been appreciated by the learned First Appellate Court. According to him, Tatima, Ext.PW2/A, has also been mis-appreciated by the Learned First Appellate Court and the said Court has not appreciated that the defendants had failed to bring on record any evidence to substantiate that they were actually in possession of the suit land and the same was not in possession of the plaintiff. Therefore, he argued that the judgment and decree passed by the Learned First Appellate Court were not sustainable on the basis of the material on record and the same were liable to be set aside and the judgment passed by the Learned Trial Court was liable to be upheld.

13. I have given a careful consideration to the averments which have been made by Mr. Palsra.

14. In my considered view, it cannot be said that the Learned First Appellate Court has either misread or mis-appreciated the statements of PW1 and PW2, nor it can be said that

the Learned First Appellate Court has misconstrued Ext.PW2/A i.e. Tatima. In fact, Mr. Palsra has not been able to convince this Court as to how the findings which have been returned by the learned First Appellate Court to the effect that the plaintiff has not been able to prove the main ingredients of adverse possession are incorrect. It is the case of the plaintiff, as pleaded in para 3 of the plaint that on 15.10.1990 defendants tried to forcibly plough the suit land and they created a dispute with their father but father of the plaintiff foiled the said attack of the defendants and did not allow them to possess the suit land. Be that as it may, the averments made in the plaint demonstrate that one of the main ingredients of 'adverse possession' that the said possession is open and peaceful is belied from these averments which has been made by the plaintiff itself in the plaint. Incidentally, in para 4 of the plaint, plaintiff has mentioned that reckoned from 15.10.1990 father of the plaintiff and plaintiff himself continued to be in open, peaceful and exclusive possession of the suit land and on these bases he sought declaration to the effect that he has become owner of the suit land by way of adverse possession. It is not his case that the plaintiff came in possession of the suit land on 15.10.1990 and thereafter he remained in peaceful possession of the same till he filed the suit. It is his case that his father was coming in possession of the suit land since April, 1970. Thus, it is apparent and evident that on the one hand the case put-forth by the plaintiff that his father was coming in possession of the suit land since April 1970, however, he has chosen 15.10.1990 as the date from which onwards according to him the possession of his father and after his father's death his possession over the suit land was adverse to true owners.

15. In these circumstances, incidentally, the onus was upon the plaintiff to have demonstrated that their alleged possession had become adverse over the suit land after 15.10.1990, though it was not so before 15.10.1990 and the same was permissive before that date. It cannot be said that the statement which has been made by plaintiff in the Court as PW1 is demonstratively conclusive that his right of ownership by way of adverse possession had fructified over the suit land as was portrayed by him in the plaint. In his cross-examination he has stated that he became owner of the suit land by virtue of his possession in the year 2002 and in revenue records the land is recorded in his name. He has feigned ignorance that on 10.6.2004 defendants had got the land demarcated from the revenue department. He has also stated that he is not aware of the date on which the Tatima was prepared. He has also feigned ignorance to the fact that a criminal case had been registered against his mother. A perusal of the statement of PW2 Patwari Surinder Pal does not further the case of the plaintiff. In his statement he has stated that Tatima, Ext.PW2/A, has been prepared by him but in his cross examination he has stated that said Tatima has not been verified by the Kanungo. Statements of PW3 and PW4 also do not furthers the case of the plaintiff because in their cross examination they have clearly admitted that plaintiff is closely related to them. Therefore, it cannot be said that the plaintiff with the help of any independent witnesses was able to substantiate that, in fact, he was in possession of the suit land. A perusal of the judgment passed by the Learned First Appellate Court demonstrates that all these aspects have been gone into in detail by the said Court. The Learned First Appellate Court has rightly held that so-called Tatima prepared by the patwari has not been prepared in accordance with law as per requirements of H.P. Land Record Manual. Further no infirmity can be found that the findings arrived at by the Learned First Appellate Court to the effect that plaintiff has miserably failed to prove and demonstrate on the basis of material on record that he had become owner by way of adverse possession of the suit land.

16. The theory of adverse possession is that an adverse possession allows a trespasser, a person guilty of tort or even crime in the eyes of law to gain legally title of land, which he has illegally possessed for 12 years.

17. Incidentally, the appellant before this Court was the plaintiff who had filed a suit for seeking declaration to the effect that he be declared owner in possession of the suit property as he had perfected the said title by way of adverse possession. The Hon'ble Supreme Court in **Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another**, (2014) 1 Supreme Court Cases 669 has held as under:-

"There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

18. The Hon'ble Supreme Court in **Chatti Konati Rao and others Vs. Palle Venkata Subba Rao**, (2010) 14 Supreme Court Cases 316, has held:-

"12. ..... What is adverse possession, on whom the burden of proof lie, the approach of the court towards such plea etc. have been the subject matter of decision in a large number of cases. In the case of T. Anjanappa v. Somalingappa, it has been held that mere possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owner's title. Relevant passage of the aforesaid judgment reads as follows: (SCC p. 577, para 20)

"20. It is well-recognized proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

13. What facts are required to prove adverse possession have succinctly been enunciated by this Court in the case of Karnataka Board of Wakf vs. Government of India and Ors. It has also been observed that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. SCC para 11 of the judgment which is relevant for the purpose reads as follows : (SCC p. 785)

"11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karim v. Bibi Sakina, Parsinni v. Sukhi and D.N. Venkatarayappa v. State of Karnataka. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of

adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma.)"

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within 12 years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of 12 years thereafter.

15. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights. Plea of adverse possession is not a pure question of law but a blended one of fact and law."

19. Accordingly, applying these principles to the facts of the present case, I am of the considered view that appellant has miserably failed to demonstrate that he was either in possession of the suit land for more than 12 years as alleged and that his alleged possession was open, peaceful and hostile as against the true owner. The Learned First Appellant Court has rightly allowed the appeal filed by the respondents and set aside the judgment passed by the Learned Trial Court. The findings arrived at by the Learned First Appellate Court are correct and based on the appreciation of the facts of the case and evidence on record and it cannot be said that the said conclusions arrived at are perverse. The Learned First Appellate Court has neither misled or misinterpreted the oral as well as documentary evidence on record especially the statement of PW1 and Ext.PW2/A. The substantial question of law is answered accordingly.

In view of the above discussion, I do not see any reason to interfere in the well reasoned judgment and decree passed by Learned Appellate Court and the appeal is accordingly dismissed with cost.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Land Acquisition Collector & another. ...Appellant.

Versus

Jatinder Singh ...Respondent.

RFA No. 953 of 2012-C a/w RFA Nos.61, 63, 64 & CO No.977/2012, 65 & CO No.1005/2012, 66 & CO No.978/2012, 67, 69 & CO No.979/2012, 70 & CO No.1008/2012, 71 & CO No.1009/2012, 72 & CO No.1007/2012, 170, 171 & CO No.982/2012, 172 & CO No.983/2012, 173 & CO No.984/2012, 174 & CO No.985/2012, 223 & CO No.39/2016, 224, 225 & CO No.1012/2012, 226 & CO No.356/2013, 227, 309 & CO No.872/2012, 310, 572, 573, 574, 575 & CO No.44/2014, 576, 577, 578, 579, 703, 704 & CO No.358/2013, 705, 706, 707, 708, 710, 711, 712, 713 & CO No.1136/2014, 714 & CO No.355/2013, 715, 716 & CO No.359/2013, 717 & CO No.34/2016, 718, 719 & CO No.361/2013, 720 & CO No.362/2013, 721, 722, 723, 730, 731 & CO No.363/2013, 741, 742, 743, 744, 745, 747, 748, 749, 750, 751, 753, 755, 756, 757, 758, 759, 760, 761, 762, 763, 765, 768, 769, 770, 778, 790, 791 & CO No.357/2013, 876 of 2012 & CO No.364/2013 and RFA No.104 of 2013.

Reserved on : 04.05.2016.

Date of Decision: June 1, 2016.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of water source- land acquisition collector determined market value of the land category wise at different rates - reference petitions were filed which were allowed and the market value was enhanced to Rs. 7.20 lakh- held, in appeal that the land was acquired for public purpose - no land was left for carrying any developmental activity- claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization- acquired area was accessible by motorable road - it had great potential of being put to both agricultural/horticultural as well as commercial use- sale deeds executed prior to acquisition were proved on record- the average value was Rs. 9.6 lakh and after deduction of 25 % on account of small area of the land, the market value of acquired land is Rs. 7.5 bigha per hectare- the court had rightly awarded the compensation- appeal dismissed. (Para-5 to 37)

Cases referred:

Haridwar Development Authority vs. Raghubir Singh & others, (2010) 11 SCC 581

Union of India vs. Harinder Pal Singh and others 2005(12) SCC 564

Nelson Fernades vs. Special Land Acquisition Officer 2007(9) SCC 447

Gulabi and etc. vs. State of H.P., AIR 1998 HP 9

H.P. Housing Board vs. Ram Lal & Ors. 2003(3), Shim. L. C. 64

Executive Engineer & Anr. vs. Dilla Ram {Latest HLJ 2008 HP 1007}

Special Land Acquisition Officer Versus Karigowda and others, (2010) 5 SCC 708

Panna Lal Ghosh & Ors. v. Land Acquisition Collector & Ors. (2004) 1 SCC 467

Shakuntalabai (Smt.) & Ors. v. State of Maharashtra (1996) 2 SCC 152

ONGC Limited v. Sendhabhai Vastram Patel & Ors. (2005) 6 SCC 454

NCT of Delhi and others Versus Ajay Kumar and others, (2014) 13 SCC 734

Haryana State Agricultural Market Board and another Versus Krishan Kumar and others, (2011) 15 SCC 297

Pattammal and others Versus Union of India and another, (2005) 13 SCC 63

Krishi Utpadan Mandi Samiti, Sahaswan, District Badaun through its Secretary Versus Bipin Kumar and another, (2004) 2 SCC 283
Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat (1989) 4 SCC 250
Atma Singh and others v. State of Haryana and another (2008) 2 SCC 568
Union of India v. Pramod Gupta (Dead) by LRs. & Ors. [(2005) 12 SCC 1
Suresh Kumar v. Town Improvement Trust, Bhopal [(1989) 2 SCC 329
Special Land Acquisition Officer, BYDA, Bagalkot Versus Mohd. Hanif Sahib Bawa Sahib, (2002) 3 SCC 688

For the Appellants:	Mr. Shrawan Dogra, AG., with M/s R.S. Verma and R.M. Bisht Addl. AGs., for the appellant(s)-State/non-objector(s).
For the Respondents:	Mr.R.K. Gautam, Sr. Advocate with Mr.Gaurav Gautam and Ms.Megha Kapoor Gautam, Advocates for the respondent(s) and for the Cross-objector(s) in CO Nos.977, 1005, 978, 979, 1008, 1009, 1007, 982, 983, 984, 985/2012, 39/2016, 1012/2012, 356 of 2013, 872/2012, 44/2014, 358/2013, 1136/2014, 355/2013, 359/2013, 34/2016, 361/2013, 362/2013, 363/2013, 357/2013 and 364/2013.

The following judgment of the Court was delivered:

Sanjay Karol, J.

At the time of hearing, learned counsel for the parties jointly prayed that all these appeals and cross-objections be heard together and disposed of by a common judgment. This was for the reason that notwithstanding the difference in the dates of commencement of acquisition proceedings. Purpose of acquisition being common, and the evidence, similar in nature, so led in six cases, the point in issue is similar. Also the land is situate in an area where there is not much variation in the geographical and topographical conditions. It is also submitted that the Court below itself had consolidated the cases and as desired by the parties, permitted evidence to be led only in six lead cases, which also is similar in nature and except for different sale deeds produced in different cases, pertaining to the period prior to the commencement of acquisition proceedings, other evidence is almost identical.

2. In these appeals arising out of awards dated 30.06.2011, 17.11.2011, 30.11.2011, 08.12.2011, and 19.04.2012, passed by the Court below, in various reference petitions, so filed under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), the Court below has uniformly re-determined the market value of the acquired land from Rs.2,30,000/- per hectare to Rs.7,20,000/- per hectare.

3. Both the State and the claimants are aggrieved of the same and have filed the instant appeals/cross-objections.

4. Challenge is on two grounds: (a) Court below erred in uniformly determining the market value of the acquired land; and (b) re-determination of the market value is on the higher/lower side.

5. For the public purpose, namely, construction of water source to be constructed by the Irrigation and Public Health Department, in relation to the Shah Nehar Project, Fatehpur, land of all the claimants, situate in Dhoulpur, Rey, Chabbar, Tatwali, Badhukhar and Duhag, came to be acquired. Proceedings for acquisition of the land, under the provisions of the Act, came to be initiated with the publication of different Notifications dated 22.09.1998, 30.01.1999, 11.06.1999, 18.06.1999 and 19.07.2002, so issued under Section 4 of the Act. The proceedings came to be culminated with the awards passed by the Collector Land Acquisition under Section

11 of the Act and the possession of the land being taken over. The Collector Land Acquisition, determined the market value of the land, category wise on different rates as per different awards dated 07.04.2001, 11.01.2001, 10.01.2002, 29.01.2002, 28.04.2003 and 26.12.2003.

6. Dissatisfied with the same, claimants filed various land reference petitions, which came to be clubbed together. The claimants set up a claim seeking re-determination of the market value ranging from Rs.26 lacs to Rs.39 lacs, which on the basis of evidence on record was found to be Rs.7.20 lacs.

7. The question which needs to be considered is as to whether the awards need to be interfered, on the asking of either of the parties or not? Having heard learned counsel for the parties as also perused the record, Court is of the considered view, that the re-determination of the market value of the acquired land is absolutely just, fair and reasonable.

8. It is not in dispute before this Court, as is also evident from the material placed on record, that the entire acquired land stood fully utilized for the public purpose. Canal stood constructed over the entire acquired land.

9. Now it is a settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization.

10. The apex Court in *Haridwar Development Authority vs. Raghubir Singh & others,* (2010) 11 SCC 581 has upheld the award of compensation on uniform rates. Also it has acknowledged the principle of providing increase in the market value up to 10% to 12% per year for the land situated near urban areas having potential for non-agricultural development.

11. In *Union of India vs. Harinder Pal Singh and others* 2005(12) SCC 564, while determining the compensation for acquisition of land pertaining to five different villages, the apex Court uniformly awarded a sum of Rs.40,000/- per acre, irrespective of the classification and the category of land.

12. Further, in *Nelson Fernades vs. Special Land Acquisition Officer* 2007(9) SCC 447 while dealing with the case where the land was acquired for laying a Railway line, the Court held that no deduction by way of development charges was permissible as there was no question of any development thereof.

13. This Court, in *Gulabi and etc. vs. State of H.P.,* AIR 1998 HP 9, where the land was acquired for the purpose of construction of National Highway-21, held that the claimants would be entitled to compensation uniformly for all classes of land irrespective of its classification or quality. I am conscious that the facts are different in the instant case and the principle laid down therein cannot be applied stricto sensu**.** But however, this principle was followed and accepted by this Court in *H.P. Housing Board vs. Ram Lal & Ors.* 2003(3), Shim. L. C. 64, wherein the land was acquired for the purposes of setting up of a Housing Colony by the respondent authority itself. The Court held that:

> "27. When the land is being developed for a housing colony, as in the present case, classification completely looses significance. Reason being that it has to be developed as a single unit i.e. for housing colony. Similarly allowing higher price for land near the road and for the one which is at a distance from the road also does not provide any reasonable, muchless rational basis to allow less price for the area. Reason being that a person may be interested to reside near the road side in a developed colony for so may reasons. Whereas another, may like to live in the vicinity which is away from the road to avoid husble and bustle of being near the roadside and for many other reasons. In these circumstances it cannot be said that location of the land and its distance from the road is a good criteria and/ or for that matter classification for the assessment of compensation. In my view entire land under acquisition should

have been assessed at Rs.200 per sq. meter irrespective of its classification and/ or distance from the road."

28. Faced with this situation, Mr. Deepak Gupta, Advocate, on behalf of Housing Board submitted, that it is matter of common knowledge that plots situated on the roadside carry higher price, as compared to the plots which are away from the road. This argument cannot be accepted in view of the decision of the Supreme Court reported in the case of Land Acquisition Officer Revenue Divisional Officer, Chittor v. L. Kamlamma (Smt.) Dead by LRs and others K. Krishnamachari and others, (1998) 2 SCC 385. What was held and is relevant was as under:-

"7. The argument advanced by Shri Nageswara Rao that the classification by the Land Acquisition Officer was in order and ought not to have been interfered with by the reference court or the High Court does not appeal to us. When a land is acquired which has the potentiality of being developed into an urban land, merely because some portion of it abuts the main road, higher rate of compensation should be paid while in respect of the lands on the interior side it should be at lower rate may not stand to reason because when sites are formed those abutting the main road may have its advantages as well as disadvantages. Many a discerning customer may prefer to stay in the interior and far away from the main road and may be willing to pay a reasonably higher price for that site. One cannot rely on the mere possibility so as to indulge in a meticulous exercise of classification of the land as was done by the Land Acquisition Officer when the entire land was acquired in one block and, therefore, classification of the same into different categories does not stand to reason."

14. This judgment has attained finality as SLP (Civil) No. 15674-15675 of 2004 titled as Himachal Pradesh Housing Board vs. Ram Lal (D) by LRs & Others, filed by the H.P. Housing Board was dismissed by the Apex Court on 16.8.2004.

15. This judgment was subsequently referred to and relied upon by this Court in *Executive Engineer & Anr. vs. Dilla Ram* {Latest HLJ 2008 HP 1007} and relying upon the decision of the Apex Court in *Harinder Pal Singh (supra)*, wherein the market value of the land under acquisition situated in five different villages was assessed uniformly irrespective of its nature and quality, also awarded compensation on uniform rates.

16. It is a matter of fact that the entire land was put to public purpose. Canal stood constructed thereupon. It was used for only one purpose and as such there cannot be any error in uniform determination of the market value of the acquired land.

17. Hence there cannot be any error in the awards to this extent. More so, for the reason, as has come in the unrebutted testimony of Satpal Singh (PW.1) that most of the acquired land was either put to agricultural use or had potential thereof.

18. Now this takes us to the second question. It is a settled principle of law that land reference petition is to be adjudicated as a plaint and the onus to prove the claim is on the claimants.

19. It is a settled principle of law that the onus to prove entitlement to receive higher compensation is upon the claimants. The claimants are expected to lead cogent and proper evidence in support of their claim. Onus primarily is on the claimants, which they can discharge while placing and proving on record sale instances and/or such other evidences as they deem proper, keeping in mind the method of computation for awarding of compensation which they rely upon. However, it cannot be said that there is no onus whatsoever upon the State in such reference proceedings. The court cannot lose sight of the facts and clear position of documents, that obligation to pay fair compensation is on the State in its absolute terms. Every case has to be examined on its own facts and the courts are expected to scrutinise the evidence led by the

parties in such proceedings. (See: *Special Land Acquisition Officer Versus Karigowda and others,* (2010) 5 SCC 708).

20. It is also a settled principle of law that the claimants have to establish their case by leading clear, cogent, convincing and reliable piece of evidence. Such evidence has to be within the meaning and scope of Section 3 and other relevant provisions of the Indian Evidence Act. Only such evidence so proven in accordance with law, which is admissible is required to be considered by the Court.

21. The most reliable way to determine the value is to rely on the instances of sale portions of the same land as stands acquired or adjacent lands made shortly before or after the Section 4 Notification. {*Panna Lal Ghosh & Ors. v. Land Acquisition Collector & Ors*. (2004) 1 SCC 467}

22. If there is evidence or admission on behalf of the claimants as to the market value commanded by the acquired land itself, the need to travel beyond the boundary of the acquired land is obviated. Instances of sale in respect of the similar land situated in the same village and/or neighbouring villages could be taken to be a guiding factors for determination of market value. {*Shakuntalabai (Smt.) & Ors. v. State of Maharashtra* (1996) 2 SCC 152, *ONGC Limited v. Sendhabhai Vastram Patel & Ors*. (2005) 6 SCC 454}.

23. In the instant case, the claimants referred to earlier awards dated 30.06.2011 (Ex.P1), so passed by Additional District Judge-(II), Kangra at Dharamshala, District Kangra, H.P., in RBT Reference Case No.9-J/2011/2004, titled as *Suresh Chand Versus Land Acquisition Collector.* However, the trial Court rightly did not rely there upon the same for it being subject matter of challenge in an appeal.

24. Record reveals that all the land references were consolidated and common evidence led by the parties in six cases. In a tabulated form, evidence led in each of the six cases, is shown here-in-under:-

RFA & CO Nos. of lead case	**Award (S.18 of the Act)**	**Date of notification u/s. 4 of the Act**	**Date of award of Collector (u/s.11 of the Act)**	**Date/Exhibit of the Sale Deeds**	**Witnesses examined**
RFA No.953/2012	19.4.2012	30.1.1999	28.4.2003	Ex.PW.1/C, Ex.PW.1/D & Ex.PW.1/E	Kewal Singh (PW.1), Lal Singh (RW.1)
RFA No.703/2012	30.11.2011	11.6.1999	29.1.2002	Ex.PW.1/B, Ex.PW.1/C & Ex.PW.1/D	Satpal Singh (PW.1), Jai Singh (RW.1)
RFA No.790/2012	8.12.2011	30.1.1999	10.1.2002	Ex.PW.1/B to Ex.PW.1/G	Sikander Singh (PW.1), Jai Singh (RW.1)
RFA No.225/2012 & CO No.	17.11.2011	19.7.2002	26.12.2K3	Ex.PW.1/D, Ex.PW.1/E & Ex.PW.1/F	Shamsher Singh (PW.1), Jai Singh

1012/2012					(RW.1)
RFA No.573/2012	30.11.2011	18.6.1999	11.1.2001	Ex.PW.1/A to Ex.PW.1/D	Satish Kumar (PW.1), Jamil Mohd. (RW.1)
RFA No.70/2012& CO No. 1008/2012	30.6.2011	22.9.1998	7.4.2011	Ex.PW.2/B, Ex.PW.2/C & Ex.PW.2/D	Joginder Singh (PW.1), Suresh Chand (PW.2), Prakash Chand (RW.1)

Amongst them lead case was taken as Reference Case RBT No.68-J/2010/2006, titled as *Satpal Singh Versus Land Acquisition Collector.* Court is conscious of the fact that Notifications and the award vary over a period of two years but it is seen that in all the cases, nature of evidence is similar, in fact stereotyped. As such, evidence in this case is being discussed.

25. Now significantly from the testimonies of two witnesses examined by the parties, namely, Satpal Singh (PW.1) and Jai Singh Kanungo (RW.1), certain undisputed facts have emerged. The land in question was acquired for the purpose of construction of a Canal. The land was put to agricultural use by the villagers. However, with the construction of a Canal, their agricultural land came to be divided into two portions, not only diminishing its utility but also causing inconvenience and hardship to the land owners. The width of the Canal is just 15 meters. It is not the case of either of the parties that the land owners were to be benefited by way of Irrigation. In fact, Canal was constructed to irrigate the lands not in the State of Himachal Pradesh, but in the neighbouring States of Punjab, Harayana and Rajasthan.

26. It is also evident from their testimonies that in close proximity there is a township. If one were to travel on foot, at the nearest habitation, there is an ITI/College at a distance of 2 kms and if one were to travel by road, then it is only 6 kms. However, if one were to travel through a longer route i.e. the bye-pass (National Highway) then it would be approximately 24 kms. There is variation with regard to the distance of the boundary of the neighbouring State i.e. Punjab. It is between 1.5 kms to 10 kms. But it also stands established that land is situated around a township and is easily accessible from all sides and by all means. Also part of the irrigation project was in existence, much prior to the issuance of the notification in the lead case. All the area where the land stood acquired was accessible by motorable road. Township of Pathankot is also closeby. Thus, it is evidently clear that the entire land had great potential of being put to both agricultural/horticultural as also commercial use. Land cannot be said to be situated in the hinterland or remotest corner of the State.

27. It is also evidently clear as is so admitted by Jai Singh (RW-1) that the Collector had determined the market value of the land by taking into account the annual average of the revenue generated by the State from the agricultural produce. Now this in view of the law laid down by the Apex Court in *Government (NCT of Delhi) and others Versus Ajay Kumar and others,* (2014) 13 SCC 734; *Haryana State Agricultural Market Board and another Versus Krishan Kumar and others,* (2011) 15 SCC 297; *Pattammal and others Versus Union of India and another,* (2005) 13 SCC 63; and *Krishi Utpadan Mandi Samiti, Sahaswan, District Badaun through its Secretary Versus Bipin Kumar and another,* (2004) 2 SCC 283, was not permissible for income generated by the State from agricultural produce is not determinative of the real market value of acquired land.

28. Now what is that real market value of the acquired land, the Apex Court has clearly held it to be that which a willing vendor and willing vendee are ready to pay and receive.

29. The market value of a property for the purposes of Section 23 of the Act is the price at which the property changes hands from a willing seller to a willing, but not too anxious a buyer, dealing at arms length. Prices fetched for similar lands with similar advantages and potentialities under bona fide transactions of sale at or about the time of the preliminary notification are the usual and, indeed the best evidences of market value. {*Mehta Ravindrarai Ajitrai (Deceased) through his Heirs and LRs. and Others v. State of Gujarat* (1989) 4 SCC 250, *Nelson Fernandes & Ors. v. Special Land Acquisition Officer, South Goa & Ors.* (2007) 9 SCC 447}.

30. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner, excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like, water, electricity, possibility of their further extension, whether near about Town is developing or has prospect of development have to be taken into consideration. (*Atma Singh and others v. State of Haryana and another* (2008) 2 SCC 568).

31. In *Union of India v. Pramod Gupta (Dead) by LRs. & Ors.* [(2005) 12 SCC 1], the Apex Court held that the best method, as is well-known, would be the amount which a willing purchaser would pay to the owner of the land. In absence of any direct evidence, the court, however, may take recourse to various other known methods. Evidence admissible therefor inter alia would be judgments and awards passed in respect of acquisitions of lands made in the same village and/or neighbouring villages. Such a judgment and award in the absence of any other evidence like deed of sale, report of the expert and other relevant evidence would have only evidentiary value.

32. In *Suresh Kumar v. Town Improvement Trust, Bhopal* [(1989) 2 SCC 329], the Apex Court has held that while determining the market value of the land acquired, it has to be correctly determined and paid so that there is neither unjust enrichment on the part of the acquirer nor undue deprivation on the part of the owner.

33. As already discussed, the onus to prove and establish the real market value is always upon the claimants. Now significantly through his testimony, Satpal Singh (PW.1) has also proven on record various sale deeds. However, trial Court has taken into account three of them being Ex.PW.1/B, Ex.PW.1/C and Ex.PW.1/D, being prior to the initiation of the acquisition proceedings. These pertain to small chunks of land whereby land admeasuring 0-00-40 HM was sold for consideration of Rs.100/- per centare; 62 Centare for Rs.5000/- and 0-01-01 HM for Rs.10,000/-. These sale deeds pertain to the year 1997. They pertain to Tikka Rey and Tikka Tatwali. The Court below, by rightly applying the principle laid down in *Haridwar Develiopment Authority Haridwar Versus Raghubir Singh,* (2010) 11 SCC 581, carried out necessary deduction of 25% there upon. This was so done in view of the exemplar sale deeds pertaining to small parcel of land. Significantly there is neither any challenge to the execution of these sale deeds or genuineness thereof. They pertain to the period prior to the commencement of the acquisition proceedings. It is also not the case of the parties that these sale deeds came to be executed only for the purpose of creating evidence in anticipation that the land in question would also be acquired. In fact, claimants had no inkling of the acquisition of their land and were taken by surprise with the commencement of the acquisition proceedings. Thus, by taking into account the average of these sale deeds, so proven on record, the value turned out to be Rs.9.6 lacs, and by carrying deduction of 25%, the Court below rightly determined the market value of the entire acquired land to be Rs.7.20 lacs per hectare. It has come in the testimony of the witness

examined by the State that the land stood acquired in Tikka Chabbar, Rey, Tatwali, Dhoulpur and Indpur.

34. Hence the Court below rightly determined compensation on the basis of material on record.

35. Noticeably since uniform rate was applied for the entire acquired land, Court below rightly did not award any amount for the loss of income of the agricultural/horticultural produce with respect to the acquired land.

36. The Court below, keeping in view the law laid down by the Apex Court in *Special Land Acquisition Officer, BYDA, Bagalkot Versus Mohd. Hanif Sahib Bawa Sahib,* (2002) 3 SCC 688, has given 10% appreciation for the years between execution of the sale deeds and acquisition of the land.

37. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Courts below are perverse, illegal or erroneous. As such, present appeals as also the cross-objections stand dismissed, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sh. Liaq Ram .....Petitioner.

Vs.

The State Government of Himachal Pradesh through the Secretary (PWD) and ors. .....Respondents.

CWP No.: 4947 of 2010
Reserved on: 26.05.2016
Date of Decision: 01.06.2016

Constitution of India, 1950- Article 226- Petitioner pleaded that he is the owner in possession of the land- respondents constructed a road through the land of the petitioner without acquiring it or without paying compensation for the same- respondents pleaded that petitioner had permitted the construction of the road – held, that State was not denying the fact that some portion of the land of the petitioner was used for the construction of the road- It was contended that road was constructed with the consent of the petitioner - however no consent in writing, no gift deed or undertaking was produced on record- petition allowed and directions issued to acquire the land or in the alternative to re-align/re-grade the road after vacating the land of the petitioner or to pay compensation for the damage caused to the land of the petitioner with interest. (Para- 9 to 15)

For the petitioner: Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.
For the respondents: Mr. V.S. Chauhan, Additional Advocate General and Ms. Parul Negi, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. *(Oral)* **:**

The present writ petition has been filed praying for the following reliefs:

"(i) That the respondents may be directed to produce total record of the case for the perusal of this Hon'ble Court, so that this Hon'ble Court may be able to decide the subject matter of the dispute;

(ii) That appropriate orders and directions may be issued in favour of the petitioner and against the respondents that the petitioner should not be deprived of his property without payment of amount of compensation and the due process should be initiated in accordance with law for payment of amount of compensation in accordance with law.

(iii) In case the respondents are not willing to acquire the land in question, directions may be issued to the respondents to vacate the area in question and handover the physical possession thereof to the petitioner and also they may be required to pay the amount of compensation/dues on account of damage as already caused by uprooting and felling down the fruit bearing apple plants and by way of throwing debris stones.

Any other suitable relief which this Hon'ble Court deems fit and proper under the given facts and circumstances of the case may also be passed in favour of the petitioner.

2. The case of the petitioner is that he is owner in possession of the land comprised in Khata Khatauni No. 1/1, Khasra No. 358, measuring 0-21-46 hectares, situated at Mauza Nohra, Pargana Baragaon, Tehsil Chopal, District Shimla, H.P. As per him, the respondents started the work of construction of Reoni to Khagna road during the year, 2008 and as per initial survey for construction of this road, land of the petitioner was not required. In other words, the road in question was to be constructed without occupying the land of the petitioner. However, despite this, the respondents without any justification altered the survey in such a manner that the road was constructed through the land of the petitioner.

3. When he came to know about this, he objected that the survey should not be changed and his land should not be utilized for the purpose of construction of the road. His grievance is that despite his objections, respondent No. 3 unauthorizedly and illegally started the construction work of the road in issue in Khasra No. 348 owned by him.

4. The case of the petitioner further is that the construction of road commenced in October, 2008 and by the time he served legal notice dated 14.01.2009 upon the respondents, his orchard has been badly damaged as a result of construction work of the said road. It is further his case that in response to the applications filed by him under the Right to Information Act, the Executive Engineer, Chopal Division, H.P. P.W.D. vide communication dated 05.11.2009 (Annexure P-11) stated that the land of the petitioner was not deliberately used by the department, but the petitioner permitted the department to use the said land and further that there was no provision of compensation of land under Pradhan Mantri Gram Sarak Yojana and that the department was constructing road in larger public interest. It was further mentioned in the communication that at the time of survey, the petitioner allowed the department to conduct the survey of the land. According to the petitioner, the contention of respondent No. 3 was totally incorrect because he had not given any consent whatsoever to the effect that he was willing to have a road constructed through his land.

5. Thus, according to the petitioner, in the present case, his land has been utilized by the respondents for the purpose of construction of road and he has been deprived of his property by the Government without adequately compensating him. It is in this background that he has filed the present writ petition.

6. In its reply, the respondent-State reiterated that the construction of the road has been done as the petitioner himself allowed the respondent department to construct the road adjacent and through the suit land and after construction of more than 500 meters of road towards Khagna, petitioner objected regarding construction of the same over some portion and demanded compensation for the same. It was further the case of the State that the respondent department was not having any option than to construct the alternative road from the point of suit land and the respondent department was going to vacate the suit land and the damaged land

can be used as a plain field by the petitioner and orchard can be planted on the suit land. It was further submitted in the reply that the compensatory plantation shall be provided to the respondent department to compensate the damaged apple plants during the construction of road in lieu of damages. It was also the stand of the State that there was no provision of any compensation for construction of such like road which was being constructed under the Pradhan Mantri Gram Sadak Yojna and if the respondent department had knowledge about the ulterior motive of the petitioner, then the respondent department would not have constructed the road over the land of the petitioner.

7. When this case was listed on 22.03.2016, this Court passed the following order:

> *"Heard for some time.*
>
> *In reply to the writ petition the stand of the respondent-State is that the road over a portion of the land belonging to the petitioner has been constructed in his presence and with his consent upto a distance of 500 meters and beyond that he did not allow the construction of road and any further. As per further stand of the respondent-State, the only option now left is to change the alignment of the road and to vacate the land of the petitioner already occupied. The response to this fact has been filed on 05.01.2011, i.e., five years back. What is the factual position qua existence of the road as of today, let the first respondent to apprise this Court qua the same by filing supplementary affidavit within two weeks. In the event of the road still exists on the land of the petitioner and its alignment is not changed, the first respondent to state specifically in the affidavit that the respondent-State still intends to vacate the land of the petitioner and change the alignment of the road or to allow the road to continue over the land of the petitioner.*
>
> *An authenticated copy to learned Deputy Advocate General for compliance"*

8. Compliance affidavit has been filed by the Additional Chief Secretary (PWD) to the Government of Himachal Pradesh. A perusal of the said affidavit demonstrates that the respondent-State is not denying the fact that some portion of the land of the petitioner has been used for construction of the road in issue. It is stated in the affidavit that at RD 3/139 to 3/225 a hair pin bend has been constructed by the respondent department for maintaining proper grade of the road and the same falls in petitioner's land. It is further mentioned that on the hill side of the road, there is Government land where the said hair pin bend has been constructed and ahead of that also forest land is situated. As per the respondents, at the relevant time, to maintain proper grade, road has been constructed through some portion of the land by the contractor with the oral consent of the petitioner. It is further stated that through this connectivity, the petitioner is also one of the beneficiary. It is further submitted that under the Pradhan Mantri Gram Sadak Yojna, there is no provision of payment of compensation to land owners. As per this affidavit, the Pradhan Mantri Gram Sadak Yojna is implemented when the land owners either give an undertaking by way of affidavit that they shall not claim any compensation for utilized land or the land owners donate the land through gift deed in favour of the department, which is based on alignment survey. Relevant paragraphs of the affidavit are quoted hereinbelow:

> *"…Thus, this scheme (PMGSY is implemented when the land owner(s) either make undertaking in affidavit that he/they shall not claim any compensation for utilized land or land owner(s) have to donate the land through gift deed in favour of deptt. Which is based upon alignment survey. Hence, the State/deptt. is now in a fix as to how to deal with this situatin because kachha road in the entire length stood constructed by the respondent deptt. Uder PMGSY scheme with a total road legth of 10 km. At RD3/139 to 3/225 through suit land as per MB NO. CHD 1113 entry so made at page 52 to 54 on 1.09.2009 cutting work has been done by the contractor namely Smt. Kamlesh Puri W/o Sh. Mahesh Puri Prop. M/s M.K. Earth Moovers to whom this work was awarded for an amount of Rs.3,99,34,404/- i.e. approx. 4 crores. The road is still kachha road and no mentalling and tarring work has been*

done till now. Therefore, its re-alignment is also possible by avoiding suit land which is also evident from two photographs of the spot Annexure R-1 (Colly.), as such it appears that at the time of filing reply by SE, 14th Circle Rohroo available option of making change of alignment was also made but had not been acted upon till now whereas on 31.03.2011 the work has been closed.

4. That as far as damages to suit land is concerned, the agreement No. 80/2007-2008 so entered between M/s M.K. Earth Moover and Executive Engineer, HPPWD Chopal under package No. HP09-136, under General Condition of Contract, Clause 12, i.e. Contracts Risk, is provided as under;

> *"All risks of loss of or damage to physical property and of personal injury and death which arise during and in consequence of the performance of the Contract other than the excepted risks, referred to in clause 11.1 are the responsibility of the Contractor."*

Therefore, 2nd claim of damages to the suit land by throwing debris, said claim is maintainable against contractor Smt. Kamlesh Puri, Prop. M/s M.K. Earthmoovers, Dhingra Estate Boileauganj, Shimla-5. Hence, for said claim contractor deserves to be impleaded as respondent to this writ petition.

5. That as far as the claim of acquisition of part of suit land so found utilized in consturucting hair pin bend in photograph Annexure R-1 is concerned, it is respectfully submitted that as submitted in para-3 above also under PMGSY, construction of road, land falling on the alignment of said link road is to be donated by land owners free of cost so as to get the benefit of connectivity when DPR is prepared. Therefore, if petitioner still insists for acquisition of utilized land in said construction, then at this stage respondent deptt. may kindly be granted 3 months time so that, re-alignment/re-gradation of the road be got completed at spot at deptt. Level whereby that portion of land as found utilized in the construction of said road belonging to petitioner could be "Bye passed" by respondent. Deptt. for which EE, SE & JE shall be jointly visiting the spot in the first week of May, 2016 as after retirement incumbent EE on 30.04.2016, new incumbent has also been posted on 5.05.2016 and by 30.06.2016 he may also re-align the link road under his personal supervision and deliver back the possession of land belonging to petitioner after re-alignment through deptt. man and machinery. By doing this residents of remaining area, beyond RD 3/225 to upto RD 10/00 km shall continue to avail road connectivity facility despite change of alignment through deptt. man and machinery being PMGSY Package of this road already closed on 31.03.2011 for doing all this SE, EE and AE have been issued strict instructions on 28.04.2016 by CE(S) to get this job completed by 31.05.2016 and send its compliance by 1st June, 2016 failing which disciplinary proceedings against them shall follow. The copy of same is annexed as Annexure R-2."

9. I have heard the learned counsel for the parties and also gone through the records, including the latest affidavit filed on behalf of the respondent-State.

10. In my considered view, the land of the petitioner could not have been utilized for the purpose of construction of road without either adequately compensating him in accordance with law or in the alternative without taking his consent in writing that in lieu of his land being utilized for the purpose of construction of road, he shall not claim any compensation from the Government.

11. It is apparent from the reply of the State as well as the latest affidavit filed by respondent No. 1 that no such consent has been taken in writing from the petitioner by the State while utilizing his land for the construction of road.

12. The stand of the State is that oral consent was given by the petitioner to the contractor at the time of utilization of his land for construction of road. In my considered view, this contention of the State merits rejection because the State cannot be permitted to deprive owner of the land of his property without duly compensating him on such like bald assertions that the owner of the property had given his verbal consent for utilization of the same.

13. The second contention of the State is that the road has been constructed under the Pradhan Mantri Gram Sadak Yojna and under this particular scheme, there is no provision to compensate the person whose land is utilized for the construction of the road because the land is either utilized on the basis of written undertaking by way of an affidavit given by the owners of the land that they shall not seek any compensation for the land of theirs which is used for construction of road or in the alternative, the land owners have to donate the land through gift deed in favour of the department which is based on alignment survey.

14. Admittedly, in the present case, there is no undertaking given by the petitioner by way of an affidavit that he shall not claim any compensation for his land which has been utilized for the purpose of construction of the road. Further, no donation by way of gift deed etc. has also been made by the petitioner for utilization of his land. Thus, in the absence of these two eventualities, the State could not have utilized his land for construction of road under the Pradhan Mantri Gram Sadak Yojna at all. In this background, the contention of the State that everything was done with the consent and knowledge of the petitioner cannot absolve them of the legal consequences of utilizing the land of a person without duly compensating him.

15. Therefore, keeping in view the above facts and the stand of the State in its reply as well as in the latest affidavit filed by it, this petition is disposed of with the following directions:

(a) The respondent-State shall initiate the steps for acquiring the land of the petitioner for utilizing the same for construction of Reoni to Khagna road within a period of three months from today; or

(b) In the alternative, the respondents may re-align/re-grade the road "bye passing" road of the petitioner within a period of three months from today.

(c) In the eventuality of the respondent-State deciding to vacate the land of the petitioner, which has been used by it for the purpose of construction of road in issue, then the respondent No. 1 shall have the damage caused to the land and orchard of the petitioner assessed from the PWD and revenue authorities of the State of Himachal Pradesh and pay to the petitioner the amount of compensation so assessed with interest @ 6% per annum from the date of filing of writ petition. In case the petitioner is not satisfied with the valuation of compensation/damage assessed by the authorities concerned, then the petitioner shall be at liberty to approach the appropriate Forum/Court of law for the redressal of his grievance in this regard, i.e. enhancement of compensation/damages.

No order as to costs.

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

Cr. M.P. (M) Nos. 617 & 618 of 2016.
Decided on: 1st June, 2016.

1. Cr.MP (M) No.617 of 2016.

Maman Chand Jain ....Petitioner.

Versus

State of HP. ....Respondent.

2. Cr.MP (M) No.618 of 2016.
Minakshi Jain ....Petitioner.
Versus
State of HP. ....Respondent.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 17, 18, 27 and 36AC of Drugs and Cosmetics Act and Section 420 of Indian Penal Code- held, that the investigation shows that the drugs manufactured by company were found to be spurious- similar case is pending in police station, Kala Amb- one FIR has also been lodged against son of the petitioner for the commission of similar offence - the possession of factory was handed over to the petitioner with a condition that no manufacturing activity will be carried out - however, the petitioner continued to manufacture the drugs unauthorizedly- custodial interrogation of petitioner is required- the accused had committed the offence against the public at large – petitioner is not entitled to bail- Petition dismissed. (Para 2-5)

For the petitioner(s): Mr. K.D. Shreedhar, Senior Advocate, with Mr. Sameer Thakur, Advocate.
For the respondent: Mr. D.S. Nainta and Mr. Virender Verma, Additional Advocates General.
SI/SHO Yoginder Singh, Police Station, Kala Amba is also present.

The following judgment of the Court was delivered:

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

This order shall dispose of both the petitions filed for grant of anticipatory bail. The petitioners are accused in a case registered against them under Section 27(c) read with Sections 18(a)(i), 17B, 36AC of the Drugs and Cosmetics Act and Section 420 of the Indian Penal Code, vide FIR No.22/16, in Police Station, Kala Amb, District Sirmaur.

2. Accused-petitioner Minakshi Jain is the owner of M/s. Vardhman Pharma, Plot No.32, Industrial Area, Kala Amb. Accused-petitioner Maman Chand Jain is her husband and allegedly general power of attorney. Previously FIR No.70/13 was lodged in Police Station, Kala Amb on 29.9.2013 against both of them for the commission of the similar offence. The premises of M/s. Vardhman Pharma were sealed during the course of investigation in that case. The same, on an application filed by the accused-petitioner, was ordered to be resealed by learned Sessions Judge, Sirmaur District at Nahan and its possession handed over to accused-petitioner Minakshi Jain vide order dated 19.1.2015 subject to her furnishing personal bond undertaking therein that no manufacturing activities shall be carried out without any authorization from the State Drugs Controller and seeking permission of the Court. However, a monthly alert issued by the CDSCO in the month of January, 2016 received from Central Drugs Department, it transpired that samples of drugs manufactured by M/s. Vardhman Pharma were found spurious. Since the premises of M/s. Vardhman Pharma was handed over to accused-petitioner Minakshi Jain subject to the condition that no manufacturing activities shall be carried out therein and as per the alert issued by the CDSCO in the month of March, 2015 the Company, M/s. Vardhman Pharma was not having any valid license by the Drugs Controller Himachal Pradesh, therefore, was not authorized to indulge in any kind of manufacturing activities. The factum of its drugs sample failed as per the alert issued by the CDSCO in the month of January, 2016, has resulted in suspicion that the said firm irrespective of the order suspending manufacturing activities passed by learned Sessions judge Sirmaur at Nahan is still manufacturing spurious drugs without any authorization. Therefore, the complainant-Assistant Drugs Controller, Nahan has secretly observed the activities going on inside the factory premises. When he was satisfied that some manufacturing activities are going on in the factory premises, he informed the State Drugs Controller accordingly. Consequently, a team was formed and the factory premises of the firm were raided on 12.3.2016 around 8.00 p.m. with the assistance of local police in the presence of

independent witnesses. At the time of raid, two persons were present inside the factory premises. They allegedly used to punch and pack the medicines at the behest of the accused-petitioners. During the checking of the factory premises, some drugs were found to be manufactured and some were in the process of being manufactured in the name of M/s. Sai Bliss Drugs and Pharmaceuticals, 6-67 Gondpur, Industrial Area, Paonta Sahib, District Sirmaur. Certain labels of drugs "Bihar Government Supply" were also seized. Labels of "M/s. Aims International" Dehradun Road, Paonta, were also found in the factory premises and seized. Therefore, case vide FIR No.22/16 came to be registered against both the accused-petitioners.

3. The investigation conducted at this stage reveals that the drugs seized from the factory premises of the firm on analysis were found spurious. A similar case was registered against the accused-petitioners in Police Station, Kala Amb vide FIR No.70/13, as recorded in the order passed on the previous date. Challan filed in that case is pending consideration in the Court. One FIR bearing No.70/16 has been registered in Police Station, Ambala (Haryana) on 14.3.2016 for the commission of the similar offence against Aniket Jain, the son of the accused-petitioners. Although, learned Counsel on instructions submits that the said FIR stands cancelled yesterday on 31.5.2016, yet the fact remains that their son is also involved in the commission of similar offence. It is, therefore, a case where the accused-petitioners instead of having title repentance to the offence they committed previously are again involved in the commission of a similar offence. They are, therefore, seem to be habitual offenders.

4. It is significant to note that irrespective of factory premises of the firm was handed over on Supurdari to the accused-petitioner subject to the condition that no manufacturing activities shall be carried out without seeking permission of the Court. As per the evidence collected at this stage, both the accused have been found to have manufactured the drugs unauthorisedly and without seeking permission of learned Sessions Judge, Sirmaur District at Nahan. Not only this, but the drugs seized from the factory premises, which on analysis have been found to be spurious, were being supplied to Government Institutions in Arunachal Pradesh, Mizoram, Tripura, Uttar Pradesh and Chhatisgarh etc. Some labels with a note "supply of Government of Bihar" were also seized from the factory premises.

5. The police is required to investigate each and every aspect of the matter in order to find out the truth. The investigation conducted at this stage is not sufficient and as such the present is a fit case where custodial interrogation of both the accused-petitioners is required because as per the allegations that they are manufacturing the spurious drugs and the offence they committed is not only against an individual, but against the public at large, the present is not a case where the discretion in the matter of grant of bail should be exercised in favour of the accused-petitioners. Since they are involved in the commission of an offence not only serious but heinous also and as in the given facts and circumstances their custodial interrogation is required, therefore, they are not entitled to be enlarged on bail. Both the petitions being devoid of any merits are accordingly dismissed.

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

Naresh Kumar ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. Revision No. 121 of 2008.
Reserved on 26.04.2016.
Decided on: 1.06.2016.

Indian Penal Code, 1860- Section 279 and 338- Accused was driving a jeep in high speed- he was requested to slow down the vehicle but in vain - vehicle hit the tree- PW-3 and PW-9 suffered injuries by the bed-box being carried in the vehicle - accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that PW-3, PW-7 and PW-9 corroborated the prosecution version- accused was carrying loose bed box in the vehicle which had hit the passengers sitting in the rear- it was his duty to ensure that goods are loaded in such a manner as not to endanger life or safety of other person - bed box had hit the passengers after the application of the brakes and, therefore, accused was negligent in driving the vehicle- Courts had rightly convicted the accused, however, report of Probation Officer called. (Para-12 to 30)

For the petitioner : Mr. Onkar Jairath, Advocate.
For the respondent : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

This revision petition is against judgment dated 23.06.2008 passed by learned Sessions Judge Kangra at Dharamshala, in Criminal Appeal No. 8-D/X-2006 vide which conviction and sentence imposed by the learned JMIC-II, Dharamshala upon petitioner in Case No. 26.II/2004, in Case FIR No. 267/2003, Police Station Dharamshala, District Kangra, H.P. under Sections 279 and 338 IPC, has been affirmed.

2. Prosecution case is that on 29.12.2003, PW-9 Shamashudin, PW-3 Rehman Shekh, PW-7 Ahmad Khan and Sarajdin had loaded vehicle No. HP-39A-3334 for transportation households from Civil Bazar to one government quarter situated near Sainik Rest House Dharamshala. During transportation, they were sitting in rear portion of the vehicle alongwith goods. Petitioner was driving the Jeep in high speed and near Shaheed Smarak they had shouted to drive the vehicle slow. However, petitioner did not accede to their request and struck the vehicle with tree as a result of which double-bed box loaded in the vehicle had fallen upon them and PW-9 Shamashudin has suffered injuries of both legs & hand and PW-3 Rehman Shekh had suffered injuries on whole body. Both of them were unconscious and were taken to the hospital. Statement of PW-9 Ext. PW-9/A was recorded on 30.12.2003 by PW-10 SI Duni Chand alleging that accident had occurred on account of rash and negligent driving of petitioner-accused.

3. On the basis of Ruka statement PW-9/A, FIR Ex. PW-5/A was recorded in Police Station Dharamshala. After completion of investigation, challan was put in the Court. Prosecution has examined 10 witnesses to prove guilt of petitioner-accused. Statement of petitioner-accused was recorded under Section 313 of Cr.P.C. and no defence witness was examined.

4. After completion of trial the learned trial Court has vide judgment dated 21.01.2006 convicted the petitioner-accused and has sentenced simple imprisonment for a period of 10 days and to pay a fine of Rs. 500/- under Section 279 IPC and in default of payment of fine, further simple imprisonment for 5 days and simple imprisonment for a period of 15 days and to pay a fine of Rs. 500/- under Section 338 of IPC and in default to pay fine, further simple imprisonment of 5 days.

5. The petitioner-accused had preferred an appeal against the judgment dated 21.01.2006, passed by learned trial Court. The said appeal has been dismissed vide judgment dated 23.06.2008 by learned Sessions Judge, Kangra at Dharamshala.

6. I have heard learned counsel for the parties and gone through exhibited documents placed on record.

7. Mr. Onkar Jairath, learned counsel for petitioner-accused has argued that both the courts below have committed mistake and illegality by misreading evidence and convicting the

petitioner-accused and impugned judgment suffers perversity and illegality. Impugned judgments have been passed ignoring settled law of the land and finding rendered by lower courts runs counter to pronouncements of Apex Court.

8. It has been submitted on behalf of petitioner-accused that it has come in the statements of witnesses that vehicle in question was being driven in normal speed and Jeep had not struck with tree but it was double bed box loaded on Jeep which struck with branches of tree leaning towards road when petitioner had driven Jeep to side of road and had applied brakes to avoid collusion with vehicle taking pass from opposite side. It has been submitted that witnesses have admitted that PW-3 Rehman Shekh and PW-9 Shamashudin had received injuries on account of felling of double bed box upon them and Jeep had not struck with tree.

9. It has been contented that goods were loaded by injured persons and their companions who were also travelling in Jeep with goods. It was their own negligence that they had kept bed boxes loose and there is no rash and negligent act on the part of petitioner inviting criminal liability.

10. On the other hand Mr. Ramesh Thakur learned Deputy Advocate General has contented that there is no material defect, mistake, illegality, material irregularity or perversity in judgments passed Courts below warranting interference of this Court under revisional powers and thus, prayed for dismissal of the petition.

11 On behalf of the State it is submitted that accident has been admitted by petitioner and even if it is presumed that Jeep had not struck with tree and accident had occurred on striking of branches leaning towards road with loosely loaded bed boxes on taking vehicle to side of road coupled with sudden application of breaks to avoid collusion with vehicle coming from opposite side, then also, petitioner-accused has acted in rash and negligent manner endangering human life, personal safety others resulting into grievous injuries rendering himself liable to be punished under Sections 279 and 338 IPC as failure to tie or get tied bed boxes is an omission on the part of petitioner amounting to rash and negligent act for fastening criminal liability upon him and therefore, petitioner has rightly been convicted and sentenced by lower courts.

12. PW-3, PW-7 and PW-9 have corroborated the prosecution story in examination in chief. However, in their cross examination it has come that it was not Jeep but loose bed boxes which had struck with tree and had fallen upon PW-3 and PW-9 causing grievous injury to them.

13. The accident, driving of vehicle by the petitioner-accused with loose bed boxes hovering on angles of Jeep, grievous injuries sustained PW-3 and PW-9 due to felling of loose bed boxes upon them after striking with tree branches are not disputed rather admitted and suggested by petitioner. PW-7 Ahmad Khan and PW-9 Shashdin though in examination-in-chief have stated that petitioner has struck Jeep with tree and he was driving the vehicle in high speed, however, in cross-examination they have admitted that Jeep had not struck with tree but bed boxes had struck with tree. PW-7 Ahamad Khan has also admitted that branches of tree were leaning towards road.

14. PW-4 Vinod Kumar was conductor of Jeep at that time and for resiling his earlier statement recorded under 161 Cr.PC, he was declared hostile and was subjected to cross-examination by the learned Public Prosecutor as well as defence counsel. It is well settled law that statement of hostile witness is not to be brushed aside in toto but the Court can look into the statement and consider portion of that statement corroborated by other evidence for charming truth. He has stated in his examination-in-chief that during course of giving pass to two buses and one truck, Jeep had collided with tree and because of that double bed box had caused injury to the labour. He has admitted that bed boxes were hovering on angles of Jeep. However, he has stated that bed boxes were loaded on angles by the labour and were not tied as labour had not allowed to tie these bed boxes.

15. PW-4 Vinod Kumar had been colleague of petitioner and there is reason for his turning hostile of help petitioner but his statement as a whole corroborated by other evidence indicates that bed boxes were loaded on angles without tying and bed boxes had struck with tree and had fallen upon the labour causing injuries to the PW-3 and PW-9.

16. In the light of evidence of this case, it is to be determined that whether it was legal duty of driver to tie up or get tied bed boxes before moving vehicle. Further whether driving Jeep with loose bed boxes causing grievous injury to PW-3 and PW-9 on account of felling bed boxes on sudden application of brakes and striking with leaning branches of tree amounts to gross negligence inviting criminal liability upon petitioner.

17. It is settled law that for punishing under criminal gross negligence on the part of person concerned is necessary ingredient. Gross negligence includes an act and also omission to perform legal duty but not moral duty. Such act and omission must be cause of accident as well as injury. Negligence of someone else must not be there.

18. It is primary duty of driver to ensure before driving vehicle that goods are loaded in such a manner so as not to cause danger of life or safety of other person on its movement. However necessity to tie up goods loaded in vehicle will also depend upon various factors like nature and weight of goods, distance to be covered, road condition and gradient of road etc. relevant for taking decision at particular point of time.

19. In case goods are heavy enough ruling out possibility of tilting or slipping even without tying and distance is too short within city or town to be covered on municipal road in good condition with normal gradient, necessity or requirement of tying up goods may not be felt. Therefore, driving a vehicle with loose goods may or may not tantamount to gross negligence attracting criminal liability in peculiar circumstances of a particular case.

20. In present case bed boxes had not slipped with their own weight for reason that bed boxes were not tied, but bed boxes had fallen on sudden application of brakes and striking with leaning branches of tree. Therefore, issue that who was responsible to tie up goods but manner, in which vehicle with loosely loaded goods was being driven and handled, is not so relevant as main cause of accident was sudden application of brakes and striking of bed boxes with leaning branches of tree.

21. Loose loaded bed boxes are remote cause whereas application of sudden brake coupled with striking of bed boxes with tree is direct and immediate cause of accident in present case.

22. Petitioner was knowing that he was driving vehicle with loose household articles loading bed boxes on angles of Jeep with labour sitting with goods in rear portion of the Jeep. Defence propounded on behalf of petitioner is that accident had occurred on sudden application of brakes at the time of crossing/passing other vehicles from opposite side and also because of striking of leaning branches with loose bed boxes.

23. It is also defence of the petitioner that speed of Jeep was normal and though some of the witnesses in their cross examination have stated that speed of Jeep was normal but for rash and negligent act speed is not relevant in all cases. In the present case when vehicle was being driven with loose articles loaded in it, speed is irrelevant but the manner in which vehicle was to be driven and was being driven is relevant. Petitioner had taken risk of transporting goods without tying goods properly then it was duty of petitioner to be careful and cautious in driving the Jeep as to avoid accident as occurred. Cause of accident is laxity on the part of driver to perform his duty to ensure proper loading of goods and also to drive vehicle with care and caution so as to avoid felling of loose goods at the time of movement of vehicle on the road.

24. Petitioner cannot shift his liability and responsibility to drive the vehicle without endangering the life and or without causing injury to other by saying that labour had not tied bed boxes or had not allowed to tie bed boxes.

25. Further at the time of driving vehicle with loose goods in his vehicle, it was duty of petitioner to drive vehicle in such a manner that there is no necessity of applying sudden brakes as any prudent person can visualize that on application of sudden break to a vehicle with loose house hold articles particularly hovering bed boxes on angles of vehicle will result into felling of goods on the labour travelling with house-hold in rear portion of vehicle. The leaning branches of tree had not come down suddenly to strike with bed boxes. It was duty of driver to be more careful and branches of tree must have been seen by the petitioner.

26. It was duty of petitioner to notice and act according to condition of road, leaning branches, flow of traffic and manner of loaded goods and also height and width of vehicle as well as loaded goods.

27. There is omission on the part of the petitioner to drive vehicle without properly loading and tying goods and also there is an act on the part of petitioner to drive vehicle in such a manner that loose goods were bound to fall.

28. Scrutiny of evidence on record reflects that both the Courts below rightly held that omissions and commissions on the part of petitioner tantamount of gross negligence causing injures to labour safety in road portion of the vehicle. Findings recorded by learned trial court are based on evidence and cannot be said to be incorrect, illegal or improper. Therefore, I find no error in holding the accused guilty under Section 279 IPC and 338 IPC and therefore conviction of accused under Sections 279 and 338 IPC is upheld.

29. Shri Onkar Jairath has argued that the incident took place in the year 2003 and petitioner has been undergoing the agony of a long drawn litigation for the last more than 12 years. He submits that keeping in view the facts of the present case no substantive sentence be imposed upon petitioner and he be given the benefit of probation. From the evidence on record it is obvious that after the incident took place it was the petitioner himself who took the injured to the hospital. The injured have suffered a grievous injury but keeping in view the fact that the petitioner has been fighting the legal battle for more than 12 years it may not be appropriate to sentence him to substantive imprisonment. Keeping in view the nature of the offence, the age of the petitioner and his conduct in taking the injured to hospital, I am of the opinion that this is a fit case where benefit of the Probation of Offenders Act, 1958 should be granted to the petitioner. The learned lower Appellate Court has not at all considered this aspect of the matter.

30. However, before passing a final order in this behalf it is necessary to call for the report of the Probation Officer concerned. Accordingly, the Probation Officer of District Kangra is directed to submit his report as to whether Shri Naresh Kumar @ Sarju S/o Shri Govind Ram R/o Sham Nagar, Tehsil and P.S. Dharamshala, District Kangra, H.P. should be released on probation or not. The Probation Officer is directed to submit his report on or before 30.06.2016. List on 4.07.2016 on which date the petitioner shall remain present.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Smt. Nisha Devi ....Petitioner.

Versus

Satluj Jal Vidyut Nigam & others. ....Respondents.

CWP No. 1490 of 2008.
Reserved on18.5.2016.
Decided on: 01.06.2016.

Constitution of India, 1950- Article 226- Land of the petitioner was acquired for the construction of Nathpa Jhakri Project- Compensation was paid to her - it was provided in the

rehabilitation scheme that employment will be provided to those persons who had been affected by the construction of the project- petitioner contended that benefit of employment was not provided to her- order of priority for consideration of employment is (i) the persons who have been rendered completely landless, (ii) the persons who are left with land holding less than five bighas, (iii) the person whose business is served completely and who does not have any alternative to earn his livelihood, and (iv) others affected by the acquisition subject to verification of their overall financial position - the benefit was to be provided to the family who is rendered landless- term 'family' is defined as husband/wife who is entered owner/co-owner of land in the revenue record, children including step or adopted children and parents and those brothers and sisters who are jointly living as per Pariwar Register on the date of notification- the petitioner was married and her name was entered in her husband's family in district Kullu- she returned to Village Jhakri to educate her children- she has not produced any record to show that her name was registered as a separate family unit in the Pariwar Register of Gram panchayat 'D' in the year 1992- Writ petition disposed of with a direction to the respondent to permit the petitioner to prove whether she was part of family or not on the date of acquisition. (Para 11-23)

For the petitioner.	: Mr. Diwan Negi, Advocate.
For respondents No1 & 2.	: Mr. Ramakant Sharma, Sr. Advocate with Ms. Devyani Sharma, Advocate.
For respondent No.3.	: Mr. V.S. Chauhan, Addl. With Ms Parul Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

The present petition has been filed praying for the following reliefs:

"a) That a writ of certiorari may kindly be issued to the respondents directing them to produce the entire records pertaining to the petitioner's case and the impugned letter dated 23.6.2007 (Annexure P-8), may kindly be quashed.

b) That a writ of mandamus may kindly be issued to respondent No.3 directing him to consider all the documentary proof produce by the petitioner and to issue a certificate to her to the effect that she falls within the definition of a 'landless family' and is thus entitled to all the benefits under the Rehabilitation and Resettlement Scheme promulgated by the respondents.

c) That a writ of mandamus may kindly be issued to the respondents directing them to grant all the benefits to the petitioner under the Rehabilitation and Resettlement Scheme in accordance with her entitlement."

2. The case of the petitioner is that she was owner in possession of land measuring 0-09-90 hectares situated in village Jhakri, Tehsil Rampur, District Shimla which was acquired for the purpose of project by respondents No. 1 and 2. According to her, there is an Award as well as Resettlement and Rehabilitation Plan prepared by respondents No.1 and 2 for the persons, who have been displaced on account of construction of Nathpa Jhakri Project. The Award prepared by respondents No.1 and 2 (Annexure P2) contemplates that employment in the project area is to be provided to those persons who had been affected by construction of the project and the categories in order of priority includes persons who have been rendered completely landless as well as persons who have been left with land holding less than 5 bighas.

3. The contention of the petitioner is that, as a result of acquisition proceedings undertaken by respondent No.1 and 2, she has been rendered landless. According to her, land owned by her in Chak Gaura measuring about ½ bigha has been transferred and mutated in the name of her brother under family settlement and as a result of this coupled with the fact that

earlier the land she used to own has been acquired by respondent No.1 & 2, she has been rendered landless.

4. According to her, respondent No.3 was appointed as Rehabilitation and Resettlement Officer by the State Government on 8.2.1994 to implement the terms of the Award as well as Resettlement and Rehabilitation Scheme (hereinafter to be referred as 'Scheme') of respondent No.1 and 2. She applied to respondent No.3 for grant of benefits under the said Scheme. It is further her case that on 7.12.1999 Government of Himachal Pradesh clarified the definition of 'family' for the purpose of Scheme and as per said clarification, family means husband/wife who is entered as owner/co-owner in revenue record, 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 entry of Pariwar Register, as on the date of Notification Section 4 of Land Acquisition Act, 1894. (in short 'Act') When petitioner became aware of the said position and of the factum that she was eligible for the benefits under the Scheme, she applied to respondent No.3 on 19.5.2001 for conferring benefits upon her under the said Scheme including providing her a job under the Scheme in issue. She repeatedly visited the office of respondents and was assured on every occasion that efforts were being made to grant her benefits as per the Scheme.

5. As per the petitioner under the Scheme, each landless family was to be allotted developed agricultural land equivalent to the area acquired or 05 bighas whichever is less, as well as other benefits including suitable employment to one member of each displaced family. It is further her case that for the purpose of employment, it was not necessary that a family should be rendered landless. However, the petitioner, though having been rendered landless, was not being issued necessary certificate by respondent No.3 nor respondents No.1 and 2 were granting her benefits under terms of the Award as well as the Scheme. Petitioner had earlier filed civil writ petition 476 of 2004 in this Court which was disposed of by this Court vide decision dated 24.4.2007 by issuing direction to respondent No.3 therein to consider the case of the petitioner in view of the amended definition of family and in case she is found landless within the meaning of amended definition then for issuance of requisite certificate in her favour within two months with further direction that on such certificate of eligibility being issued in favour of the petitioner, respondent No.1 will process and decide the case of the petitioner for the grant of relief, if any, available to her under the Scheme.

6. Vide Annexure P-8 which was received by her in the first week of July, 2007, respondent No.3 had rejected her case by holding that on the basis of revenue record, statement of petitioner and entries recorded in the Pariwar Register, it has been found that petitioner has not been entered as a separate family as on 16.6.1999, as per the definition of family and therefore, she does not fall under the category of landless person within the meaning of definition of family.

7. According to the petitioner, this decision of respondent No.3 is contrary to records and had she been given proper opportunity to submit documentary proof, she would have had established on record that she falls within the ambit of definition of 'landless'. Her case is that after her marriage in the year 1987, her name was deleted from the Pariwar Register Jhakri, Gram Panchayat Dhar Gaura and included in the Pariwar Register of her husband's family, at Gram Panchayat Sargha, District Kullu. After residing with her husband's family for a couple of years in District Kullu, she returned to village Jhakri in the year 1989 with the intention to educate her children there, as there was no proper school in her husband's village. She gave birth to a son on 26.10.1988 and daughter in the year 1991 and both her children underwent their education in Jhakri. Her further case is that she is residing independent either of her parental family or her husband's family. According to her, this is substantiated from record of Gram Panchayat Jhakri for the year 1998. Petitioner is maintaining separate residence at Jhakri as a separate family along with her children much before the year 1999, which was evident from various documents like Water connection, Electricity connection, Ration Card and Gas connection etc. According to her, she produced all these documents before respondents on

various dates after receiving letter of rejection but respondents are not taking cognizance of the same. According to her, her case has been rejected by construing the entries recorded in the Pariwar Register for the year 1989 to 1998. Therefore, in this background, the petitioner has filed present petition praying for relief already mentioned hereinabove.

8. As per reply filed to the petition by respondents No.1 and 2, there is no infirmity with the order passed by respondent No.3, vide which the said authority has come to the conclusion that petitioner does not fall in the category of landless within the definition of family. According to said respondents, besides the land which was owned by petitioner in Jhakri, she was owner of land measuring 0.05.30 hectares in Chak Gaura which was not acquired by the said respondents. The said land was transferred by petitioner by way of relinquishment deed on 4.5.2000 in favour of her brother. Thus, it is not as if the petitioner was rendered landless because her entire land was acquired by respondent No.1 and 2 for the purposes of the project. Even after acquisition of the land by respondent No.1 and 2, the petitioner was possessed with sufficient land which she relinquished in favour of her brother and accordingly she cannot be termed as landless within the meaning of the word 'family', as is being claimed by her. It is further the case of respondents No.1 and 2 that petitioner was married in the year 1987 in village Banuridhar, Gram Panchayat Dhara-Sarga, Tehsil Nirmand, Distt. Kullu. Therefore, according to respondents, the factum of land coming to the share of petitioner having been acquired thereafter by no stretch of imagination can permit the petitioner to state that she has been displaced from her land and house and her existence has been affected by the project. It was further mentioned in the reply that, in fact, purposely petitioner has not disclosed the date on which she relinquished her share in favour of her brother. This relinquishment was made on 4.5.2000. The said respondents also refuted contention of the petitioner that she was not given reasonable time by respondent No.3 to place on record the relevant documents in order to demonstrate that she was entitled to the benefits envisaged in the Rehabilitation Policy of respondent No.1 and 2. As per said respondents, keeping in view the fact that petitioner had already been married before acquisition of her share in the land at Jhakri it could not be said that she falls in the definition of displaced or landless person. According to them, respondent No.3 had rightly rejected the case of the petitioner for issuance of certificate identifying the family to whom benefit is to be given under the Scheme.

9. In rejoinder which has been filed to the said reply by petitioner, she has reiterated that respondent No.3 has wrongly come to the conclusion that she does not fall within the definition of 'family' especially keeping in view the fact that her was a separate family as per Annexure P-12 appended with the petition. It was further stated that factum of her having relinquished her share in favour of her brother could not have rendered her claim liable to be rejected for the reason that as per policy of the respondents, a person who was left with less than 05 bighas of land after acquisition was also eligible for the grant of benefits and in the present case the total land holding of the petitioner after the land was acquired by respondents was 15 biswas only, which she relinquished in favour of her brother.

10. I have heard learned counsel for the parties and gone through the pleadings of the parties.

11. Before referring to the contention of the parties, it is necessary to take note of relevant parts of the Award and relevant provisions of Scheme of the respondents which are placed on record as Annexure P2 and P3. As per relevant portion of the Award, (Annexure P2) order of priority to be considered for employment from amongst those who have been affected by the project is as under:-

> *"1. The persons who have been recorded completely landless.*
>
> *2. The persons who are left with land holding for less than 5 bighas.*
>
> *3. The persons whose business is served completely and do not have any other alternative to earn their livelihood.*

4. Others affected by this acquisition subject to verification of their overall financial position."

12. Similarly, a perusal of extract from the Minutes of the Meeting of Board of Directors dated 27.11.1991, Annexure P3, will demonstrate that the Board discussed at length and approved the plan for Rehabilitation and Resettlement of Persons being displaced due to construction of NJPC as is indicated below:-

"a) To allot developed agricultural land, to each family, who is rendered landless, equivalent to the area acquired or 5 bighas, whichever is less. This 5 bighas would include any land left with the family after acquisition. This would be done only after the certificate of his having become landless is submitted duly signed by Sub-Divisional Magistrate, Rampur.

b) To provide a house with a building up plinth area of 45 sqm. to each landless family whose house is acquired alternatively to pay Rs. 45,000/- to each landless family, whose house is acquired, and constructs his house at his own cost, with a plinth area of 45 sqm. or more. In case of such persons constructs less than 45 sqm. plinth area, then the amount to be given will be worked out in direct proportion to the area of house constructed vis-à-vis Rs. 45,000/- as the cost of 45 sqm. Plinth area.

c) To provide water supply, electricity, street light and approach paths in the rehabilitation colonies at project cost.

d) To provide transportation at project cost for physical mobilization of all the displaced families, as soon as the houses get constructed.

e) To give preference in allotment of shops in the proposed market to the shopkeepers being displaced from village, Jhakri. The commercial premises/shops allotted to any oustee on preferential basis shall be utilized by the oustee for h is bonafide use only.

f) To provide suitable employment to one members of each displaced family according to his capability and qualifications subject to availability of vacancies. However, persons who are allotted shops would not be eligible for benefit of employment and vice-versa.

g) To incur the estimated expenditure of Rs. 184 lacs on rehabilitation (Annexure-VII of the Rehabilitation Plan) against an adhoc provision of Rs. 18 lacs in Detailed project Report (September, 1986 price level)."

13. Annexure P5 is communication dated 7th December, 1999 addressed by Financial Commissioner-cum-Secretary (Revenue) to the President, Registered Welfare Society, Jhakri, Shimla, as per which the definition of the family as per Item No.1 of State Level Nathpa Jhakri and Baspa Project Relief and Rehabilitation Advisory Committee's meeting held on 16.6.1999 has been mentioned:-

"Family: 'Family' means husband/wife, who is entered as owner/co-owner of land in the revenue record, the children including step or adopted children and includes his/her parents and these brothers and sisters who are living jointly with him/her as per entries of Panchayat Parivar Register as on the date of Notification of Section- of the Land Acquisition Act, 1894.

Provided that only the Panchayat Parivar Register entry, as it stood on the date of Notification of Section4 of Land Acquisition Act, 1894, shall be taken into account for the purpose of 'Separate Family' for rehabilitation benefit i.e. employment in the project."

14. Now the moot issue is as to whether the petitioner falls within the definition of 'family' as is defined in Annexure P5 or not. According to Annexure P5, 'family 'means husband/wife, who is entered as owner/co-owner of land in the revenue record, children

including step or adopted children and includes his/her parents and these brothers and sisters who are living jointly with him/her as per entries of Panchayat Pariwar Register as per Notification of Section 4 of the Land Acquisition Act, 1894 (in short 'Act'). **It is further stated therein that only the Panchayat Pariwar Register entry as it stood on the date of Notification of Section 4 shall be taken into account for the purpose of separate family for rehabilitation benefits that is employment in the project.**

15. Now it is necessary to take note of the fact as to whether the petitioner was registered as 'separate family' in the Panchayat Pariwar Register as it stood on the date of Notification of Section 4 under the Act. In the present case as per averments made in para 2 of the petition, the land in ownership and possession of the petitioner was acquired by respondents No.1 and 2 in the year 1991 for the construction of residential colony for the employees of the project. Thus, according to the petitioner, her land was acquired in the year 1991. Though, the date of issuance of Notification under Section 4 of Act is not given but broadly, let us see as to whether the petitioner is registered in the Panchayat Pariwar Register as a separate family or not even in the year 1991 when her land was acquired.

16. It is the case of the petitioner herself that she was married in the year 1987. She has appended on record copy of Pariwar Register of Gram Panchayat, Dhar Gaura for the year 1985-86, in which her name is also mentioned and her year of birth is given as 1968. It is further her case that after her marriage in the year 1987, her name was deleted from the Pariwar Register of Gram Panchayat, Dhar Gaura and included in the Pariwar Register of her husband's family at Gram Panchayat Sargha, District Kullu, as was evident from Annexure P10. Further case of the petitioner is that after residing with her husband, she returned back to village Jhakri in the year 1989 with the intention to educate her children. According to her, the factum of her residing independently either of her parental family or her husband's family is confirmed from the Pariwar Register of Jhakri, Gram Panchayat, Dhar Gaura for the year 1998. Annexure P12 is a copy of Pariwar Register of Gram Panchayat Dhar Gaura, Distt Shimla pertaining to the year 1998. The petitioner has not produced any document on record to demonstrate that her name was registered as a separate family unit in the Pariwar Register of Gram Panchayat Dhar Gaura as in the year 1991 that is the year in which her land was acquired for the purpose of project by the respondent-Company. This Court is not oblivious to the fact that Annexure P5 has been issued on 7th December, 1999. However, it still remains a fact that it is categorically mentioned in letter dated 7.12.1999 that only the Panchayat Pariwar Register entry, as it stood on the date of issuance of Notification under Section 4 of the Act, 1894 shall be taken into account for the purpose of separate family for rehabilitation benefit i.e. employment in the project. Because it is the case of the petitioner that her land was acquired in the year 1991 and in the absence of their being anything on record to demonstrate as to what is the date of issuance of Notification under Section 4 of the Act, this Court is assuming that the Notification was issued somewhere in the year 1991 or earlier. However, the fact of the matter remains that the petitioner has not produced even an iota of material on record to demonstrate that either before 1991 or during the year 1991 her name was registered as a separate family in the Pariwar Register of Gram Pancyayat, Dhar Gaura.

17. Rule-21 of the Himachal Pradesh Panchayati Raj (General) Rules, 1997 deals with Pariwar Register and registration of births, deaths and marriages. The said Rule reads as under:-

> *21. Pariwar Register and registration of births, deaths and marriages.-*
>
> *(1) After the Government has established a Sabha by a notification under sub-section(1) of section 3, a Pariwar Register shall be prepared for every Gram Sabha in Form-19 appended to these rules. It shall contain the names and particulars of all persons, family-wise, who are the bonafide residents of the village which forms part of the Sabha area. The register shall be prepared by the*

Panchayat Secretary and shall be verified by the Panchayat Inspector of the concerned Block.

(2) At the close of each calendar year, the entries in the Pariwar Register, required to be prepared under sub-rule(1) shall be revised and all entries pertaining to births, deaths and marriages shall be made in the register which had taken place during the preceding year i.e. up to the 31st day of December. No other addition or alternation may be made without any authenticated evidence or certificate of the member of concerned constituency of the Gram Panchayat. In the event of division of the family, separation of family may only be entered in the Pariwar Register on the decision of the Gram Sabha by passing a resolution by majority in its general or special meeting on an application made by the head of family concerned. However, the Gram Sabha shall take into consideration the definition of the family as defined under clause (13-A) of section 2 of the Act while deciding the matter regarding division of family.

(3) The register shall be revised and brought upto-date under sub rule (2) by 31st January of each year and public notice will be issued to the effect that -

(a) the register has been revised and brought upto-date under sub rule(2);

(b) the register, as revised, is available for public inspection for a period of fifteen days(excepting the public holidays) between 10 AM to 5 PM in the office of the Gram Panchayat ;

(c) if any person has to make any objection with regard to any entry or any omission in the register, he may make the objection to that effect to the Secretary of the Gram Panchayat within the said period of fifteen days. The notice shall be pasted in the office of the Gram Panchayat and other conspicuous places in a Gram Sabha area.

(4) The revised entries made in the register under sub-rule(2) and the objections received under sub-rule(3), shall be taken into consideration and disposed off and verified by the Panchayat Inspector after having given an opportunity of being heard to the person(s) concerned.

(5) The Secretary of the Gram Panchayat shall undertake registration of births and deaths in accordance with the provisions of the Registration of Births and Death Act, 1969 and rules made thereunder.

(6) The officer or employee of the Gram Panchayat, appointed as Registrar of Marriages, shall undertake registration of marriages in accordance with the provisions of the Himachal Pradesh Registration of Marriages Act, 1996 and the Himachal Pradesh Registration of Marriages Rules, 2004."

18. A perusal of the said Rule demonstrates that there is a detailed procedure laid down with regard to the entries to be made in the *Parivar* Register which is to be maintained in the Panchayat and how said register is to be revised.

19. Rule-21 of the Panchayati Raj Act deals with the maintenance and revision of *Parivar* Registers by the Panchayat. There is a detailed procedure laid down in the said Rule as to how revision has to be made in the *Parivar* Register. Rule 21(2) provides that in the event of division of the family, separation of family may only be entered in the *Parivar* Register on the decision of the Gram Sabha by passing a resolution by majority in its general or special meeting on an application made by the head of family concerned. It is further mentioned that it shall be the duty of the Panchayat Inspector to verify these entries after satisfying himself about the reasons recorded by the Panchayat Secretary. He shall also put his initials on the *goshwara* prepared by Panchayat Secretary on Form 19-A. Rule 21(3) envisages that the register shall be revised and brought upto-date under sub rule (2) by 31st January of each year.

20. A perusal of the said provision makes it amply clear that revision of *Parivar* Register is a cumbersome process and the same is undertaken by complying with the procedural formalities which are envisaged in the Rules mentioned above. Therefore, the only prudent conclusion which can be drawn with regard to a family being treated as separate family as per the said Rules is that a family can be treated as a separate family only after it is duly entered as such in *Parivar* Register after complying with all the procedural formalities contemplated in Rule 21 (supra).

21. In my considered view though the definition of family has been amended on 7th December, 1999, however, the fact still remains that the entries in the Panchayat Pariwar Register are to be taken as they stood on the date of issuance of Notification Section 4 of the Act for the purpose of separate family, meaning thereby that after 7th December, 1999, though now the word 'family' was to be interpreted in the manner in which it is contemplated in this communication, however, still in order to identify as to how actually were entered as separate family in the Panchayat Pariwar Register, the relevant date for that is not 7th December, 1999 but the date of issuance of Notification under Section 4 of the Act.

22. A perusal of the impugned order issued by respondent No. 3 will demonstrate that this order has been passed by assuming that the relevant date on which a person is to be identified as separate family as envisaged in communication dated 7.12.1999 is the date when the relevant meeting was held i.e. 16.6.1999. In my considered view respondent No.3 has erred in coming to this conclusion. The said authority has failed to appreciate that vide communication dated 7.12.1999, though the definition of term family had been modified, however, it still remains a fact that it was clearly mentioned in this Notification that only the Panchayat Pariwar Register as it stood on the date of Notification of Section 4 under the Act shall be taken into account for the purpose of separate family for rehabilitation etc. including employment in the project. Therefore, the impugned order passed by respondent No.3, though is not liable to be set aside on the grounds taken by the petitioner, however, the same is liable to be set aside on the ground that the said authority has failed to appreciate that the relevant date for the purpose of identifying as to whether a family is entitled for rehabilitation benefit is not 16.6.1999 but the date of issuance of Notification under Section 4 of the Act. Therefore, on this count, the impugned order passed by respondent No.3 i.e. Annexure P8 dated 23.6.2007 is quashed and set aside.

23. However, the fact of matter still remains that yet it cannot be deciphered as to whether the petitioner is entitled for the benefits under the Scheme or not. For this it is necessary to find out as to what was her status as on the date when the Notification under Section 4 of the Act was issued on the basis of which her land was acquired by respondents No.1 and 2.

In this view of the matter the present writ petition is disposed of by setting aside the impugned order passed by respondent No.3, Annexure P8, with further direction to the said respondent to provide an opportunity to the petitioner to prove her status as to whether she falls within the definition of 'separate family' as envisaged in communication dated 7.12.1999 **as on the date when Notification was issued under Section 4 of the Land Acquisition Act on the basis of which land belonging to her share was actually acquired by respondents No.1 and 2.** This exercise shall be completed by respondent No.3 positively on or before 30.9.2016 and incase the petitioner is found to be falling within the definition of 'separate family' as on the date when the Notification under Section 4 of the Act was issued then necessary benefits be conferred upon her within a further period of three months. With the said observations, the petition is partly allowed and disposed of in above terms, so also pending application(s), if any. No order as to cost.

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

Sh. R.K. Jha & anr. .....Petitioners.

Versus

State of Himachal Pradesh & ors. .....Respondents.

Cr.MMO No. 121 of 2016.
Date of decision: June 01, 2016.

Code of Criminal Procedure, 1973- Section 438-An FIR was registered against the petitioner no. 1 for the commission of offences punishable under Sections 420 and 406 of IPC- status report shows that the petitioner no. 1 has absconded – he had received Rs. 9.60 lakh for the construction, operation and maintenance of Jan Suvidha Parisars- the work was stopped without any intimation- the investigation has not proceeded due to non- availability of accused- petition dismissed. (Para 2-4)

For the petitioners : Mr. Praveen Chandel, Advocate.
For the respondents : Mr. D.S. Nainta, Addl. AG.

The following judgment of the Court was delivered:

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

Petitioner No. 1 is an accused in FIR No. 145/14, Annexure P-1 registered under Sections 420 and 406 of the Indian Penal Code in Police Station, Ghumarwin, District Bilaspur, H.P. He is the Chairman of All India Environment and Rural Development Social Organization having its head office at Dwarka in Delhi (petitioner No. 2). The department of Tourism and Civil Aviation, Himachal Pradesh has released the funds to the tune of Rs.9.60 lacs to the petitioners for construction, operation and maintenance of Jan Suvidha Parisars (toilets and bath complex) at Kandrour-Harlong Chowk, District Bilaspur in order to provide facilities to the tourism/local people. The agency chaired by the accused-petitioner No. 1 has executed some work at the site and abandoned the work at his own without any intimation to the department. Now the correspondence being made is also not attended to nor is he picking the telephone calls. The agreement was executed with the Director, Tourism and Civil Aviation, Himachal Pradesh by the accused-petitioner No. 1. Therefore, a complaint was made to the Superintendent of Police, Bilaspur by Deputy Director, Tourism and Civil Aviation, Mandi and Bilaspur. On the basis of the complaint so made, FIR has been registered.

2. The status report placed on record reveals that accused-petitioner No. 1 after the registration of the case is not available to the investigating agency for the purpose of investigation and has absconded.

3. Admittedly the accused-petitioner No. 1 is the chairman of the agency, namely, All India Environment & Rural Development Social Organization. There is again no quarrel so as to he has received a sum of Rs.9.60 lacs from the department of Tourism and Civil Aviation, Himachal Pradesh for construction, operation and maintenance of Jan Suvidha Parisars (toilet and bath complex) at Kandrour-Harlog chowk in District Bilaspur. The police report reveals that the work is incomplete. The accused-petitioner No. 1 has stopped the work without any intimation to the department. The allegations against him that he is now not responding to the correspondence being made nor picking the telephone calls seem to be correct as he has not associated with the investigation of the case also. The only argument put forth by learned Counsel is that the liability if any is civil in nature and not criminal. While drawing the attention of this Court to the provisions contained under Section 415 of the Indian Penal code it has been submitted that in the given facts and circumstances no criminal liability can be fastened on the

accused-petitioner No. 1. This Court feel that the submissions so made at this stage are premature because this case is yet at initial stage. The judgment of the Apex Court in ***V.P. Shrivastava*** *versus* ***Indian Explosives Limited and Others, (2010) 10 SCC 361*** is hardly of any help to the case of the accused-petitioner No. 1 being distinguishable on facts.

4. As a matter of fact, appropriate course available to the accused-petitioner No. 1 was to have associated himself with the investigation of the case and urged the points in his defence during the course of investigation. The investigating agency either may have filed the cancellation report in the event of no case ultimately found to be made out against him or in the alternative the accused-petitioner No. 1 to have resorted to the remedy available to him for the cancellation of FIR. This petition at this stage is, however, premature. In case the accused-petitioner No. 1 is innocent why he has not been responding to the correspondence made by the department. Otherwise also, a FIR in exercise of the inherit powers vested in the Court under Section 482 of the Code of Criminal Procedure can only be quashed where the Court is satisfied that to allow the criminal proceedings to continue against the accused would amount abuse of process of law. Here accused-petitioner No. 1 has received a sum of Rs.9.60 lacs from the department. He has not completed the work and rather absconded. He even has failed to respond to the correspondence made by the department.

5. Therefore, at this stage, when the investigation in the case is not at all progressed due to non availability of the accused-petitioner No.1 for the purpose of interrogation, this petition being premature and also devoid of any merits, is dismissed.

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

State of H.P. .....Appellant.
Versus
Bhumi Dev .....Respondent.

Cr. Appeal No. 286 of 2007
Decided on : 1.6.2016

Indian Penal Code, 1860- Section 323 and 325- Accused had attacked the complainant with ladle (kadchhi)- he was tried and acquitted by the trial Court- held, in appeal that the person who was cited in the FIR as rescuer was not examined by the prosecution nor any reason was assigned for his non-examination- ladle was not recovered promptly- disclosure statement was not recorded prior to the recovery- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-10 and 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Neha Scott, 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 24.10.2006 by the learned Judicial Magistrate, 1st Class, Court No.III, Hamirpur in Police Challan No. 90-II/2003, RBT No. 372-II/2004 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 3.8.2003 at about 6.45 AM at place Awahdevi, accused Bhumi Dev has attacked the complainant Sh. Bachittar Singh with ladle (kadchhi). The injured was moved to the hospital and relevant FIR was registered. Medical

examination of the complainant was conducted which revealed that he had sustained grievous injury. Police visited the spot and site map was prepared.

3. 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.

4. Charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 325 and 323 IPC to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He chose to lead evidence in his defence and examined DW-1.

6 On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

7. 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.

8 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.

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. In proof of the prosecution case the prosecution has laid dependence upon the testimonies of ten witnesses. The complainant/victim has deposed as PW-1. His sole testimony qua the occurrence would ipso facto attain credibility bereft of its standing meted corroboration by any eye witnesses to the occurrence, on upsurgings emanating therein of his testimony qua the occurrence being trustworthy as well as inspiring. However, the complainant while deposing as PW-1 has echoed therein of at the relevant time his standing rescued by his elder brother Raghunath from his standing belaboured by the accused respondent herein. Though the complainant victim deposes in his deposition comprised in his examination in chief of at the relevant time except Raghunath none else being available at the site of occurrence contemporaneous to its taking place thereat yet the Investigating Officer despite the factum of the victim omitting to name both PW-5 and PW-6 in his examination in chief to be also the persons available at the site of occurrence also theirs hence witnessing it alongwith Raghunath his elder brother, has proceeded to join them as witnesses to the occurrence. The effect of the omission on the part of complainant to communicate in his deposition comprised in his examination in chief of both PW-5 and PW-6 witnessing the occurrence has a concomitant bearing upon the efficacy of the concert of the Investigating Officer to associate them as witnesses to the occurrence besides has a telling effect upon their respective depositions wherein they unveil a narration qua the occurrence in corroboration to the testimony of PW-1 narration whereof by them emanates from theirs witnessing the occurrence yet when for reasons aforestated the victim not naming them in his examination in chief of theirs witnessing the occurrence renders their respective depositions wherein they communicate an ocular account qua the occurrence to be engineered, concocted as well as contrived. In sequel, the creditworthiness of theirs respective testimonies qua the occurrence gets enfeebled especially when the prosecution has concerted to secure corroboration thereto from PW-5 and PW-6 the purported eye witnesses to the occurrence testimonies whereof when stand ingrained with a vice of invention besides of concoction also hence deprive the

prosecution case of its probative sinew and vigour. In aftermath, the genesis of the prosecution case in its entirety holds no tenacity. Moreover, even the testimony of PW-1 acquires a stain of untruthfulness engendered by the factum of the Investigating Officer adding besides Raghunath, PW-5 and PW-6 as persons who witnessed alongwith the aforesaid Raghunath, the ill-fated occurrence.

11. Be that as it may with Raghunath standing named by the victim to be the person who rescued him from the clutches of the accused respondent also his preempting the latter from continuing to belabour him though stood cited as a prosecution witness yet stood unexamined by the prosecution whereas he stood examined as a defence witness wherein he has attributed the sustaining of injuries by the victim to his accidently slipping at the site of occurrence. The learned APP concerned was enjoined to when his name occurs in the list of prosecution witnesses to examine him as its witness for securing corroboration to the testimony of PW-1 especially when he names him to be the only person available at the site of occurrence. However, the APP concerned omitted to examine him on the flimsy ground of his being won over. Even if as a matter of fact he deposes in support of the defence hence may foist vigour to the omission on the part of the APP concerned to examine him as a prosecution witness nonetheless even prior thereto it was enjoined upon the APP concerned to despite his holding a view of there being a likelihood of his not supporting the prosecution case his endeavoring to test the factum of his holding leanings towards the accused by facilitating his stepping into the witness box as a prosecution witness whereupon in case he reneged from his previous statement, it was yet open for the learned APP to with the permission of the Court declare him hostile whereupon it was open for him to belittle the factum of his reneging from his previous statement recorded in writing by his on holding him to cross-examination confront him with his previous statement recorded in writing. However, the learned APP omitted to make the aforesaid endeavour besides also when Raghunath deposes in favour of the defence version the learned APP while cross-examining him did not confront him with his previous statement recorded in writing for impeaching the credibility of his deposition in his examination in chief wherein he has deposed a version supportive of the defence. Consequently, also the latter omission on the part of the learned APP concerned pronounces upon the factum of his thereat also not making any concerted attempt to belittle his testimony supportive of the defence version qua the incident. Consequently, the version which stands propagated by DW-1 appears to be a truthful version besides also engenders an inference of his previous statement recorded in writing by the Investigating Officer being both engineered as well as false.

Preeminently the Karchi with user whereof the accused/respondent struck grievous wounds on the person of the victim stood not recovered on 3.8.2003 rather stood belatedly recovered on 18.08.2003 under memo Ext.PW-1/A. Consequently, the aforesaid delay in the recovery of Karchi the purported weapon of offence used by the respondent to belabour the victim stains its recovery. Also given the fact that preceding its standing recovered under memo Ext.PW-1/A no disclosure statement of the accused victim was recorded rather the recitals of memo Ext.PW-1/A whereunder it stood recovered portray of the victim handing it over to the Investigating Officer. It appears that the purported voluntary handing over of Ext.P-1 by the victim to the Investigating Officer prodded the latter to dispense with the legal necessity enjoined upon him to preceding its recovery record the apposite disclosure statement of the accused/respondent with revelations occurring therein qua its place of hiding, keeping or concealing by him. Even the said recital qua the manner of recovery of Karchi Ext.P-1 under memo Ext.PW-1/A would yet not dispense with the enjoined legal necessity cast upon the Investigating Officer to preceding its recovery record the apposite disclosure statement of the accused especially when he in the Company of the Investigating Officer had led the latter to his house, factum whereof made it all the more incumbent upon the Investigating Officer to prior to his departing from the police station concerned to the house of the accused respondent elicit under an apposite recorded disclosure statement of the accused qua the place whereat it stood kept or concealed by him. Any omission on the part of the Investigating Officer to prior to its recovery under memo Ext.PW-1/A record the apposite disclosure statement of the

accused/respondent with communications occurring therein qua the place of its hiding or keeping by him would not lend any hue of veracity or efficacy to the factum of its standing handed over to the Investigating Officer by the accused when both in the company of the witnesses visited the house of the accused/respondent nor would it constitute an efficacious manner of its recovery under Memo Ext.PW-1/A when bereft of an apposite disclosure statement preceding thereof standing recorded by the Investigating Officer.

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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh .....Appellant.

Vs.

Budh Ram .....Respondent.

Cr. Appeal No.: 762 of 2008
Reserved on : 17.05.2016
Date of Decision: 01.06.2016

Indian Penal Code, 1860- Section 302 and 364- Deceased went to Puruwala to purchase medicines but did not return- His wife lodged a report with the police-The deceased was seen going with the accused on a scooter towards Paonta Sahib by PW-2- Deceased and accused had gone to the house of PW-5 and had left towards Malva for purchasing fish- The accused was seen with the deceased sitting on a parapet by PW-4- An unidentified body was found lying in the canal which was subsequently identified as the dead body of the deceased- accused was tried and acquitted by the trial court- held, in appeal that in case of circumstantial evidence, the circumstances from which the guilt of the accused is to be determined should be fully established – The circumstances should be consistent only with the hypothesis of the guilt of the accused- circumstantial evidence should be of conclusive in nature and should exclude every possible hypothesis except the guilt of the accused- deceased was missing on 10-10-2004 after 2:00 p.m. - wife of the deceased had not suspected the involvement of the accused in the missing report lodged by her- It was not proved that accused was last seen with the deceased - motive projected by the prosecution that the accused suspected illicit relations of his wife with the deceased was not proved - No explanation was given as to why no independent witness was associated at the time of making the disclosure statement- There are contradictions regarding the time at which the disclosure statement was made- Recovery of dead body cannot lead to any inference that murder was committed by the accused– chain of circumstances do not lead to the inference of the guilt- The accused was rightly acquitted by the Trial court- Appeal dismissed. (Para-12 to 46)

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, Dy. A.G. & Mr. J.S. Guleria, Assistant A.G.

For the respondent : Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

This appeal has been filed by the State against judgment dated 22.08.2008 passed by the Court of learned Additional Sessions Judge, Sirmaur at Nahan in Sessions Trial No. 1-N/7 of 2005, under Sections 364 and 302 of the Indian Penal Code vide which, the learned trial Court has acquitted the accused of the offence alleged against him.

2. The case of the prosecution, in brief, was that deceased Mohinder Singh was working as a Beldar in H.P. P.W.D. department. On 10.10.2004, he went to Puruwala in order to purchase medicine at around 2:00 p.m., but did not return back. PW-1 Gohro Devi conducted search of her husband and when she could not locate him, she lodged a rapat with the police on 12.12.2004 regarding the fact that her husband was missing. Copy of the said rapat is Ex. PW1/A, which was recorded by HHC Amar Singh (PW-11), the then MC, Police Station, Paonta Sahib. The deceased in fact was seen going with the accused on a scooter towards Paonta Sahib on 10.10.2004 at about 5:00 p.m. by Mahima Nand (PW-2), whereas at about 2:00 p.m., the deceased and the accused had gone to the house of Parkasho Devi (PW-5) and thereafter, they had left towards Malwa for purchasing fish. Yusuf (PW-4) also saw the deceased with the accused on 10.10.2004 at about 7:00 p.m. sitting on a parapet on the side of the road near canal in village Kulhal consuming liquor and after one hour, when Yusuf (PW-4) returned back, then he saw that the accused was going alone on his scooter. Parkasho Devi (PW-5) on inquiry after 3-4 days told PW-1 Gohro Devi that the deceased had gone with the accused towards Malwa Cotton Mill. About one year before 10.10.2004, Gohro Devi (PW-1) was called by Rekha, wife of accused to her house and told that accused was suspecting that Rekha Devi was having illicit relations with the deceased. Therefore, she suspected that the deceased might have been kidnapped by the accused on account of the abovementioned suspicion in order to kill him.

3. On the basis of the report lodged by Gohro Devi (PW-1), FIR Ex. PW1/B was recorded in Police Station, Paonta Sahib by Inspector Narveer Singh (PW-17). The accused on inquiry by Gohro Devi (PW-1) also told her that he had gone with the deceased on 10.10.2004 to the liquor shop near Malwa Cotton Mill and he had left the deceased at the liquor shop. Further, as per the prosecution, on 16.10.2004, Ram Kumar (PW-10), who had gone to the fields in Village Jadhari at about 1:30 p.m. noticed that an unidentified body was lying in the canal. He gave a telephonic information to police at Police Station, Chacharoli, District Yamuna Nagar and on the basis of the same, rapat in the daily diary Ex. PW8/A came to be recorded by HC Dilbagh Singh (PW-8). On receipt of the said information, ASI Arjun Singh (PW-15) went to the spot and recorded the statement of Ram Kumar. The photographs of the dead body were taken by Suresh Kumar (PW-14) and the dead body was identified to be that of Mohinder Singh by his relatives. The inquest report Ex. PW10/A was prepared by ASI Arjun Singh (PW-15) and the body was sent for post mortem examination. The post mortem examination was conducted on 18.10.2004 by Dr. P.K. Paliwal (PW-19) and as per his opinion, the deceased died due to ***"alcohol poisoning"*** .

4. The accused was arrested on 16.10.2004 and while in police custody, he made a disclosure statement in the presence of Constable Navinder Singh (PW-6) that he could identify the place where he alongwith deceased had taken liquor near village Kulhal on the side of the canal and could get recovered one nip and disposable glasses. This information was reduced into writing as Ex. PW6/A. On the basis of this disclosure statement, the accused identified the place near canal in village Kulhal and got recovered one nip and two disposable glasses, which were put in a parcel and sealed with seal impression 'H' and were taken into possession vide memo Ex. PW6/B in the presence of Constable Navinder Singh (PW-6) by SI Gurdeep Singh (PW-18).

5. On the conclusion of the investigation, charge sheet was filed against the accused in the Court of learned Judicial Magistrate, 1st Class, Court No. 1, Paonta Sahib, who committed the case to the Court of learned Sessions Judge, Sirmaur District at Nahan, from where the case was sent for trial to the Court of learned Additional Sessions Judge, Sirmaur at Nahan.

6. As a prima facie case was found against the accused, accordingly he was charged for the commission of offence under Section 364 and 302 of the Indian Penal Code, to which he pleaded not guilty and claimed trial.

7. In order to substantiate its case, the prosecution in all produced 19 witnesses. Out of these, the relevant witnesses are PW-1 Smt. Gohro Devi (wife of the deceased), PW-2 Mahima Nand, PW-3 Ravinder Singh, PW-4 Yusuf, PW-5 Parkasho Devi, PW-6 Constable Navinder Singh and PW-18 SI Gurdeep Singh, whose statements shall be dealt with by us in detail.

8. On the basis of the material produced on record by the prosecution before the learned trial Court, the said Court concluded that none of the circumstance on which the prosecution was placing reliance was established on record beyond doubt and, as such, on the basis of the said circumstances, the accused cannot be held to be connected with the commission of the alleged offence. The learned trial Court further concluded that the circumstances, even if taken together, do not lead to the conclusion that it was the accused and none else who committed the murder of Mohinder Singh after kidnapping and abducting him. Thus, it held that the charges as framed against the accused could not be held to have been established by the prosecution by leading convincing, cogent, satisfactory and confidence inspiring evidence and the accused cannot be held guilty of the commission of offence punishable under Section 364 and 302 of the Indian Penal Code and the accused was accordingly acquitted.

9. We have heard the learned Additional Advocate General and the learned counsel for the respondents and also gone through the judgment passed by the learned trial Court as well as the records of the case.

10. Learned Additional Advocate General primarily argued that this being a case of circumstantial evidence, the learned trial Court has erred in law in not appreciating that the chain of circumstances stood established by the prosecution beyond all reasonable doubt and there was no missing link in the chain connecting the accused with the murder of the deceased.

11. On the other hand, learned counsel for the respondent has argued that the learned trial Court has rightly dismissed the case of the prosecution because the prosecution has miserably failed to link the accused with the murder of the deceased. According to him, the circumstances neither stood established nor stood proved by the prosecution to link the accused with the murder of the deceased. Therefore, as per the learned counsel for the respondent, there was no merit in the appeal of the State and the same deserved dismissal.

12. In our considered view, this being a case of circumstantial evidence, where no eye witness was present, it has to be examined as to whether on the basis of the material on record, i.e. circumstantial evidence, the prosecution has been able to connect the accused with the commission of the offence alleged against him beyond all reasonable doubt or not.

13. According to the State, following are the circumstances and the same were duly proved by the prosecution:

(1) Missing of the deceased since 10.10.2004;

(2) Last seen;

(3) Motive;

(4) Disclosure statement of the accused; and

(5) Recovery of the dead body.

14. 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."*
>
> > *25. 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. 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."

It is settled position of law that suspicion, however strong, cannot take the character of proof.

22. We, therefore, have no hesitation in allowing these appeals and setting aside the conviction and sentence of the two appellants under Section 302 read with Section 34 of the Penal Code. We order accordingly. The appellants are directed to be released from jail forthwith, if not required in any other case."

15. 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

(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."

16. 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."

25. 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. 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."

(emphasis supplied)

18. 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. In our opinion, it is not safe to record a finding of guilt of the appellant and the appellant is entitled to get the benefit of doubt. We, therefore, allow the appeal and set-aside the conviction and sentence of the appellant. The appellant be set at liberty unless required in any other case."

17. 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.

18. 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. Neither there is any direct evidence nor there is any eye witness who allegedly has seen the accused committing the crime. Thus, the case of the prosecution is solely based on circumstantial evidence. 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.

19. We will test all the circumstances vis-à-vis material produced on record regarding each circumstance by the State separately.

(1) <u>Missing of the deceased since 10.10.2004:</u>

20. The case of the prosecution is that the deceased went missing on 10.10.2004, when according to PW-1 at around 2:00 p.m., he had gone to purchase some medicine. In this regard, it is relevant to refer to the testimony of PW-1 and the rapat which has been registered by her on 12.10.2004. The copy of the rapat registered by PW-1 Gohro Devi is Ex. PW1/A. This rapat has been registered at 2:00 p.m. on 12.10.2004, i.e. two days after her husband went missing. It is stated in the said rapat that her husband Mohinder Singh was working as a Beldar in P.W.D. department and on 10.10.2004, which was a holiday on account of being Sunday, her husband was at home. At around 2:00 p.m., he stated that he was not feeling well and that he was going to Puruwala to purchase medicine. She waited till evening, but he did not come back. In these circumstances, she searched for him in the morning alongwith her relatives and her brothers and brother-in-laws and other villagers all around. However, till the time of registration of the report, the whereabouts of her husband were not known. She also handed over to the police a photo of her husband. Incidentally, in the said rapat, there is neither any reference of the accused nor any apprehension has been expressed by the complainant (PW-1) that she apprehends that her husband is either abducted by the accused or he has been done away with by the accused. There is no reference in the said rapat that the accused suspected that the deceased was having illicit affairs with his wife. The said witness while deposing as PW-1 in the Court has stated that after her husband went missing on 10.10.2004, she searched for her husband and also inquired from her relatives and friends and accordingly, she lodged a report with regard to the missing of her husband on 12.10.2004. She has further deposed in the said statement that Parkasho Devi told her that her husband had gone with Budh Ram towards Malwa Cotton Factory and on this, she went to the house of Budh Ram to inquire about her husband, who told her that he alongwith her husband on 10.10.2004 had gone to liquor shop near Malwa Factory and the accused had left her husband at liquor shop. She has recorded in her statement that about one year ago from the date her husband went missing, the wife of accused Rekha had called her at her house and told her that Budh Ram, i.e. accused has suspicion that his wife has illicit relations with the deceased and she doubts that her husband was killed by the accused. Incidentally, none of these facts find mention in the rapat dated 12.10.2004, which admittedly has been registered after two days since her husband went missing and which was reported by her after she made inquiries about whereabouts of her husband from her relatives as well as villagers and alongwith these people all around the area.

21. We would also like to refer to the FIR which was subsequently lodged with the police on 15.10.2004. Copy of FIR is Ex. PW1/B. In FIR which has been lodged on 15.10.2004, the earlier version reported in rapat dated 12.10.2004 is mentioned and thereafter it is stated that on the date of lodging of FIR, Parkasho Devi told her that on 10.10.2004, she had seen her husband with the accused at around 3-4 p.m. during day time going towards Malwa Cotton Factory on the scooter of the accused. On this she went to the house of Budh Ram, who told her that on 10.10.2004, her husband had gone with him till Malwa Cotton Factory. She disclosed this fact to her brother-in-law and brother, who made inquiries near the liquor shop around Malwa Cotton Factory, where one Ravinder told that on 10.10.2004 Budh Ram and Mohinder Singh had

come to the liquor vend and they had purchased liquor from there and consumed it in his shop and thereafter they had left on the scooter towards Paonta. It was further mentioned in the FIR that now she has come to know that Budh Ram and her husband while going towards Paonta Sahib on scooter were also seen by some other officials of the PWD department, whereas Budh Ram was refuting all these facts. It was further mentioned that Budh Ram was suspecting that deceased was having illicit relations with his wife, on which issue, earlier an altercation had taken place between them and she suspected that her husband has been abducted by the accused with intent to kill him.

22. It is also relevant to refer to the statement of one Smt. Bala Devi (PW-7), who has stated that about one year ago from the date of incident, Rekha Devi, wife of Budh Ram accused had asked her to inform Gohro Devi that she wanted to meet him and she had informed Gohro Devi that Rekha Devi desired to meet her.

23. From the above facts, the factors which are evident are that the deceased went missing on 10.10.2004 after 2:00 p.m. PW-1 reported this matter to the police by way of rapat which was registered on 12.10.2004. In the said rapat, she did not make any reference that she suspected the accused to have had abducted her husband with intent to kill him, because the accused suspected her husband to be having illicit relations with his wife. These facts find mention only in the FIR which was lodged on 15.10.2004, though as per PW-1 herself the wife of the accused Rekha Devi has apprised her all these facts that her husband was suspicious of the deceased about one year back and also according to the complainant, the deceased and accused had stopped talking with each other for some time, but thereafter they were on talking terms. These facts, in our considered view, raise cloud on the trustworthiness of the said prosecution witness, who admittedly is an interested witness as the deceased was her husband. Even otherwise, on the basis of the said material, the factum of the deceased missing w.e.f. 10.10.2004 cannot be attributed beyond any reasonable doubt to the accused.

(2) <u>Last seen:</u>

24. The second circumstance as per the appellant-State connecting the accused with the offence is that he was last seen with the deceased on 10.10.2004, i.e. the date from which the deceased went missing.

25. In order to substantiate this circumstance, the appellant has relied upon the statements of PW-2 to PW-5.

26. PW-2 Mahima Nand stated that he was working in PWD department and on 10.10.2004, while returning from Paonta, he saw the accused and the deceased on a scooter coming from the opposite direction and proceeding towards Paonta Sahib at around 5:00 p.m. According to him, they met him at village Bhuppur/Kartarpur and the scooter was being driven by Budh Ram.

27. PW-3 Ravinder Singh has been declared as hostile witness as he has not supported the story of the prosecution and stated that he did not remember whether the deceased Mohinder Singh had come to his shop and consumed liquor on 10.10.2004 or not.

28. PW-4 Yusuf has stated that on 10.10.2004, he went to jungle in search of his cattle and at about 7:00 p.m., he saw accused Budh Ram and Mohinder sitting on a parapet on the side of the road consuming liquor. He has further deposed that when he returned back after about an hour, he saw only Budh Ram going on the scooter. He has further stated that there is canal on the side of the road and river Yamuna on the left side of the road and that he had seen them near “Mazar Baba Bhure Shah”, which is situated in Village Kulhal, Uttrakhand.

29. PW-5 Parkahsho Devi has deposed that she knew both accused and the deceased and about three years ago, deceased Mohinder Singh and accused Budh Ram had come to her house at about 2:00 p.m. to keep there wet towel and one bucket and then they went towards Malwa for purchasing fish and after 3-4 days, wife of Mohinder Singh came to her house to

inquire about her husband and she told her that her husband had gone with accused Budh Ram towards Malwa Cotton Mill.

30. In his cross-examination PW-2 Mahima Nand has stated that village Bhuppur and Kartarpur are situated at a distance of two kilometers and the accused and deceased had met him on the road between the said two villages. He has further deposed that Gohro Devi (PW-1) had not inquired from him about the whereabouts of her husband on 10.10.2004 or thereafter. He came to know after 3-4 days that Mohinder Singh was missing. He has further stated that he was called by the police in the Police Station to record his statement. He has also deposed that he has not made any statement to the police that accused Mohinder Singh has met him at Bhuppur and Kadarpur. This witness has been confronted with the statement made under Section 161 of the Criminal Procedure Code, wherein he has stated that accused and Mohinder Singh had met him at Bhuppur and Kadarpur. Besides this, according to him, he did not tell PW-1 nor did she inquire from him about the whereabouts of her husband either on 10.10.2004 or 3-4 days thereafter. It is recorded in the FIR that PW-1 has stated therein that she had also come to know that the accused and her husband were seen going towards Paonta by some officials of PWD department. However, PW-2 Sh. Mahima Nand, who happens to be serving in PWD department has clearly stated that Gohro Devi has not inquired from him about the whereabouts of her husband on 10.10.2004 or thereafter and it was after 3-4 days that he came to know that Mohinder Singh was missing. 31. Similarly, whereas PW-3 Ravinder Singh has not supported the version of the prosecution, according to PW-4 Yusuf, his village Kulhal is in Uttrakhand and he had seen the accused and the deceased near "Mazar Baba Bhure Shah", which is situated in village Kulhal Uttrakhand.

32. PW-5 Parkasho Devi has also been confronted with her earlier statement in her cross-examination wherein the factum of the deceased and accused coming to her house to keep wet towel and bucket had not been recorded, nor the factum of the accused and the deceased having gone to purchase fish from their house was recorded. Most important fact is that in her cross-examination, she has stated that she does not remembers the date when Mohinder Singh and accused came to her house. These in all are the witnesses, who according to the appellant/prosecution prove that the deceased was last seen with the accused whereafter he went missing.

33. As has been observed by us above, there are contradictions in the statements of PW-2 Mahima Nand, PW-4 Yusuf, PW-5 Parkasho Devi and PW-3 Ravinder Singh has not supported the story of the prosecution. Incidentally, PW-5 Parkasho Devi does not even remembers the date on which she saw the accused and the deceased together. Therefore, it cannot be said beyond reasonable doubt that the date when allegedly the said witness saw accused and deceased together was that very date on which the deceased went missing. Therefore, in our considered view, even this circumstance has not been proved beyond reasonable doubt against the accused by the prosecution.

34. Even as far as PW-4 Yusuf is concerned, according to him, he has seen both the accused and the deceased sitting on the parapet consuming liquor. He has not seen accused either pushing deceased into the canal nor he has deposed as to how he knew the accused and the deceased because he happens to be a resident of Uttrakhand. Further, the case of the prosecution is not that the accused died on account of consumption of liquor, but according to the prosecution, it is a case of liquor poisoning. We are afraid that no material has been produced on record by the prosecution to substantiate that the accused has poisoned the deceased.

(3) <u>Motive:</u>

35. According to the prosecution, there was motive with the accused to do away with the deceased because he suspected that his wife was having illicit relations with the deceased. Interestingly, this angle of illicit relation has been introduced by PW-1 in the FIR which was got registered on 15.10.2004. As we have mentioned earlier also, in the rapat which was recorded by her on 12.10.2004, there was no mention of Budh Ram as a suspect. The statement of PW-1 in

this regard also does not inspire any confidence. She has deposed that about one year before 10.10.2004, the wife of the accused Rekha Devi had called her to her house and when she went to her house, Rekha, mother of Budh Ram and 2-3 other ladies were present there and Rekha told her that Budh Ram suspects her that she was having illicit relations with the deceased. According to her, they also told her that they have never seen them in any suspicious circumstance. According to her, after that incident for few days her husband and the accused were not in speaking terms, but thereafter the relations were cordial. In her cross-examination, she has admitted that the accused used to visit her house 5-7 times in a month, but her husband never used to go to the house of the accused. From the deposition of the said witness, it can be safely inferred that save and except her bald statement, there is no other material produced on record by the prosecution to the effect that accused had any motive to do away with the deceased. Therefore, in our considered view, this circumstance has not been proved beyond reasonable doubt by the prosecution against the accused. We reiterate that ***"doubt"*** no matter how much strong cannot be a substitute for ***"proof".***

(4) Disclosure statement of the accused:

36. The appellant has heavily relied upon the disclosure statement of accused Ex. PW-6/A, on the basis of which, the nip and the glasses in which the deceased and the accused allegedly consumed liquor were recovered. This disclosure statement has been witnessed by Navinder Singh and Joginder Singh. As per the disclosure statement, the accused had stated that on 10.10.2004, the accused had brought Mohinder Singh on his scooter bearing No. HP-17A-0560 at Kulhal and he had taken him near the side of the Kanal adjacent to "Baba Bhure Shah", where they both sat and consumed a nip of country liquor Sirmaur No. 1 and they had left two disposable glasses and liquor bottle at the spot and after Mohinder Singh got drink, he pushed him into the canal.

37. It is reiterated that as per Section 27 of the Indian Evidence 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 has been committed by the accused. In fact, thereafter, burden lies on the prosecution to establish that 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.

38. In the present case, PW-6 Navinder Singh and PW-18 SI Gurdeep Singh are the witnesses to the discovery statement. Both these witnesses are police officials. No explanation has been given by the prosecution as to why no independent witness was associated when the said disclosure statement was made by the accused. Be that as it may, we will independently scrutinize the statements given by PW-6 and PW-18.

39. PW-6 Constable Navinder Singh has stated that on the basis of the disclosure statement, the site was visited and near the canal from the bushes, the accused got recovered one nip of Sirmaur No. 1 and two disposable glasses. In his cross-examination, he has mentioned that disclosure statement was recorded in Police Station, Paonta Sahib **at 8:00 a.m.** He has also stated that there are many shops near the Police Station. He has further stated that he could not say that the disposable glasses and the nip which were found at the time of recovery were in standing position or in lying condition. He does not remember that if the lid of the nip was tied with the nip. He further stated that the nip and disposable glasses were recovered from just below the parapet.

40. PW-18 SI Gurdeep Singh has stated that the accused gave disclosure statement at around **9:30 a.m.** He has further stated that the glasses and nip were found lying near the bushes just below the parapet on the bank of the canal and the glasses were found in lying condition.

41. It is apparent that there are major contradictions in the statements of both the said witnesses with regard to the time when the said disclosure statement was recorded. According to PW-6 Navinder Singh, it was recorded **at 8:00 a.m.**, whereas according to PW-18, the same was recorded **at 9:30 a.m.** The prosecution has not been able to justify as to why there is material contradiction between the depositions of these two witnesses with regard to the time of the accused having recorded his disclosure statement. Further, PW-6 says that he does not remember as to in what condition glasses and bottle of liquor were found, whereas PW-18 has categorically stated that the said articles were lying near the bushes just below the parapet on the bank of the canal. Further, the appellant was not able to satisfy this Court as to why at the time when the accused allegedly made the disclosure statement, no independent witness was associated, whereas it is admitted case of the prosecution that the statement was recorded in the Police Station and there were many shops near the Police Station. Therefore, it can be easily inferred that even this circumstance has not been proved beyond doubt against the accused.

(5) Recovery of the dead body:

42. Now coming to the last circumstance, i.e. recovery of the dead body. The relevant witnesses as far as recovery of the dead body is concerned are PW-8 HC Dilbagh Singh, PW-10 Ram Kumar, PW-15 ASI Arjun Singh and PW-19 Dr. P.K. Paliwal.

43. PW-8 HC Dilbagh Singh has deposed that on 16.10.2004, a telephonic information was received from Ram Kumar regarding the presence of dead body in the canal at Jidhri bridge. Thereafter, a rapat to this effect was entered in rojnamcha and necessary steps were taken in this regard. PW-10 Ram Kumar deposed that on 16.10.2004, he had gone on account of some work to his fields in village Jadhari, which are situated near the canal and at about 1:30 p.m., he noticed an unidentified body in the canal and he passed this information to Police Station Chacharoli. Thereafter, police came to the spot and recorded his statement and the dead body was taken into possession.

44. PW-15 ASI Arjun Singh has deposed that after receiving information from Ram Kumar, he visited the spot and after recording the statement of Ram Kumar, took the dead body into possession and thereafter post mortem of the same was got conducted. He further says that he collected the post mortem report and viscera of the deceased and the dead body was handed over to the relatives of the deceased for cremation. PW-19 Dr. P.K. Paliwal conducted the post mortem and according to his opinion the cause of the death was alcohol poisoning.

45. Recovery of the dead body of the deceased *per se* cannot be said to be a conclusive evidence of the fact that he has been murdered by the accused. As we have already discussed above, the prosecution has failed to prove all the links of chain of circumstantial evidence against the accused beyond any reasonable doubt. The judgment passed by the learned trial Court has also taken into consideration the chain of circumstances and after discussing the material produced on record by the prosecution, it has also concluded that the prosecution had failed to link the chain of circumstances beyond any reasonable doubt, on the basis of which, the accused could have been convicted for the offences alleged against him. We agree with the said findings returned by the learned trial Court.

46. After going through the judgment passed by the learned trial Court and after going through the records of the case at length, we are also of the considered view that the prosecution has failed to bring home the guilt of the accused. They have not been able to link the accused with the crime beyond reasonable doubt. The chain of circumstance is neither complete nor it links the accused with the crime beyond all reasonable doubt and the same cannot be made basis to convict the accused.

47. Therefore, according to us, there is neither any infirmity nor any perversity with the judgment which has been passed by the learned trial Court and the same warrants no interference and accordingly, the appeal is dismissed.

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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

Jagmohan alias Mohini ... Respondent.

Cr. Appeal No 247 of 2008.
Reserved on 23.5.2016.
Decided on: 1.6.2016.

Indian Penal Code, 1860- Section 302, 201 and 34- Accused persons hatched conspiracy and after committing the murder of R destroyed the evidence by throwing away his body - the accused were tried and acquitted by the Trial Court- held, in appeal that there was no direct evidence - prosecution relied upon circumstantial evidence– the prosecution has to establish not only each of the circumstance but also the link connecting the circumstances – circumstances should lead to the inference of guilt and not to any other inference– medical Officer found that the death was caused due to asphyxia, as a result of strangulation by a ligature- It was not proved that accused were last seen with the deceased and they had consumed liquor- No motive to murder the accused was proved- disclosure statement was also not proved- time of death was not established to infer that accused was last seen with the deceased- the evidence was rightly appreciated by the court- Appeal dismissed. (Para-6 to 23)

Cases referred:

Prandas v. The State, AIR 1954 SC 36

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the appellant. : Mr.V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, Dy. Advocate General,

For the respondent . : Mr. J.R. Poswal, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this case, main accused, Sanjeev Kumar alias Sanju, has since expired. Appeal qua him already stands abated.

2. We are called upon to examine the correctness of the judgment dated 26th September, 2007 passed by learned Sessions Judge, Bilaspur in Sessions Trial No. 18 of 2006, whereby accused Sanjeev Kumar (since deceased) and co-accused Jagmohan alias Mohini stand acquitted for having committed offence punishable under Sections 302, 201 read with Section 34 of Indian Penal Code (in short 'IPC').

3. Trial Court, charged the accused for having committed offence punishable Sections 302, 201 read with Section 34 IPC, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as fifteen witnesses. Statements of accused Sanjeev Kumar and co-accused Jagmohan under Section 313 of the Code of Criminal Procedure were also recorded, in which accused Jagmohan took the following defence:-

> *"This is a false case against me. In fact, on 10.2.2006, my sister got married with Abhishek and that up to 15.2.2006 I remained busy with my newly married sister and Jija*

while taking them around different temples situated nearby. On 15.2.2006, since my Jija had reservation in train, we hired a Scorpio vehicle in order to go to Chandigarh where we left our Jija whose, train left Chandigarh at 5.00 p.m. and thereafter, I alongwith my father, sister and driver made shopping at Chandigarh on the same day i.e. 15.2.2006. After having taken dinner at Chandigarh, we started for our place at about 8.30 p.m. and reached our house at about 12.30 a.m.(night). Thereafter, I remained with my sister in our house up to 21.2.2006, on which date, I alongwith my sister, mother, younger brother went to New Delhi in the same vehicle (Scorpio) since my Jija had to board flight for London. On the night of 22.2.2006, we returned to our house. On 23.2.2006 I was arrested by the police. In the month of March, 2005, I had an altercation with the then ASP, Sh. Patial at Kandraur who was in civil dress. At that time, he had threatened to frame me in some case and that in the instant case, I have been roped at the instance of ASP Patial. A case under Sections 107, 150 Cr.P.C. was also got prepared by the ASP against me and others regarding the occurrence whereby I had an altercation with him. In the police Station, witness Jai Hind was telling that he did not know us but the police got, from him various papers, signed by giving beating."

Six witnesses were examined by the accused in their defence.

5. Trial Court, after appreciating the testimony of the prosecution witnesses acquitted both the accused. Hence the present appeal.

6. We have heard V.S.Chauhan, learned Additional Advocate General, assisted by Mr. Vikram Thakur, learned Deputy Advocate General, on behalf of the State as also Mr. J.R. Poswal, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

8. In Prandas v. The State, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

"(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:

> *"Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not*

weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice.""

9. Undisputedly, there is no direct evidence and the prosecution case primarily rests upon circumstantial evidence. The prosecution wants to bring home the guilt of accused on the basis of circumstantial evidence, through the testimonies of 15 prosecution witnesses, so examined in Court. It is sought to be proved that some time in the night of 15th February, 2006 accused persons hatched conspiracy and after consuming alcohol, committed the murder of Raghunath alias Raju and thereafter destroyed the evidence by throwing away his body at a place, other than the one where such murder came to be committed.

10. It is a matter of record, as has emerged from the testimony of PW13-ASI Rattan Lal, that dead body of the deceased was found lying under the heap of a cow-dung in village Kandraur. When such information was communicated to the police and Rattan Lal reached the spot. On the basis of the Rukka so sent by him, FIR No. 70/06, dated 21.2.2006 (Ext. PW11/C) came to be recorded at Police Station, Sadar, Bilaspur. Dead body came to be identified by the relatives (PW1-Jai Hind) of the deceased and after preparation of the inquest report, post-mortem of the dead body was got conducted at District Hospital, Bilaspur.

11. The learned Trial Court has specifically not culled out the circumstances pressed by the prosecution to bring home the guilt of the accused beyond reasonable doubt. However, according to Mr. V.S. Chauhan, learned Addl. Advocate General, following circumstances arise for consideration by this Court:-

1. The deceased was lastly seen in the company of the accused in the night of 15.2.2006 when all of them consumed alcohol;
2. The recovery of dead body from a place other than the one where the accused and the deceased together consumed alcohol;
3. The post-mortem report establishing the factum of death of the deceased by strangulation; and
4. The disclosure statement (Ext.PW9/F) so made by accused Jagmohan in the presence of Hira Lal (PW-9) which further led to recovery of the clothes worn by the said accused, vide memo (Ext.PW9/B).

12. It is a settled principle of law that in a case of circumstantial evidence, the onus heavily lies upon the prosecution to establish not only each of the circumstance but also the link between them, beyond reasonable doubt. It has to be an unbroken chain of events. Also, what is required to be established is that the guilt of the accused alone is proven, ruling out any doubt of his complicity or involvement of anyone else in the alleged crime. The chain of evidence has to be complete and not leave any reasonable ground of the conclusion inconsistent with the innocence of the accused and the hypothesis must be such that under all circumstances and in all probability, the act must have been committed by the accused alone and none else.

13. We now proceed to examine each of the circumstance. It is a matter of record, which fact also cannot be disputed by the accused, that the dead body stood recovered from a place known as Kandraur in the presence of, Jai Hind (PW-1). Identity of the dead body is also not disputed in any manner, which fact in any event stands established through the testimony of independent witnesses. Testimonies of the independent witnesses cannot be rendered to be doubtful.

14. It is also a matter of record that post-mortem of the dead body was got conducted by the police through Dr. N.K. Sankhyan (PW-12) who has proven on record the post-mortem

report (Ext.PW12/F) and opined that deceased died due to mechanical asphyxia, as a result of strangulation by a ligature.

15. We do not find the accused to have probablised his defence but independent of that we have examined the prosecution evidence.

16. Now when we examine the testimony of Jai Hind (PW-1) on the question of last seen circumstance, we notice him to have deposed that "some time" "in the evening" of 15.2.2006 accused, deceased and he consumed liquor in his room. After some time, accused Sanju asked the deceased to bring more liquor from the liquor shop. Soon deceased returned empty handed, and stating that the liquor vend had closed. At that, accused Sanju started abusing other persons (Khan) who were also present in the room. This witness caught Sanju and snatched the danda which he was holding in his hand. Soon thereafter, on the asking of accused Sanju, deceased went outside. Accused Jagmohan also accompanied them. This was at about 10:30 p.m. While going, accused Sanju had also taken the danda along with himself. Thereafter, deceased never returned. Well this is all that he states. He does not state any scuffle, fight or verbal dual having taken place between the deceased or the accused. In fact, accused Sanjeev Kumar got annoyed at other persons presenting the room and not the deceased. But even when we examine the cross-examination part of his testimony, we do not find such version to be correct. This witness wants the Court to believe that Jagmohan came to be identified on the asking of the police, but then no such test identification parade was ever got conducted by the police. Unrebuttedly, the witness admits to have been beaten up by the police. In defence the accused has stated so. The possibility of his having deposed falsely against both the accused cannot be ruled out, more so in the light of testimony of Rakesh Kumar (PW3) and Het Ram (PW-10), who have not supported the prosecution and despite their extensive cross-examination nothing fruitful could be elicited from their testimony. He himself may have been a suspect.

17. The accused and the deceased allegedly consumed alcohol in the room of this witness. But then there is no link/corroborative evidence to establish such fact. Noticeably, from his testimony, motive of murdering the deceased cannot be inferred. Also, it cannot be stated that the accused had quarreled with the deceased. No such quarrel took place. All that the witness states is that when the deceased came empty handed, accused Sanju started abusing the Khan and not the deceased.

18. Now coming to the next circumstance of disclosure statement of accused Jagmohan (Ext. PW9/F) dated 28.2.2016, we find four facts to have been disclosed by this accused:-

1. Both he and accused Sanju had murdered deceased Raju;
2. He could get recovered his shirt and Baniyan (vest) which he had concealed in the house of Sanju;
3. He could get recovered blue colour Baniyan (vest), with which they had strangulated the accused, concealed in the house of Sanju; and
4. The scissors with which the said Baniyan (vest) was cut.

19. Such statement was allegedly made in the presence of Jindu and Hira Lal. Witness Jindu has not been examined in the Court. From the testimony of Hira Lal (PW-9) we find such statement to have been made by accused Jagmohan. But however, there is one fact which renders the factum of recording of such statement to be doubtful and that being, admission made by this witness, that accused had also made a statement on 21.2.2006. Now, and what is that statement? Is not evidently clear from the record. Certainly it is not the one on which reliance is sought. Also, we find Balbir Singh (PW-14) to have admitted that accused stood arrested, prior to his taking over the investigation on 25.2.2006. Now the arrest memo is not on record. What transpired between 21.2.2006 and 25.2.2006 is evidently not clear on record. Hence, the veracity of such disclosure statement itself is in doubt. That apart, what was recovered are the clothes of accused Jagmohan and Baniyan (vest) allegedly with which the deceased was strangulated. The

first part of disclosure statement cannot be used against the accused, in view of Sections 25 to 27 of the Indian Evidence Act. In so far as the recovery of the clothes of the accused are concerned, it does not further establish anything else, for the blood stains found on such clothes were not that of the deceased. The disclosure statement itself, as we have already observed is rendered to be doubtful and cannot be said to be a circumstance to have been established beyond reasonable doubt.

20. Post-mortem was conducted on 22.2.2006. As per version of Dr. N.K. Sankhyan (PW-12) death would have taken place sometime between 4 to 10 days. The death of deceased could not be established to be proximate to the time when he was last seen in the company of the accused.

21. There is yet another mitigating circumstance in favour of the accused. Allegedly the deceased was found missing w.e.f. 15.2.2006 but no report was ever lodged by anyone, much less by Jai Hind (PW-1). After all he wants the Court to believe that the deceased had lastly left in the company of the accused. Also there was no motive for the accused to kill the deceased.

22. Thus, the Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice.

23. The accused persons have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in ***Mohammed Ankoos and others*** versus ***Public Prosecutor, High Court of Andhra Pradesh, Hyderabad*** (2010) 1 SCC 94, since it cannot be said that trial Court has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending application(s), if any. Bail bonds furnished by the accused are discharged. Record of the trial Court be immediately sent back.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Civil Revision No. 154 of 2004 alongwith
CMPMO No. 121 of 2012.
Judgment Reserved on : 2.3.2016
Date of Decision : June 1, 2016

1. Civil Revision No. 154 of 2004
Sh. Yog Raj Sood ... Petitioner/Landlord
Versus
Smt. Sunita Kaushal & another ... Respondents/tenants
2. CMPMO No. 121 of 2012
Sh. Yog Raj Sood ... Petitioner/Landlord/DH
Versus
Smt. Sunita Kaushal & another ... Respondents/tenants/JDs

Code of Civil Procedure, 1908- Order 41 Rule 22**-** Cross objections were filed to the judgment passed by the Appellate Court in the Revision Petition- held, that the provisions of Code of Civil Procedure are not applicable to the Revisional jurisdiction- however, the court will have ample power to consider the objections raised by the parties- Rent Controller is a designated authority and is not a Judge/ Presiding Officer of a Civil Court- Rent Act is a complete code in itself dealing with the control of rent and eviction within the urban areas of State of Himachal Pradesh- Rent

Act provides for a complete mechanism for adjudication of rights, duties and obligations of the landlord and the tenant - the provision of Order 41 Rule 22 will not be applicable in the exercise of Revisional jurisdiction. (Para 19-27)

Code of Civil Procedure, 1908 -Order 41 Rule 27- Landlord filed an eviction petition on the ground that tenant was in arrears of rent and the tenant had started running a restaurant which had diminished the value and utility of the tenanted premises and caused nuisance to the occupiers of the building- the petition was allowed by the Rent Controller- an appeal was filed which was allowed- a revision was preferred and an additional issue was framed by the High Court- the issue was answered by the Rent Controller- appeal preferred by the tenant was dismissed- Tenant filed an application for leading additional evidence- held, that the tenant wants to establish two facts which relate back to the year 2000 – 2001- tenant never led evidence to prove these facts despite having adequate opportunity to do so- the court has power to take note of subsequent events but such events have to be brought promptly to the notice of the Court in accordance with the procedure enabling the Court to take note of such events and such events must have a material bearing on right to relief of any party- the application was not filed at the first instance but subsequently and is meant to procrastinate proceedings- the event is not necessary to adjudicate the controversy between the parties- hence, application dismissed.

(Para-14 to 18)

building for a purpose other than for which it was leased and tenant having committed acts which are likely to impair the value or utility of the building- the premises was let out for running business of carpet but tenant started running a restaurant- held, that if the dominant purpose for which a building is let out is maintained, then a tenant may not be liable to be evicted in the absence of a contract prohibiting a user different from the one mentioned in the deed- however, if a building is let out for residential or business purpose and the tenant started manufacturing activity then it would amount to change of user - a businessman cannot be compelled to carry on a particular commercial activity, if he feels it to be non-viable, non-manageable or non-profitable – Landlord had specifically led the evidence to show that the nature of business was changed - the tenant did not appear in the witness box despite opportunity- It was proved that there was no proper ventilation and the fumes emitted from the ground floor, straightaway entered on the first floor of the landlord- Rent Controller had allowed ejectment of the tenant on the ground of nuisance to the occupiers of the buildings which was affirmed by the Appellate Court- there was no infirmity in the orders passed by the courts. (Para-34 to 50)

Cases referred:

K. Venkataramiah vs. A. Seetharama Reddy, AIR 1963 SC 1526
Municipal Corpn. of Greater Bombay vs. Lala Pancham, AIR 1965 SC 1008
Soonda Ram vs. Rameshwarlal, (1975) 3 SCC 698
Syed Abdul Khader vs. Rami Reddy, (1979) 2 SCC 601
Haji Mohammed Ishaq vs. Mohd. Iqbal & Mohd. Ali & Co., (1978) 2 SCC 493
State of U.P. vs. Manbodhan Lal Srivastava, AIR 1957 SC 912
S. Rajagopal vs. C.M. Armugam, AIR 1969 SC 101
State of Orissa vs. Dhaniram Luhar, (2004) 5 SCC 568
State of Uttaranchal vs. Sunil Kumar Singh Negi, (2008) 11 SCC 205
Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity, (2010) 3 SCC 732
Sant Lal Gupta vs. Modern Coop. Group Housing Society Ltd., (2010) 13 SCC 336
Union of India vs. Ibrahim Uddin & another, (2012) 8 SCC 148
Atma S Berar vs. Mukhtiar Singh, (2003) 2 SCC 3
Gogula Gurumurthy & others vs. Kurimeti Ayyappa, (1975) 4 SCC 458
Sri Saibaba Cloth Emporium, Adoni vs. Kolli Sanjeevamma & another, AIR 1991 Andhra Pradesh 106
Jamshed Hormusji Wadia vs. Board of Trustees, Port of Mumbai & another, (2004) 3 SCC 214

Venkatarama Naicker vs. Ramasami Naicker & others, AIR (39) 1952 Madras 504
Gian Devi Anand vs. Jeevan Kumar & others, (1985) 2 SCC 683
Municipal Corporation of Delhi & others vs. International Security & Intelligence Agency Ltd., (2004) 3 SCC 250
Nalakath Sainuddin vs. Koorikadan Sulaiman, (2002) 6 SCC 1
Kamal Kumar vs. Smt. Imartibai & others, 2003 (1) RCR 681 (Madhya Pradesh)
Jugraj Pal vs. Bhim Sain, 2001 (2) RCR 294 (P & H)
V. V. Krishna Vara Prasad vs. S. Surya Rao, 1997 (1) RCR 613 (A.P.)
Munnalal Agarwal vs. Jagdish Narain & others, (2000) 1 SCC 31
Ram Charan Singh vs. Brij Bhushan Pandey, 1996 (2) RCR 382 (M.P.)
Neon Lawrie & another vs. O. R. Properties and Builders (P) Ltd. & others, 2013 (1) RCR (Rent) 348 (Rajasthan)
State of Haryana & another vs. Vinod Tayal, 2011 (1) RCR (Rent) 480 (P & H)
Ravinder Kumar Sharma vs. State of Assam & others, (1999) 7 SCC 435
Saibaba Cloth Emporium, Adoni vs. Kolli Sanjeevamma & another, AIR 1991 Andhra Pradesh 106
Mahaboob Bi vs. Alvala Lachmiah, AIR 1964 Andhra Pradesh 314
Jia Lal vs. Mohan Lal, AIR 1960 J & K 22; Moti Ram vs. Suraj Bhan, AIR 1960 SC 655
Pattammh vs. Krishnaswami Iyer, AIR 1928 Mad 794
Lakshmipathi & others vs. P. Nithyananda Reddy & others, (2003) 5 SCC 150
Narinder Mohan Arya vs. United India Insurance Co. Ltd. & others, (2006) 4 SCC 713
G. L. Vijain vs. K. Shankar, (2006) 13 SCC 136
Balbir Kaur & another vs. Uttar Pradesh Secondary Education Services Selection Board, Allahabad and others, (2008) 12 SCC 1
Bentool Steel Products Private Limited vs. O.M.A. Mohammed Omar & another, (2008) 17 SCC 679
Management of Sundaram Industries Limited vs. Sundaram Industries Employees Union, (2014) 2 SCC 600.
Vinod alias Raja vs. Smt. Joginder Kaur, 2012 (3) Him. L. R. (FB) 1401
Hindustan Petroleum Corporation Limited vs. Dilbahar Singh, (2014) 9 SCC 78
Hari Rao vs. N. Govindachari & others, (2005) 7 SCC 643
Shiv Ram & another vs. Sheela Devi, AIR 1993 H.P. 49
Rajinder Kumar Sharma vs. Smt. Kanta Kumari, Latest HLJ 2007 (HP) 73
Jagdish Lal vs. Parma Nand, (2000) 5 SCC 44
Man Kaur (dead) by LRs vs. Hartar Singh Sangha, (2010) 10 SCC 512
Santosh Tangri vs. Ved Matta, 2002 (2) RCR (Rent) 657
M/s Goyal Steel Industries & others vs. Sangram Singh Sandhawalia & others, 2005 (1) RCR (Rent) 187
St. Michaeal's Cathedral Catholic Club vs. Smt. Harbans Kaur Nayani, 1997 (1) Sim. L.C. 237

For the petitioner : Mr. R. L. Sood, Senior Advocate with Mr. Arjun Lall, Advocate, for the petitioner(s).
For the respondent : Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashista, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this petition filed under Section 24(5) of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as the "Act"), following questions arise for consideration:

(i) As to whether application filed before this Court (under Order 41 Rule 27 CPC), seeking permission to lead additional evidence is bonafide and is necessarily to be allowed for determining the controversy in issue? (ii) Whether Cross Objections filed by the respondent-tenant under Order 41 Rule 22 CPC are maintainable or not? (iii) What is the scope of interference by this Court in a revision petition filed under Section 24(5) of the Act? (iv) Whether, while examining the correctness, legality or propriety of the orders passed by the Authorities below, this Court can grant relief to the respondent-tenant? (v) Whether the findings, concurrent in nature, so returned by the Authorities below are perverse or illegal, warranting interference by this Court? and (vi) Whether in the absence of any interim order, staying the operation of the order sought to be executed, it was open for the Rent Controller to have dismissed the execution petition only on account of pendency of the petition before this Court?

2. Vide agreement dated 27.3.1992 (Ext. PW-2/A), petitioner Yog Raj Sood rented out the tenanted premises comprising of one shop, situate in Ward No. 6, Municipal Council House No. 167, Kotwali Bazar, Dharamshala on a monthly rental of Rs.1000/- (rupees one thousand) to Smt. Sunita Kaushal (respondent No.1) wife of Shiv Kumar Kaushal (respondent No. 2). Subsequently the rent came to be enhanced to Rs.1200/- (rupees one thousand & two hundred) per month. On 9.10.2001, landlord preferred a petition under the provisions of Section 14 of the Act. As per the claim set out in the petition, w.e.f. 1.4.2000 the tenant was in arrears of rent. Also, though initially the shop was let out for the purpose of running a business of carpets, but however, w.e.f. 26.6.2000, the tenant started running a restaurant under the name and style of "Taste Point". Such change not only damaged but also diminished the value and utility of the tenanted premises, apart from being a cause of nuisance to the occupiers of the building in the neighbourhood and the landlord who resides alongwith his family on the first floor.

3. The tenant responded by denying the averments, further clarifying that in any event, the business of restaurant stood closed.

4. On the strength of the pleadings of the parties, the Rent Controller framed the following issues:

1. Whether the respondent No. 1 is in arrears of rent from 1.4.2K, as alleged? OPP

2. Whether the respondent No. 1 with the help of respondent No. 2 without the consent of petitioner changed the business in the premises in dispute by running restaurant instead of original business of carpet, as alleged? OPP

3. Whether the respondents have materially impaired the value and utility of the premises in dispute, as alleged? OPP

4. Whether the premises in dispute requires renovation which cannot be carried out without the building vacated, as alleged? OPP

5. Whether the petition of the petitioner is not maintainable in the present for, as alleged? OPR

6. Whether the shop in dispute is required for bonafide reason by the petitioner for the establishment of his own business? OPP

7. Relief.

5. The issues came to be answered by the Rent Controller in terms of order dated 20.12.2002, passed in Rent Petition No. 3 of 2001, titled as *Yog Raj vs. Sunita Kaushal & another*, holding (i) the tenant to be in arrears of rent @ Rs.1200/- per month w.e.f. 1.7.2000 and not 1.4.2000 [Ground of ejectment under Section 14 (2) (i)]; (ii) Even though the purpose of tenancy was running a business of carpets, but however, without the consent of the landlord, it came to be changed with a restaurant being run therefrom [Ground of ejectment under Section 14(2) (ii) (b)]; and (iii) there was no material impairment in the value and utility of the premises [Ground of ejectment under Section 14(2)(iii)]. Accordingly issues No. 1 (partly) and 2 came to be decided in

favour and issues No. 3, 4 and 6 against the landlord. Thus on first two grounds petition came to be allowed.

6. Such findings, on a limited ground, came to be assailed by the tenant by way of an appeal filed under the provisions of Section 24 of the Act. However, no challenge was laid to the findings on the arrears of rent. On the question of change of user, the Appellate Authority could not persuade itself to agree with the findings arrived at by the Rent Controller and as such, on a limited ground, allowed the appeal in terms of order dated 25.6.2004 passed in Rent Appeal No. 7-D/2003, titled as Sunita Kaushal & another vs. Yog Raj.

7. The landlord preferred the present Revision Petition filed under the provisions of Section 24(5) of the Act and this Court on 26.4.2005, by framing the following additional issue, on a limited point, remanded the matter to the Rent Controller for decision thereupon:

> Issue No. 3(a):
>
> "Whether the respondents are guilty of such acts and conduct as are a nuisance to the occupiers of the building in the neighbourhood including the petitioner and his family members, as alleged?"

8. This additional issue came to be decided by the Rent Controller in terms of order dated 5.8.2006. Since the controversy primarily revolves around the same, for proper appreciation, relevant portion thereof is extracted:

> "23. Hence, as per Order 14(2) it is stipulated that in case the tenant has been guilty of such acts and conduct as are nuisance of the occupiers of buildings in the neighbourhood, he is liable for eviction. This principle is based on 'maxim six utere tue ut alienum non laedas' meaning that you use your property as not to injure others. In the present case the petitioner has alleged that private nuisance has been caused to him. Private nuisance includes obstruction to light and air, wrongful escape of deleterious substances, such as smoke, smell fumes, gas, noise, water, heat etc.
>
> 24. In order to prove the nuisance the petitioner got examined himself as PW-3 and has specifically stated that the respondent is running a restaurant under the name and style of 'Taste Point". He has stated that he resides on the upper storey and has only one window which opens towards the front. He has stated that the respondent uses L.P.G. Gas and Stove in the restaurant as a result of which smoke enters into his house from the front window and, therefore, he cannot reside comfortable. He has stated that the respondent keeps dustbins on the stairs which go to his resident which also creates problem. It is also perused that the petitioner is an old age man of 63 years.
>
> 25. Further, the petitioner has examined PW5 Sansar Chand who has proved his report Ex. PW5/C dated 27.10.2000 which he had prepared in the capacity of an inspector. On perusal of his report it is found that he after visiting the shop on 27.10.2000 had reported that the restaurant violated the bye laws, as it had no licence under PFA. He has stated in para No. 2 that the restaurant omitted abnoxious smell. Further in his report he has stated that there was one window on the upper storey and when it was opened gusts of smoke entered into it causing more pollution and un-hygienic situation for residing. The petitioner, in the present case, had examined PW4 Jitender Kumar Sanitary Inspector who had brought the original record o the Municipal Committee. Further, in the present case, the petitioner examined PW6 who too has corroborated the version of the petitioner. The petitioner has also examined PW8 who is the relative of the petitioner and who had come to stay in the house of the petitioner. He has stated in his examination-in-chief that he could not stay in the house of the petitioner due to the smoke coming from the restaurant below.

> 26. On the other hand, the defence of the respondent is solely to the effect that he has closed his restaurant long time back and is now running the shop of carpeting and furnishing. The respondent has also cross examined PW3 i.e. the petitioner on the ground that the shop is now being run for carpeting and furnishing. Interestingly, in the present case the respondent has not stepped into the witness box and it as the husband of the respondent who got himself examined as RW3. In his testimony he has stated that he used to run the restaurant from July 2000 to March 2001. Hence, his defence is on the ground that no restaurant is being run. Further, the respondent examined RW1 Anuj Thapa who has stated that he is a manufacturer of noodles and used to supply noodles to the respondent 7 – 8 months. Upon his cross-examination, this witness has admitted that the respondent used L.P.G. Gas and Stove."
>
> [Emphasis supplied]

9. Appeal preferred by the tenant, assailing the aforesaid findings, came to be dismissed by the Appellate Authority in terms of order dated 29.3.2007 passed by Appellate Authority-III, Kangra District at Dharamshala in Additional Rent Appeal No. 26-D/XIV/06 (Rent Appeal No. 7-D/2003) titled as Sunita Kaushal & another vs. Yog Raj.

10. Record reveals that instead of independently assailing the same, in the instant Revision Petition, on 17.5.2007, tenant filed objections under Order 41 Rule 26 CPC (CMP No. 327 of 2007).

11. On 16.10.2014, the tenant also preferred an application (CMP No. 16411 of 2014 in Civil Revision No. 154 of 2004) under Order 41 Rule 27 CPC, seeking permission to lead additional evidence for establishing that the landlord (i) had agreed to withdraw all cases in view of a compromise which took place sometime in the month of April, 2001 and (ii) that the business of furnishing & flooring stood re-established w.e.f. January, 2002.

12. Subsequently the landlord sought execution of the order dated 29.3.2007, and such application came to be dismissed by the Rent Controller, Dharamshala, H.P. in terms of his order dated 16.3.2012 passed in Execution Petition No. 17/2010, titled as *Yog Raj vs. Sunita Kaushal & another*, holding that since the matter was *sub judice* before this Court and despite there being no stay of the operation of orders dated 5.08.2006 and 29.3.2007 by this Court, the execution petition was not maintainable.

13. Such order independently stands assailed by the landlord by way of CMPMO No. 121 of 2012 and is connected with the present petition, hence considered and disposed of together.

14. Firstly the application for leading additional evidence needs to be considered. This relates to Question No. (i).

15. As already observed, in terms of this application (CMP No. 16411 of 2014, dated 16.10.2014), tenant wants to establish two facts which relate back to the year 2000 – 2001. Prior to the filing of the present application, tenant never led any evidence and this, despite having adequate opportunities of doing so before the Rent Controller, the Appellate Authority or this Court. The plea sought to be taken by the tenant of the matter having been compromised between the parties appears only to be false and an after thought, and not based on any material. Conduct of the parties is reflective of such fact. Also from the time of filing of the reply and passing of the order of eviction, tenant never thought of leading the evidence on the other plea, which undoubtedly was to her knowledge.

16. The apex Court, after considering the principles laid down in its earlier decisions *K. Venkataramiah vs. A. Seetharama Reddy,* AIR 1963 SC 1526; *Municipal Corpn. of Greater Bombay vs. Lala Pancham,* AIR 1965 SC 1008; *Soonda Ram vs. Rameshwarlal,* (1975) 3 SCC 698; *Syed Abdul Khader vs. Rami Reddy,* (1979) 2 SCC 601; *Haji Mohammed Ishaq vs. Mohd.*

Iqbal & Mohd. Ali & Co., (1978) 2 SCC 493; *State of U.P. vs. Manbodhan Lal Srivastava,* AIR 1957 SC 912; *S. Rajagopal vs. C.M. Armugam,* AIR 1969 SC 101; *State of Orissa vs. Dhaniram Luhar,* (2004) 5 SCC 568; *State of Uttaranchal vs. Sunil Kumar Singh Negi,* (2008) 11 SCC 205; *Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity,* (2010) 3 SCC 732; and *Sant Lal Gupta vs. Modern Coop. Group Housing Society Ltd.,* (2010) 13 SCC 336, in *Union of India vs. Ibrahim Uddin & another,* (2012) 8 SCC 148 has observed that:

> "48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."
>
> [Emphasis supplied]

17. The apex Court in *Atma S Berar vs. Mukhtiar Singh,* (2003) 2 SCC 3 has held the power of the Court to take note of subsequent events to be well-settled and undoubted. However, it is accompanied by three riders: firstly, subsequent event should be brought promptly to the notice of the Court; secondly, it should be brought to the notice of the Court consistently with rules of procedure enabling Court to take note of such events and affording the opposite party an opportunity of meeting or explaining such events; and thirdly, the subsequent event must have a material bearing on right to relief of any party.

18. The application in question has not been filed at the first opportune moment. It appears to be a route adopted for further procrastinating the proceedings. It is not that the tenant was unaware of the pleas or on account of legal disability was precluded from raising the same at the earliest point in time. It is not a case of inability on the part of the tenant to understand the legal issues or that she was under any wrong/incorrect advice or there was any negligence on the part of her pleader. Also she is not a rustic villager unaware of her rights and remedies. The evidence sought to be led, apart from being factually incorrect would have no bearing on the outcome of the case. The tenant cannot be allowed to reopen the case afresh for filling up the lacunae. This court does not find the evidence sought to be brought on record necessary for adjudication of the controversy in issue, as such, in the light of the ratio of law laid down by the apex Court in *Union of India vs. Ibrahim Uddin & another,* (2012) 8 SCC 148, the application is dismissed.

Questions No. (ii) and (iv):

19. Now coming to the cross-objections filed under Order 41 Rule 26 CPC (CMP No. 327 of 2007), it be only clarified that this Court at the very first instance, vide order dated 22.8.2007 had clarified that the maintainability of such application shall be considered at the stage of final hearing.

20. Learned counsel for the parties have referred to and relied upon the following decisions of the Courts, wherein divergent views stand expressed on the question of maintainability of the Cross Objections filed under Order 41 Rule 22 CPC in the proceedings of the nature with which this Court is concerned: *Gogula Gurumurthy & others vs. Kurimeti Ayyappa,* (1975) 4 SCC 458; *Sri Saibaba Cloth Emporium, Adoni vs. Kolli Sanjeevamma & another,* AIR 1991 Andhra Pradesh 106; *Jamshed Hormusji Wadia vs. Board of Trustees, Port of Mumbai &*

another, (2004) 3 SCC 214; *Venkatarama Naicker vs. Ramasami Naicker & others,* AIR (39) 1952 Madras 504; *Gian Devi Anand vs. Jeevan Kumar & others,* (1985) 2 SCC 683; *Municipal Corporation of Delhi & others vs. International Security & Intelligence Agency Ltd.,* (2004) 3 SCC 250; *Nalakath Sainuddin vs. Koorikadan Sulaiman,* (2002) 6 SCC 1; *Kamal Kumar vs. Smt. Imartibai & others,* 2003 (1) RCR 681 (Madhya Pradesh); *Jugraj Pal vs. Bhim Sain,* 2001 (2) RCR 294 (P & H); *V. V. Krishna Vara Prasad vs. S. Surya Rao,* 1997 (1) RCR 613 (A.P.); *Munnalal Agarwal vs. Jagdish Narain & others,* (2000) 1 SCC 31; *Ram Charan Singh vs. Brij Bhushan Pandey,* 1996 (2) RCR 382 (M.P.); *Neon Lawrie & another vs. O. R. Properties and Builders (P) Ltd. & others,* 2013 (1) RCR (Rent) 348 (Rajasthan); *State of Haryana & another vs. Vinod Tayal,* 2011 (1) RCR (Rent) 480 (P & H); and *Ravinder Kumar Sharma vs. State of Assam & others,* (1999) 7 SCC 435.

21. I need not deal with each one of the decisions separately. Certain High Courts have held the provisions of Order 41 Rule 22 CPC to be made applicable whereas others have held only principles analogous thereof to be applicable. Much emphasis was laid on *Sri Saibaba Cloth Emporium, Adoni vs. Kolli Sanjeevamma & another,* AIR 1991 Andhra Pradesh 106 wherein, view taken in *Mahaboob Bi vs. Alvala Lachmiah,* AIR 1964 Andhra Pradesh 314; *Jia Lal vs. Mohan Lal,* AIR 1960 J & K 22; *Moti Ram vs. Suraj Bhan,* AIR 1960 SC 655; and *Pattammh vs. Krishnaswami Iyer,* AIR 1928 Mad 794, stands affirmed. If one were to carefully peruse the judgment, one would find that the Court has specifically not held the provisions of the Code of Civil Procedure applicable to the revisional jurisdiction under the Act. In fact, it specifically quoted the view expressed by K. V. Gopal Krishnan Nair, J. holding that though the scope of Order 41 Rule 22 would not extend to revisional jurisdiction yet, the High Court in exercise of its revisional jurisdiction would have sufficient powers to entertain the question which may be raised by the respondents, subject of course to the limitations prescribed therein.

22. While dealing with the provisions of the Special Statute namely the Provincial Insolvency Act, 1920 the Division Bench of Madras High Court in *Venkatarama Naicker vs. Ramasami Naicker & others,* AIR (39) 1952 Madras 504 has specifically held that no cross objection would lie in a revision petition.

23. On consideration of the provisions of the Act, it is seen that not every provision of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) is made applicable to the Special Statute. A Controller being a designated authority so defined under Section 2(c) of the Act would not mean a Judge/Presiding Officer of a Civil Court so defined under Section 2(8) of the Code. Unless so expressly or impliedly barred, suits of civil nature are to be tried by courts having competent jurisdiction. This is so provided in Part-I (Section 9) of the Code. The Code, procedural in nature, provides a complete mechanism for trying such suits and execution of decrees passed therein. It also provides remedies by virtue of an appeal and revision.

24. Noticeably the Act also is a complete Code in itself, dealing with the control of rent and eviction within the urban areas of the state of Himachal Pradesh. This special statute provides for a complete mechanism for adjudication of rights, duties and obligations *inter se* the landlord and the tenant in accordance with the procedure prescribed therein. The right of the landlord to recover possession on the grounds specified under the Act is required to be adjudicated in a petition filed under the Act. Such application is to be filed in a prescribed format (Form-A), so specified under Rule 3 of the Himachal Pradesh Urban Rent Control Rules, 1990 (hereinafter referred to as the Rules). For adjudication of such application, provisions of the Code of Civil Procedure are not specifically made applicable. As per sub-rule (2) of Rule 12, the Controller is to be guided by the principles of the procedure laid down in the Code. A petition for revision is required to be filed under Rule 15. However, only for the purposes of production of evidence and summoning and enforcing attendance of the witnesses, by virtue of Section 25 of the Act, the Controller is vested with the powers of a Court under the Code. The orders passed by the Controller, by virtue of Section 26 of the Act, are made executable by the Controller as a decree of a Civil Court. Hence the Controller, for such limited purpose, is specifically empowered

to exercise all powers of a Civil Court. It is thus seen that only for a limited purpose, provisions of the Code are made applicable to the provisions of the Act.

25. I am unable to persuade myself in accepting the submission made on behalf of the tenant that provisions of Order 41 Rule 22 CPC would be applicable to a petition filed under Order 24(5) of the Act. While doing so, apart from the aforesaid analysis of the statutory provisions, I seek reliance upon the decision rendered by the apex Court in *Nalakath Sainuddin vs. Koorikadan Sulaiman,* (2002) 6 SCC 1.

26. However, by virtue of the power so vested under Section 24(5) of the Act, this Court is duty bound to examine the legality and propriety of the order passed by the authority or conduct of the proceedings, irrespective of the fact as to whether cross objection stands filed by the tenant or not, for it is open for anyone of the parties to invite attention of the Court to the same. In *Nalakath Sainuddin* (supra), the Court had an occasion to deal with the Kerala Buildings (Lease and Rent Control) Act, 1965 (para-8), which are similar to the ones with which we are concerned. Landlord's petition for ejectment stood allowed only on limited grounds to which also there was no challenge by him. However, the High Court, in the course of its revisional jurisdiction, even in the absence of any petition filed by the landlord, passed orders also on the grounds which stood rejected by the Controller. Challenge laid by the tenant stood repelled by the apex Court in the following terms:-

> "17. We agree with the view taken by the High Courts of Madhya Pradesh and Madras. We are of the opinion that-
>
> (i) There is no reason to read and interpret Section 20 of the Kerala Buildings (Lease and Rent Control) Act, 1965 narrowly and limit the scope of revisional jurisdiction conferred on the High Court thereby;
>
> (ii) Once a revision petition is entertained by the High Court, whichever be the party invoking the revisional jurisdiction, the High Court acquires jurisdiction to call for and examine the records of the authority subordinate to it. The records relating to 'any order' and/or any proceedings, are available to be examined by the High Court for the purpose of satisfying itself as to the (a) legality, (b) regularity, or (c) propriety of the impugned order, including any part of the order, or proceedings. The only limitation on the scope of High Court's jurisdiction is that the order or proceedings sought to be scrutinized must be of the subordinate authority. Any illegality, irregularity or impropriety coming to its notice is capable of being corrected by the High Court by passing such appropriate order or direction as the law requires and justice demands.
>
> (iii) 'Any aggrieved party', the expression employed in Section 20(1), means a person feeling aggrieved by the ultimate decision, that is, the operative part of the order. A party to the proceedings, who has succeeded in securing the relief prayed for, is not a party aggrieved though the order contains a finding or two adverse to him. The respondent can support the order and pray for the ultimate decision being sustained, without filing a revision of his own, and for achieving such end he may seek reversal of any findings recorded against him. However, if the non-petitioning party feels entitled to a more beneficial or larger order in his favour but was allowed a lesser or smaller relief then to the extent of claiming the more beneficial or larger relief he should have filed a revision petition of his own as he was 'an aggrieved party' to that extent.
>
> 18. There is, therefore, no doubt in the present case that in a revision preferred under Section 20 of the Act by the tenant laying challenge to the propriety of the decision of the Appellate Authority under Section 11(8) of the Act, the landlord could have urged that the order of eviction could be sustained under Section 11(3) of the Act also. The High Court has not erred in permitting the landlord to urge such a plea in the revision filed by the tenant though the landlord did not

> file any revision of his own. A landlord who has succeeded in securing an order of eviction on one of the several grounds urged by him cannot be said to be a person aggrieved by such order. He cannot file a revision rather he can feel satisfied with the order. The person aggrieved is the tenant and in a revision preferred by the tenant it is only just and equitable that the landlord should be permitted to support the order of eviction by disputing correctness of the finding recorded in the impugned order whereby the availability of additional ground for eviction was negatived. Such a right has to be necessarily spelled out in favour of the landlord who has succeeded from the Court below else there would be grave injustice." [Emphasis supplied]

The decision still holds field and subsequently referred to and relied upon by the Apex Court in *T. Lakshmipathi & others vs. P. Nithyananda Reddy & others,* (2003) 5 SCC 150; *Narinder Mohan Arya vs. United India Insurance Co. Ltd. & others,* (2006) 4 SCC 713; *G. L. Vijain vs. K. Shankar,* (2006) 13 SCC 136; *Balbir Kaur & another vs. Uttar Pradesh Secondary Education Services Selection Board, Allahabad and others,* (2008) 12 SCC 1; *Bentool Steel Products Private Limited vs. O.M.A. Mohammed Omar & another,* (2008) 17 SCC 679; and *Management of Sundaram Industries Limited vs. Sundaram Industries Employees Union,* (2014) 2 SCC 600.

27. In fairness to the learned counsel, I must refer to the decisions reported in *Gogula Gurumurthy & others vs. Kurimeti Ayyappa,* (1975) 4 SCC 458 and *Jamshed Hormusji Wadia vs. Board of Trustees, Port of Mumbai & another,* (2004) 3 SCC 214 on the issue in hand. But both of them on given facts, are inapplicable as none of them specifically deal with the ambit, scope and power of the revisional jurisdiction of the High Court under the Rent Control legislations of the States/land.

Question No. (iii):

28. For the purpose of convenience and ready reference sub-Section (5) of Section 24 of the Act is extracted as under:-

> "Vesting of Appellate Authority on officers by the State Government.
>
> Section 24 … …
>
> … …
>
> (5) The High Court may, at any time, on the application of the aggrieved party or on its own motion call for and examine the records relating to any order passed or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceeding and may pass such order in relation thereto as it may deem fit." [Emphasis supplied]

29. A Full Bench of this court in *Vinod alias Raja vs. Smt. Joginder Kaur,* 2012 (3) Him. L. R. (FB) 1401 has held the right of appeal to be a statutory right, not to be circumscribed by the delegatee/State Government.

30. The order of the authority attaches finality not to be called in question in any Court of law, except by the High Court in exercise of its revisional jurisdiction which can be either on an application filed by an aggrieved party or *suo motu* by the Court. The court can call for and examine the records for "satisfying itself" about the "legality and propriety" of the "order" or the "proceedings". The High Court may pass orders as it may "deem fit".

31. Now what is the scope of such revisional jurisdiction and the extent of the power which the court can exercise is now well settled by a five-Judge Bench of the apex Court reported in *Hindustan Petroleum Corporation Limited vs. Dilbahar Singh,* (2014) 9 SCC 78. The findings can be summarized as under:

> (i) The term 'propriety' would imply something which is legal and proper.

(ii) The power of the High Court even though wider than the one provided under Section 115 of the Code of Civil Procedure is not wide enough to that of the appellate Authority.

(iii) Such power cannot be exercised as the cloak of an appeal in disguise.

(iv) Issues raised in the original proceedings cannot be permitted to be reheard as a appellate Authority.

(v) The expression "revision" is meant to convey the idea of much narrower expression than the one expressed by the expression "appeal". The revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the CPC but certainly it is not wide enough to make the High Court a second court of first appeal. While holding so the Court reiterated the view taken in *Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal,* (1975) 2 SCC 246.

(vi). The meaning of the expression "legality and propriety" so explained in *Ram Dass vs. Ishwar Chander,* (1988) 3 SCC 131 was only to the extent that exercise of the power is not confined to jurisdictional error alone and has to be "according to law".

(vii) Whether or not the finding of fact is according to law or not is required to be seen on the touch stone, as to whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence; overlooking; ignoring the material evidence all together; suffers from perversity; illegality; or such finding has resulted into gross miscarriage of justice. Court clarified that the ratio of *Ram Dass (supra)* does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a finding contrary to the findings returned by the authority below.

(viii) In exercise of its revisional jurisdiction High Court shall not reverse findings of fact merely because on reappreciation of the evidence it may have a different view thereupon.

(ix) The exercise of such power to examine record and facts must be understood in the context of the purpose that such findings are based on firm legal basis and not on a wrong premise of law.

(x) Pure findings of fact are not to be interfered with. Reconsideration of all questions of fact is impermissible as Court cannot function as a Court of appeal.

(xi) Even while considering the propriety and legality, high Court cannot reappreciate the evidence only for the purposes of arriving at a different conclusion. Consideration of the evidence is confined only to adjudge the legality, regularity and propriety of the order.

(xii) Incorrect finding of fact must be understood in the context of such findings being perverse, based on no evidence; and misreading of evidence.

32. The Court was dealing with the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965, T. N. Buildings (Lease and Rent Control) Act, 1960 and Haryana Urban (Control of Rent and Eviction) Act, 1973. The incongruity in the decisions rendered by the apex Court in *Rukmini Amma Saradamma vs. Kallyani Sulochana,* (1993) 1 SCC 499 and *Ram Dass (supra)* was the backdrop in which the Constitution Bench was called upon to decide the scope of the revisional jurisdiction and the expression "legality and propriety" provided in the relevant statues. The essential question being as to whether in exercise of such powers, the revisional authority could reappreciate the evidence or not. Finally the Court answered the reference by making the following observations:-

"43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the court/authority below is according to law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."

[Emphasis supplied]

33. In view of the aforesaid discussion the correctness, legality and propriety of the orders passed both by the Rent Controller and the Appellate Authority are required to be examined.

Question No. (v):

34. The Act specifies several grounds on which a tenant can be evicted. For ready reference Section 14(2) of the Act is reproduced as under:-

"14. Eviction of tenants.

(1). ... ...

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied-

(i) that the tenant has not paid or tendered the rent due from him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement by the last day of the month next following that for which the rent is payable:

... ...

(ii) that the tenant has after the commencement of this Act without the written consent of the landlord -

... ...

(b) used the building or rented land for a purpose other than that for which it was leased ; or

(iii) that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land ; or

> (iv) that the tenant has been guilty of such acts and conduct as are nuisance to the occupiers of buildings in the neighborhood; or
>
> … …
>
> the Controller may make an order directing the tenant to put the landlord in possession of the building or rented land … …"

35. The landlord had sought ejectment of the tenant on the grounds of: (i) Non payment of rent [Section 14 (2) (i)]; (ii) Without written consent of the landlord, used the building for a purpose other than that for which it was leased [Section 14 (2) (ii) (b)]; and (iii) Tenant had committed acts which are likely to impair materially the value or utility of the building [Section 14 (2) (iii)].

36. Broadly speaking, a building or a part thereof can be let out for three purposes viz. (i) Residential; (ii) Business; and (iii) Manufacturing. Section 108 of the Transfer of Property Act, 1882 prohibits the lessee to use the tenanted premises for a purpose other than the one for which it was leased. Normally, if the dominant purpose for which a building is let out is maintained, then a tenant may not be liable to be evicted in the absence of any covenant in the contract between the parties, prohibiting a user different from the one mentioned in the lease deed and the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of the premises. But if the building is let out for residential or business purpose and the tenants starts manufacturing activity or vice a versa, then it would amount to change of user subject to the provisions of the Act.

37. What is the meaning of the expression "*used the building or rented land for a purpose other than that for which it was leased*" had arisen for consideration before various Courts. Generally it is held that mere change of user from one commercial activity to another, in itself, is no ground for claiming ejectment unless and until injury to the property and interest of the landlord is proved. [Civil Revision No. 54 of 2012, titled as *Sain Ram Jhingta vs. Surinder Singh,* decided on 9th October, 2015 by this Court and *Hari Rao vs. N. Govindachari & others,* (2005) 7 SCC 643].

38. This Court in *Shiv Ram & another vs. Sheela Devi,* AIR 1993 H.P. 49 has held that:-

> "(7) On the question whether such a change of user is incidental or allied to the business or that it was only a small change in the user and would not be actionable, reliance is placed upon two judgments of the Supreme Court in Mohan Lal v. Jai Bhagwan, AIR, 1988 SC 1034 and Gurdial Batra v. Raj Kumar Jain (1983) 3 SCC 441 (sic).
>
> (8) Section 14(2)(ii)(b) of the Act enumerates the grounds on which eviction of petitioner No. 1 has been sought and ordered, namely, 'use of the building or rented land for a purpose other than that for which it was leased'. … …
>
> (11) The ratio of the aforementioned two judgments of the apex court in Mohan Lal's and Gurdial Batra's cases (supra) appears to be that carrying of a business other than the one for which the premises were let out when such a business is an allied business would not amount to change of user. However, a small change in the user in the business, which is not allied to the business for which it was let out, would also not amount to change of user unless there is impairment to the utility or likelihood of damage being caused to the building and business can conveniently be carried on without creating any nuisance."

39. It is in the aforesaid backdrop that this Court framed an additional issue and directed the Controller to return his findings thereupon.

40. The rent control legislation is enacted in the larger interest of the society as a whole and it is not intended to confer any disproportionately larger benefit on the tenant to a greater disadvantage of the landlord. But it is also a beneficial piece of legislation recognizing reasonable protection to the tenant as one of the objects. While construing a provision of law imposing a liability for eviction, like Section 14(2)(ii)(b) of the Act, one must see whether there has been such a change of user of the premises as to make it alien to the purpose for which the building was let.

41. A Coordinate Bench of this Court in *Rajinder Kumar Sharma vs. Smt. Kanta Kumari,* Latest HLJ 2007 (HP) 73 has held that "13. Similarly, in Mohan Lal vs. Jai Bhagwan [1988 (2) SCC 474] citing the observations of Lord Diplock about the legislative intendment, their Lordships clearly held that unless any mischief or detriment or an impairment is caused to the shop in question, the change of user by itself from one commercial activity to another commercial activity cannot be a ground for eviction of the tenant. Culling the aforesaid ratio in the aforesaid two judgments and applying the same to our case, I have no hesitation in holding that there is a clear nexus between the concept of change of user (provided the activity remains either commercial or business, as the case may be) and any injury or impairment caused to the property or any prejudice caused or likely to be caused to the landlord because such a nexus alone can be made the basis of the eviction of the tenant. Otherwise in ordinary prudence and in normal circumstances merely because a tenant changes his commercial activity from one business to another for any reason, this should not be by itself a ground for eviction. It is very commonly understood in the mercantile world that even though a tenant may have obtained a shop on lease for a particular and specified commercial activity, either because of the reason of his failure in that activity or changes in the economic scenario, he may have to put that commercial activity to an end and to earn his livelihood by starting another commercial activity in the same shop. After all, a businessman cannot be compelled to carry on with a particular commercial activity even if he feels it to be non-viable, non-manageable or non-profitable. Every businessman has a right to carry on a business of his choice. Merely because for the reasons best suited to him he undertakes a change in commercial activity, this by itself should not be a ground of his eviction from the shop. As noticed above, the change of user has to be clearly linked, and inseparably coupled with, an element of injury or impairment of the shop or causing any prejudice or having the potential of prejudice, to the landlord."

42. The apex Court in *Jagdish Lal vs. Parma Nand,* (2000) 5 SCC 44 has observed that:-

> "18. On a consideration of these decisions, it comes out that where the new business started by the tenant in the premises let out to him was an allied business or a business which was ancillary to the main business, it would not amount to change of user. It is true that where a premises is let out for commercial purposes, carrying on of a new business activity therein would not change the nature of the building and it would still remain a commercial building. But that is not enough. Having regard to the provisions of the Act and the intendment of the legislature in providing that the tenant would not use the premises for a purpose other than that for which it was let out, the new business should either have some linkage with the original business, which under the agreement of lease the tenant was permitted to carry on, or it should be an allied business or ancillary to that business. Where local laws provide a specific prohibition in respect of the use of the premises under the rent legislation and that provision has been interpreted in a particular manner by the High Court consistently, it would not be proper to disturb the course of decisions by interpreting that provision differently."

43. In the very same decision, finding the tenant to have reverted to his original business, Court only in exercise of its power under Article 136 of the Constitution of India – to meet the ends of justice – allowed the tenant to continue and occupy the premises on an

enhanced rent. The Court noticed the observations made by the Punjab and Haryana High Court with respect to the provisions which are paramateria with the Act in question and found that the change of business from general merchant to a tea stall; dry fruits and soda water to selling pakoras and general provision store to selling stones and marble chips to be change of user making the tenant liable for ejectment.

44. In the instant case, certain facts are not in dispute. (i) Tenancy is for a non-residential purpose. (ii) Rent agreement (Ext. PW2/A) does not clearly specify the purpose of tenancy. (iii) When the tenant changed the business of carpet and started running a restaurant, landlord did protest. (iv) Inspection by the statutory authorities proved that the tenant had started the business of a restaurant. (v) Landlord, a driver, employed with the Fire Department, Delhi, who has since retired and is living on pension, never acquiesced to such actions of the tenant and consistently, rather vigorously pursued the matters before appropriate forums.

45. In the instant case the tenant had adequate opportunity of appearing as a witness and depose with regard to the change in the character of the business, if any, and also as to whether such business was a source of nuisance, leaving the premises in the neighbourhood to be inhabitable or not. She deliberately chose not to do so without any justifiable reason. It is not that she is ailing, infirm or aged. Her power of attorney could not depose the facts of which she alone had knowledge. It is a settled principle of law that a power of attorney holder cannot depose on behalf of the principal for the acts done on behalf of him though he can depose on the facts personally known to him. [*Man Kaur (dead) by LRs vs. Hartar Singh Sangha,* (2010) 10 SCC 512]

46. From the record it could not be pointed out as to how on the additional issue, findings returned by the Rent Controller are illegal, perverse and erroneous. It cannot be said that such findings are not borne out from the record.

47. Landlord has examined himself as PW-3 as also Jitender Kumar (PW-4), Sansar Chand (PW-5), Umesh Kumar (PW-6), Sudershan Lal (PW-7) and Mitya Nand Sood (PW-8). In one voice, all of them have clearly, consistently and cogently deposed that the shop in question was let out to the tenant for the purpose of carrying out the business of carpets etc. but however, without consent of the landlord, the tenant changed the said business and since the year 2000 a restaurant in the name and style of "Taste Point" came to be opened up in the tenanted premises.

48. Significantly though the tenant chose not to appear as a witness, but through her power of attorney i.e. Shiv Kumar Kaushal (Respondent No. 2) admitted it to be so. In fact, she also examined Anuj Rana (RW-1) for establishing the fact that noodles for running the business stood supplied by him. The Courts below concurrently have disbelieved the version of Swaroop Kumar (RW-2) and Shiv Kumar Kaushal (RW-3) to the effect that subsequently such business stood closed. In any case, such fact would not have any bearing on the outcome of the present petition, for all that is required to be seen is as to whether prior to the filing of the eviction petition, tenant subjected herself for eviction, with a right accruing in favour of the landlord under the Act. [*Mrs. Santosh Tangri vs. Ved Matta,* 2002 (2) RCR (Rent) 657; *M/s Goyal Steel Industries & others vs. Sangram Singh Sandhawalia & others,* 2005 (1) RCR (Rent) 187; and *St. Michaeal's Cathedral Catholic Club vs. Smt. Harbans Kaur Nayani,* 1997 (1) Sim. L.C. 237]. Moreover, through the testimony of the Sanitary Inspector (PW-4) landlord has established that with the setting up of the restaurant, much nuisance was caused, both to him and in the neighbourhood. There was no proper ventilation and the fumes emitted from the kitchen on the ground floor, straightaway went to the house of the landlord on the first floor. Also on the stair case leading to the first floor, the tenant kept a dustbin which came to be always littered, causing pollution and unhygienic conditions. Landlord's relatives have deposed that purely on account of such unhygienic and unlivable conditions they stopped visiting him.

49. Thus no interference is warranted on the findings returned by the authorities below. It cannot be said that the order is illegal or passed dehors the Rules. Both the orders passed by the Rent Controller as also the Appellate Authority have to be read together. Obviously

the Rent Controller has now allowed ejectment of the tenant on the ground of nuisance to the occupiers of the buildings in the neighbourhood, including the landlord and his family members. Insofar as such findings are concerned, there is neither any illegality nor any impropriety. Also there is no perversity. Testimonies of the witnesses stand correctly and completely appreciated. Documentary evidence also stands considered. The provisions of law are correctly applied to the given facts and circumstances.

50. As such, present petition is disposed of affirming the order of eviction dated 5.8.2006, passed by Rent Controller (II), Dharamshala in Rent Case No. 3 of 2001, titled as *Yog Raj Rood vs. Sunita Kaushal & another* and as affirmed by Appellate Authority in terms of order dated 29.3.2007 passed in Rent Appeal No. 7-D/2003 (alongwith Additional Rent Appeal No. 26-D/XIV/06), titled as *Sunita Kaushal & another vs. Yog Raj.* Also impugned order dated 25.6.2004 passed by Appellate Authority (III), Kangra at Dharamshala, in Rent Appeal No. 7-D/2003, titled as *Sunita Kaushal & another vs. Yog Raj*, is set-aside and that of the Rent Controller (II), Dharmshala, passed in Rent Petition No. 3 of 2001, titled as *Yog Raj vs. Sunita Kaushal & another*, dated 20.12.2002 upheld.

Question No. (vi):

51. I shall now examine the correctness of the order passed by the Rent Controller, Dharamshala in dismissing the execution petition. Mere pendency of a petition in the absence of any stay of the operation of the order of which the execution was sought, cannot and would not be a ground for dismissing the execution petition. The Rent Controller seriously erred in doing so. At best, if at all, he could have adjourned the petition *sine die,* asking the landlord to await till the decision of this Court. At least he could have sought clarification from the Court. Section 24(2) of the Act specifically provides for the stay of proceedings. As such in the absence of any stay of the operation of the order, trial Court could not have dismissed the execution petition. Hence, order dated 16.3.2012, passed by Rent Controller, Dharamshala, H.P., in Execution Petition No. 17/2010, titled as *Yog Raj vs. Sunita Kaushal & another*, is totally unsustainable in law and is quashed and set aside and the Execution Petition is restored to its original number and position. Parties are directed to appear before the Rent Controller on 30th June, 2016.

52. This Court places on record, with appreciation, the efforts put in by Sh. Arjun Lall, Advocate and Sh. Dheeraj K. Vashista, Advocate, in assisting the Court.

Petitions stand disposed of accordingly, as also pending applications(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.

CWP No. 692 of 2016 a/w CWP No.92 of 2016.
Reserved on 16.5.2016
Decided on 02. 06.2016

CWP No.692 of 2016
Anil Verma & ors ...Petitioners
Versus
State of HP & ors ...Respondents
CWP No. 92 of 2016
Love Kishore & ors ....Petitioners
Versus
State of H & ors ...Respondents.

Administrative Tribunal Act, 1985- Section 15- A notification issued by the State government was challenged before the Administrative Tribunal at the instance of certain persons who were unemployed - the application was essentially in the nature of public interest litigation- held, that

Administrative Tribunal is not competent to hear and entertain the application which is in the nature of public interest litigation- the notification was issued as per the direction issued by the High court - the Tribunal had questioned the authority of the High Court by questioning the notification - writ petition allowed and order of Tribunal set-aside. (Para 12-20)

Cases referred:

Dr. Duryodhan Sahu & ors Vs. Jitendra Kumar Mishra and ors (1998) 7 SCC 273
Samriti Gupta & anr Vs. State of HP & ors, Latest HLJ 2016 (HP) 191,

For the Petitioner(s): Mr.M.L. Sharma, Senior Advocate with Mr. B.L.Soni, Mr. Aman Parth and Mr.G.K. Nadda, Advocates.

For the Respondent: Mr. Shrawan Dogra, Advocate General, with Mr.Anup Rattan and Mr. Romesh Verma,Addl. AGs, with Mr. J.K. Verma, Dy. AG, for respondents 1 to 3.

Mr. D.K.Khanna, Advocate for respondent No.4 in both the petitions.

Mr. Ashwani Sharma-II, Advocate for the applicant in OA NO.4272 of 2015.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

Since common questions of law arise for consideration, therefore, both these writ petitions are taken together and are being disposed of by way of a common judgment.

2. CWP No.92 of 2016 has been filed for the following relief:

"In view of the facts and circumstances narrated hereinabove, it is humbly prayed that the present petition may kindly be allowed and the order dated 6.11.2015 may kindly be set aside besides setting aside the OA No. 4272 of 2015 being without jurisdiction in the interest of justice and fair play."

Whereas CWP No.692 of 2016 has been filed for the following reliefs:

"1. That respondents may kindly be directed to implement the policy and comply with directions passed in CWP No.2836 of 2015 titled as Monika Thakur and ors Vs. State of HP and ors in a time bound manner.

2. That advertisement dated 9.10.2015 may kindly be stayed and in alternative posts on which petitioners are to be adjusted as per the policy may kindly be kept reserved in the interest of justice and fair play.

3. That direction may kindly be issued not to disturb and dislodge the petitioners from their posts."

3. With the consent of the parties, CWP No.92 of 2016, titled as Love Kishore & ors Vs. State of HP & ors, is taken as the lead case.

The dispute lies in a narrow compass

4. Petitioners and similarly situated persons had filed various petitions before this Court, the lead whereof was CWP No.2978 of 2012 titled as Anil Verma & ors Vs. State of HP & ors, wherein they had sought a declaration to the effect that they be declared appointed on contract basis with all consequential benefits. These writ petitions were allowed by the learned Single Judge. The respondent State as also certain aggrieved lecturers thereafter filed various Letters Patent Appeals as also writ petitions before this Court, the lead whereof was LPA No. 107 of 2014 and the same came to be decided by this Bench on 3rd December, 2014 and the judgment of learned writ court was ordered to be set aside. However, at the same time, a direction was issued to the State Government to examine the cases of the writ petitioners for regularization

or conversion of their posts on contractual basis while keeping in view the recommendations made by the official respondents themselves vide communication dated 25.4.2011, which reads thus:

> *""DIRECTORATE OF TECHNICAL EDUCATION*
> *VOCATIONAL AND INDUSTRIAL TRAINING*
> *H.P. SUNDERNAGAR.*
> *No.STV (TE)H:B (2)8/C-Vol-XIV-16035 dated 25.4.2011.*
>
> *To*
>
> *The Secretary,*
> *(Technical Education)*
> *to the Govt. of H.P. Shimla-2.*
>
> *Sub: Converting of the services of the employee working on hourly basis/consolidated salary under Student Fund/Student Welfare Fund in the Department into contract basis.*
>
> *"Please refer to your letter No. EDN(TE)B(15) 8/2009 dated* ***14.3.2011*** *on the above cited subject.*
>
> *In this connection, I have the honour to bring to your kind notice that a number of posts falling vacant due to the retirements, promotions and other reasons in Technical Educational Institutions are required to be filled up immediately in the interest of teaching work. It is also intimated that in the recent past, the admission intake in various disciplines has increased in polytechnics and a number of new trades have also been introduced in Industrial Training Institutes without creation of posts of the Training Instructors. Government Polytechnics at Talwar has been established, where only 08 posts have been created and no post of Engineering-faculty, supporting technical staff ministerial and Class-IV has been created. The posts created for Government Polytechnic Banikhet and Chamba have also not been allowed to be filled-up. There is a complete ban on direct recruitments, resultantly no appointments can be made even on contract basis without seeking the prior approval of Government. The process of seeking the approval of the Government for creation of additional posts, permission for filling-up of the vacant posts and recruitment through the concerned recruitment agencies is time consuming and cumbersome. In view of the aforesaid, the Department is facing acute shortage of staff in Technical Education Institutions and same is adversely affecting the teaching work. The posts in the Technical Educational Institutions can not be let vacant for a long as it affects the very purpose for which they have been created.*
>
> *In view of the aforesaid, the department engages teaching staff in Technical Educational Institutions under the control of Department on lecture/hourly basis. A number of teachers/ staff have been engaged almost in all the Institutions under the Student Fund of the Institute by calling applications through Employment office and conducting the Interviews as per the requirement of R&P Rules of the concerned post at the level of concerned Institution so that the teaching/ training of the students may not suffer. A number of persons so employed are continuing as such for the last 4/5 years.*
>
> *A number of representations made to the Govt. of HP have been received for conversion of their such services to contract basis.*

As per the policy of the Government an employee has to work for about 40 to 42 hours in a week. Therefore, the considered view of the Department is that Government may consider the demand/ request of those employees who fulfill the requisite qualifications as per the R& P Rules and have been working more than 5 years continuously and have completed 9600 hours. It is submitted that Govt. may consider such cases for appointment on contract basis against the existing sanctioned posts by making a policy. It is further submitted that this situation is peculiar being department specific and there is a strong premise for evolving policy in respect of Technical Education Department by the State Govt."

Submitted for consideration and appropriate directions please.

Yours faithfully,
Director
Technical Education
Vocational & Industrial Training
H.P. Sundernagar."

5. The respondent State thereafter **issued** notification dated 3.10.2015, whereby it took over the services of all the teaching and non teaching employees engaged on hourly or period/lecture basis through Student Welfare Fund, Institute Management Committee(s) and under other schemes up to 31.7.2015 (i.e. date of closing of academic year 2014-2015) in Government Engineering Colleges, Polytechnics and Industrial Training Institutes of the Department of Technical Education Vocational & Industrial Training, on contract basis after completion of 7 years or 9600 hours whichever is earlier as one time measure, in the public interest with immediate effect. This, however, was subject to the condition that no litigation is subsisting and undertaking to this effect was to be taken from all the concerned employees. This was further subject to various terms and conditions as stipulated in the notification itself.

6. Aggrieved by the aforesaid notification, respondents 5 to 7 preferred Original Application No.4272 of 2015 titled as Tanvi Vidya & ors Vs. State of HP & ors before the learned H.P. State Administrative Tribunal, seeking therein the following reliefs:-

"(i) That the impugned notification dated 3.10.2015 whereby the respondent Government has directed to take over the services on contract basis of teaching and non teaching employees earlier engaged on hourly or period/lecturer basis be quashed and set aside."

(ii) Further, respondent government be directed to start regular recruitment process for these posts in accordance with statutory rules."

7. Indisputably, the present petitioners were not arrayed as parties and the learned Tribunal proceeded to pass an interim order on 6.11.2015 and stayed the operation of the notification dated 3.10.2015.

8. In the meanwhile, Special Leave to Appeal filed by the certain persons similarly situate as that of Tanvi Vidya aforesaid against the judgment rendered by this Court in LPA No.107 of 2014 came up for consideration before the Hon'ble Supreme Court on 27.1.2016 and the same was disposed of in the following terms:

"Having given a thoughtful consideration to the challenge raised in the present petition, we consider it just and appropriate to relegate the petitioners to the High Court of the State of Himachal Pradesh so as to enable them to assail the notification dated 3.10.2015. It shallbe open to the petitioners, if they are so advised, to assail the directions given by the High Court to the State Government (in its order dated 3.12.2014) passed in LPA No.107 of 2014."

9. When the instant writs came up for consideration before this court on 2.5.2016, it was pointed out by the learned counsel representing the petitioners that the notification issued by the State government on 3.10.2015, was, in fact, in compliance to the judgment rendered by this Court on 3.12.2014 in LPA No. 107/2014 and despite this fact having been brought into the notice of learned Tribunal, it had not vacated the interim order earlier passed by it on 6.11.2015.

10. In order to verify this fact, we called for the records of OA No.4272 of 2015 from the learned Tribunal and it is revealed that on 6.11.2015, the learned Tribunal passed the followed order:

> " *Heard notice.*
>
> *Mr. Varun Chandel, learned Additional AG waives service of notice on behalf of respondents 1 to 3. Notice on behalf of respondent No.4 is also waived by Mr. Narender Singh Thakur, appearing vice Mr.D.K.Khanna, learned Standing counsel.*
>
> *In the facts and circumstances, before the respondents are called to enter upon replies, it shall be expedient and in the interest of justice that the learned Additional Advocate General obtains instructions in the matter. Ordered accordingly.*
>
> *In the facts and circumstances, it shall also be expedient and in the interest of justice that further action pursuant to the impugned notification dated 3.10.2015, annexure A-9, may continue, but shall not be finalized, in the meanwhile, till the next date of hearing."*

11. It would be noticed that OA No.4272 of 2015 has been filed at the instance of certain persons who are unemployed and, was, therefore, essentially in the nature of public interest. In such circumstances, the moot question that arises for consideration is as to whether the learned Administrative Tribunal could have entertained the petition which was in the nature of public interest litigation and furthermore whether the OA, which in substance questioned the order passed by the Division Bench of this court in LPA No.107/2014, could have been entertained by the learned Tribunal?.

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

12. The first question is no longer *res integra* in view of the authoritative pronouncement of the Hon'ble Supreme Court in ***Dr. Duryodhan Sahu & ors*** Vs***. Jitendra Kumar Mishra and ors (1998) 7 SCC 273,*** which position of law has subsequently been reiterated by the Hon'ble Supreme Court in its various judgments. All these judgments have been taken note of by this court in ***Samriti Gupta & anr*** *Vs.* ***State of HP & ors, Latest HLJ 2016 (HP) 191,*** and it has thereafter been concluded as under:

> *"11. Now, what emerges from the aforesaid exposition of law is that a private citizen or a stranger having no existing right to any post and not intrinsically concerned with any service matter is not entitled to approach the Tribunal and the necessary corollary which follows is that it is only "person aggrieved" within the meaning of the Act who can prefer an application for redressal of his grievances before the Tribunal constituted under Article 323-A of the Constitution of India. The Administrative Tribunals are constituted for adjudication or trial of the disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts. Its jurisdiction and powers have been well defined in the Act and more importantly it does not enjoy any plenary power.*
>
> *12. In the result, it can safely be concluded that the Administrative Tribunals constituted under the Act cannot entertain a Public Interest Litigation and the same would amount to defeating the object of speedy disposal of the service matter for which the Tribunals have been created."*

13. In view of the aforesaid discussion, it can conveniently be held that OA No.4272 of 2015, which was in the nature of public interest litigation, was not maintainable and the same, therefore, could not have been entertained by the learned Tribunal.

14. Now, adverting to the second question, we may notice that respondents No. 5 to 7 in OA No. 4272 of 2015, filed by them, had virtually questioned the judgment rendered by this Court in LPA No. 107 of 2014. This would be evident from the grounds (b), (c) and (f) of the petition, which read thus:-

> *"b.That the impugned notification of taking over the services on contractual basis of lecturers earlier appointed on hourly/period/lecturer basis contained in Annexure A-9 has been issued without considering the fact that the appointees contained in the impugned notification were initially appointed without following the regular procedure prescribed by the rules applicable for recruitment to such posts. Even on the ground of discrimination any notification issued for their absorption in regular service is in violation to the right of equality contained in Article 14 and 16 and will be contrary to the constitutional scheme of appointment to public employment. Hence, on this sole ground, the same is not sustainable in the eyes of law and is required to be quashed and set aside.*
>
> *c. That the impugned notification of taking over the services on contractual basis of lecturers earlier appointed on hourly/period/lecturer basis contained in Annexure A-9 has been issued by the respondent government without considering the fact that these appointees contained in the notification were initially appointed by constituting a selection committee dehors the statutory rules at Institutional Level constituting of Principal as Chairman, HOD and lecturers as members. Otherwise, as per statutory rules, the Principal Secretary (Technical Education) is appointing/disciplinary authority and Himachal Pradesh Public Service Commission is recruiting agency and as per regular procedure of recruitment the Principal Secretary (Technical Education) after taking approval from State Government was required to sent the requisition to recruiting agency for commencing recruitment process. Here, case in hand in most of the cases after advertisement of posts of lecturer/practical/hourly basis only one or two candidates were appeared before Selection committee and moreover, Chairman of the committee by exercising his unbridled and uncanalised powers even has waived off the condition of experience of two years as contained in statutory rules at his own illegally. These illegal appointees have no legitimate right enforceable by Court of law or legitimate expectation for absorption as they had been appointed at prescribed rate of Rs. 200/- per lecture and for Rs.100/- per practical with a stipulation that these appointments will be purely on hourly basis and the candidates selected will not have the right to regularization/continuation in service. Moreover, it is settled precedent laid down by the Hon'ble Apex Court in catena of judgments that irregularity can be regularized but illegality cannot be. Hence, on this sole ground the impugned notification is not sustainable in the eyes of law.*
>
> *f.That the impugned notification of taking over the services on contractual basis of lecturers earlier appointed on hourly/period/lecturer basis contained in Annexure A-9 has been passed without considering the fact that the appointees contained therein were appointed completely dehors the statutory rules and constitutional provisions and hence the same is illegal one. Moreover, while passing the impugned notification the respondent government has failed to appreciate the difference between illegal and irregular appointment and verdict passed by Hon'ble Supreme Court in case titled as* ***State of MP & ors Vs. Lalit Kumar Verma, 2007 (1) SCT 620: (2007) 1 SCC 575,*** *wherein in para 12 of its judgment, it has been held that:*

> *"The question which, thus, arises for consideration, would be : Is there any distinction between 'irregular appointment' and 'illegal appointment'? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is State within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance of the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to. This court in B.N. Nagarajan cleary stated that whereas any irregularity can be regularized but an illegality cannot be. Hence, on the basis of judgments passed by Hon'ble Supreme Court in B.N. Nagarajan and Lalita Kumari the impugned notification is not sustainable in the eyes of law."*

15. It is also borne out from the record that the notification dated 3.10.2015, as a matter of fact, had been issued in compliance to the directions passed by this Court in LPA No. 107 of 2014, and this would be evident from para 5 of the short reply submitted on behalf of respondents 1 to 3, which reads thus:

> *"5. That it is respectfully submitted that in compliance with the aforesaid direction of the Hon'ble High Court, draft proposal with regard to framing a policy for regularization or conversion of services of hourly basis/lecture basis, lecturers and other staff engaged under Students Welfare Fund/IMCs in various institutions of the Technical Education Department, i.e. Engineer/ Polytechnic/ITI wings was under examination with Advisory Departments of the State Government, being a Policy matter. However, in the mean time the respondent/petitioners in LPA No.117/2014 feeling aggrieved with non compliance of the aforesaid directions of the Hon'ble High Court had filed Execution Petition No.15/2015 in LPA No.117/2014 wherein the Hon'ble High Court vide order dated 26.5.2015 disposed of the same by directing the respondents to comply with the aforesaid direction of the Hon'ble Court within a period of eight weeks, if not already complied with and to report compliance before the Registrar (Judicial)(Copy of the judgment is enclosed as Annexure R-1). As a matter of framing policy was under examination with Advisory Departments, therefore, an application seeking extension of time for the execution of the aforesaid decision of the Hon'ble High Court was filed in the matter of Execution petition under reference. Further, after obtaining the opinion of all the Advisory Department, the matter was placed before the Council of Ministers for consideration and after its approval the impugned notification dated 3.10.2015, i.e. Annexure A-9 was issued and accordingly the compliance affidavit has been filed in the Hon'ble High Court in the Execution petition under reference on dated 31.10.2015 (Copy of compliance affidavit is enclosed as Annexure R-2)."*

16. It is rather strange that despite these facts having been brought to the notice of the learned Tribunal by the official respondents in their reply, it vide order dated 8.3.2016 still proceeded to extend the interim order earlier passed by it on 6.11.2015 and matter was ordered to be listed on 29.3.2016.

17. Once the official respondents had themselves acknowledged the notification dated 3.10.2015 to have been issued in compliance to the directions passed by this Court, then what to talk of the learned Tribunal even this Court would not have the jurisdiction to entertain the petition, which virtually seeks to question the decision passed by this Court in LPA No. 107 of 2014.

18. In addition to the aforesaid, it would also be noticed that even in terms of the orders passed by the Hon'ble Supreme Court, liberty to assail the notification dated 3.10.2015

was available only to the persons who had approached the Hon'ble Supreme Court and was, therefore, not available to respondents 5 to 7.

19. In view of the aforesaid discussion, it can safely be concluded that OA No.4272 of 2015, filed by respondents 5 to 7, was not maintainable and, therefore, could not have even been entertained much less adjudicated by the learned Tribunal.

20 Accordingly, these writ petitions are allowed and the OA No.4272/2015 is ordered to be dismissed and resultantly, respondents are directed to comply with the notification dated 3.10.2015 in its letter and spirit.

The petitions are accordingly disposed of in the aforesaid terms, leaving the parties to bear their costs.

****

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

Desh Raj Thakur. ...Appellant

Versus

State of Himachal Pradesh & Another. ...Respondents

LPA No. 325 of 2011
Judgment reserved on: 24.5.2016
Date of Decision: 02.6.2016.

Constitution of India, 1950- Article 226- Petitioner filed an application for premature retirement - he withdrew the application, still he was prematurely retired- he filed a writ petition which was dismissed by the Writ court holding that the request for premature retirement was accepted prior to the request for withdrawal - however, the record shows that his request for voluntary retirement was pending when the request for withdrawal was received- Appeal allowed.

(Para-3 to 7)

For the Appellant: Ms.Komal Kumari, Advocate.

For the Respondents: Mr. Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.M.A. Khan, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellant has assailed the judgment rendered by the learned writ Court, whereby his claim for quashing the order dated 9.2.2011 came to be rejected.

2. Undisputed facts are that the petitioner on 31.1.2011 made a request to the respondents seeking premature retirement for the reasons that he met with an accident, resulting in non functioning of his left arm and also on account of adverse family circumstances. The appellant after realizing the consequences vide letter dated 9.2.2011, sought withdrawal of his request, which according to the respondents was not accepted, as his request seeking premature retirement vide letter dated 31.1.2011 stood accepted by the respondents earlier on 9.2.2011 itself. The learned writ Court dismissed the petition by concluding that the application for premature retirement made by the appellant already stood accepted before the receipt of request for withdrawal of the same. Aggrieved by the judgment, the appellant has filed the instant appeal on various grounds as set out in the grounds of appeal.

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

3. In order to satisfy ourselves regarding the stand taken by the respondents that they had accepted the request of the petitioner for premature retirement on 9.2.2011, we on 29.2.2016 directed the respondents to keep available the records at the time of hearing.

4. It is evident from the records that the request of the appellant seeking premature retirement stands entered at Sr. No. 828 dated 3.2.2011 of the diary register. The application moved by the appellant for withdrawal of the request for voluntary retirement made on 9.2.2011 and is entered at Sr. No. 967 dated 9.2.2011. Entry in the peon book shows that office order dated 9.2.2011 was sent through peon and received by the appellant/petitioner on 10.2.2011 at 12.00 P.M.

5. Apparently, the case of the appellant till 9.2.2011 was being examined, but in noting dated 9.2.2011, it has been mentioned that the request of the appellant for premature retirement has already been accepted by the HOD on the PUC itself on 1.2.2011. This noting is irreconcilable with the defence taken by the respondents, wherein they themselves have admitted that the competent authority had accepted the request of voluntary retirement on 9.2.2011. This is clearly evident from para 1 of the reply, which reads thus.

> *"1. It is true that petitioner has applied for voluntary retirement vide his application dated 31.01.2011 Annexure R-1 and the same was accepted vide order dated 9th February, 2011 Annexure R-2. Petitioner has applied for voluntary retirement citing the reason of his inability to discharge his duties due to the accident. Petitioner has submitted the application for voluntary retirement without any pressure and fear and the same was accepted under the Rules."*

6. Similar averments are thereafter reiterated in para 4 of the reply. Thus, it is evident that some mischief down the line had definitely been played. Be that as it may be, there is nothing on record to even remotely suggest that the appellant was communicated the decision regarding rejection of his application for voluntary retirement, rather it is borne out from the record that the application filed by the appellant for withdrawal of his request for voluntary retirement had been received by the respondents and was already pending, before the impugned decision had been taken by the respondents.

7. In addition to the aforesaid, it would also be noticed that it is the specific case of the appellant that his wife had visited the office of respondent No. 2 on 8.2.2011 and thereafter on 9.2.2011 and had apprised him about the condition of the petitioner and his intention to withdraw his application for premature retirement. This fact is admitted by the respondents in their reply and otherwise stands established on record from the gate passes annexed with the petition as Anenxures P-4 and P-5, respectively. Thus, it is proved on record that respondent No. 2 was fully aware of the intention of the appellant regarding withdrawal of his request for premature retirement, yet for some strange reasons, he ensured that the appellant's request is not acceded to. Therefore, in such circumstances, to say the least, the conduct of respondent No. 2 cannot be said to be "fair", as he virtually left no stone unturned to ensure that the office order dated 9.2.2011 is issued, thereby rejecting the request of the appellant for voluntary retirement without even caring for the request of withdrawal submitted earlier by the appellant on 9.2.2011 itself.

In view of the above discussion, we find merit in this petition and the same is accordingly allowed. The judgment passed by the learned writ Court is set aside and consequently the writ petition is allowed, as prayed for, leaving the parties to bear their costs.

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

Gurdev Singh ....Appellant/Plaintiff
Versus
Narain Singh & ors ...Respondents/Defendants

RSA No.332 of 2007
Reserved on 1.6.2016
Decided on: 2. 6.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking permanent prohibitory injunction for restraining the defendants from raising construction, taking forcible possession or interfering with the suit land- it was pleaded that plaintiff was owner in possession of the suit land - the defendants got their land increased and suit land decreased during settlement- an application for correction was filed, which was allowed- the defendants disputed the correctness of the site plan- suit was decreed by the trial court - an appeal was preferred, which was allowed- held, that the revenue record prepared during settlement was rectified by the Collector- the order was affirmed by Divisional Commissioner- no further appeal/revision was filed and the order of Divisional Commissioner has attained finality – the Settlement Collector has jurisdiction to entertain the application- the correctness of the order cannot be seen by the Civil Court - even if the order was incorrect, it cannot be assailed in collateral proceedings- Appellate Court could not have gone into the correctness of the order to reverse the decree passed by the trial court- appeal allowed - judgment passed by the Appellate Court set-aside and the judgment passed by Trial court restored. (Para 8-16)

Case referred:
Ujjam Bai Vs. State of Uttar Pradesh& anr, AIR 1962 SC 1621

For the Appellant :Mr.N.K.Thakur, Senior Advocate with Ms. Jamuna, Advocate.
For the respondents: Mr.R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This Regular Second Appeal at the instance of the appellant (hereinafter referred to as the 'plaintiff') is directed against judgment and decree dated 27.6.2007 passed by learned Additional District Judge (FTC), Una whereby the judgment and decree dated 29.4.2000 passed by the learned Sub Judge 1st Class, Court No.1,Amb has been reversed.

2. The appellant/plaintiff sought the relief of permanent injunction restraining the respondents/ defendants from raising any sort of construction, taking forcible possession or interfering in any manner in the suit land, more specifically shown by letters ABCDEFG with red in the site plan being part of land of Khasra No.216. The contention of the plaintiff was that he was owner in exclusive Hissadari possession of the suit land and the defendants who were very clever and head strong persons in connivance with the settlement field staff had got the shape of the suit land disfigured with regard to the location and in consequence thereto Karukans of the suit land were reduced on the eastern side. It is the case of the appellant/plaintiff that during the process of settlement defendants got their land increased thereby causing loss and reduction of the land of the plaintiff. On coming to know about the wrong done by the settlement field staff with regard to the reducing of the area of the plaintiff, he filed an application for correction of Karukans before the Collector Settlement who vide order dated 10.1.1995, ordered the correction to the effect that the area comprised of khasra No.213/3, 214/1 and 215/1 be deleted from the ownership of defendants by adding the same to the ownership of the appellant/plaintiff. The

order passed by the Collector was unsuccessfully assailed by the defendants before the Divisional Commissioner.

3. Respondents/Defendants contested the suit by raising preliminary objections of non maintainability of the suit and estoppel. In Para No.1 of the written statement the ownership of the suit land being that of the plaintiff/appellant was not disputed. However, it was submitted that the site plan produced by the plaintiff was wrong as he had wrongly included the land of the defendants in the site plan. In nut shell, the stand of the defendants was that the plaintiff wanted to encroach upon the land of the defendants comprised in khasra No.215.

4. Plaintiff filed replication to the written statement wherein he denied the allegations of the defendants and reiterated the claim set out in the plaint.

5. On the basis of the pleadings of the parties, learned trial court vide order dated 29.4.2000 framed the following issues:

"(1)Whether plaintiff s entitled to the relief of injunction as alleged? OPP.

(2) Whether land shown by letters ABCDEFG in site plan is part of the suit land? OPP.

(2B) Whether the defendants during pendency of the suit had raised construction on 10.12.1994? OPP.

(3). Whether suit s not maintainable? OPD.

(4) Whether plaintiff is estopped from filing suit? OPD.

(5). Relief.

6. The learned trial court allowed the suit of the plaintiff. Aggrieved by the judgment and decree passed by the learned Trial court, respondents/defendants filed appeal before the learned lower appellate, who allowed the same, constraining the appellants to approach this court by way of instant Regular Second Appeal.

7. On 1st August, 2007, the appeal was admitted on the following substantial questions of law:

"1. Whether the order passed by the revenue Officer ordering the correction of the Karukans which were wrongly prepared during the settlement, can be gone into by the civil court, more particularly when such order of correction had attained the finality with the order of the Divisional Commissioner and no further appeal or revision was preferred?.

2. What is the effect of non filing the appeal/ revision by the defendants/ respondents against the order of confirmation passed by the Divisional Commissioner of correcting the mistake with regard to the Karukans committed by the field staff?.

3. Whether the admission of a party to the lis is binding on such party and can be used against such person and non consideration of such admission by the learned lower appellate court has caused a prejudice to the plaintiff/appellant?."

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

Substantial Question No.1

8. It is not in dispute that during settlement, the karukans prepared were ordered to be rectified by the Collector vide order Ext P-8 and the order so passed was affirmed by the Divisional Commissioner vide order Ext P-9. It is further not in dispute that this order has attained finality, having not been assailed before any authority or even a court of competent jurisdiction. Now, what would be the effect of the order?.

9. Section 11 Explanation VIII of the Code of Civil Procedure reads as under:

> "An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

10. It cannot be disputed that the Settlement Collector had the jurisdiction to entertain the application for correction. Therefore, in such circumstances, whether the order was right or wrong or in accordance with law or not in accordance with law, would not make the order *coram non judice* or void and the respondents/defendants, if at all aggrieved, were required to assail the same before the competent authority.

11. To be fair to the learned counsel for the respondents/defendants, he has vehemently argued that once it is proved on record that no proper procedure was followed by the Settlement Collector while ordering the correction of entries and also bearing in mind that these corrections were carried out at the back of the respondents without affording proper and reasonable opportunity of being heard to them, these findings cannot be held to be binding much less operate as *res judicata* against the respondents/defendants.

12. It is more than settled that where a court or Tribunal is having authority or jurisdiction to decide a particular dispute, but in exercise of such jurisdiction, comes to a wrong conclusion then it is difficult to hold that such an order is void. The correctness of the order has nothing to do with the jurisdiction of the court. It is equally settled that where a quasi judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or facts and if decides wrongly, the party wronged can only take the recourse prescribed by law for setting the matters right and if that course is not taken, the decision, however, wrong, cannot be disturbed.

13. Similar issue came up before a Constitution Bench of Hon'ble Supreme Court in ***Ujjam Bai Vs. State of Uttar Pradesh& anr, AIR 1962 SC 1621*** and it was held as under:

> *"15.Now, I come to the controversial area. What is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly intra vires? It is necessary first to clarify the concept of jurisdiction. Jurisdiction means authority to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until (1) (1962) 1 S.C.R. 540 reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or in fact. The question, whether a tribunal hat; jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the enquiry". (Rex v. Bolten, (1841) 1 QB 66 at p.74).. Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determining any of those questions incorrectly but it has no jurisdiction to entertain a claim for reinstatement or damages for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required, (i. e.) has*

jurisdiction to determine. The strength of this theory of jurisdiction lies in its logical consistency. But there are other oases where Parliament when it empowers an inferior tribunal to enquire into certain facts intend to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and with in the other area impeachable. "The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a, fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists (1) [1841] 1 Q.B. 66,74.

or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess."

(Halsbury's Laws of England, 3rd Edn. Vol. II page 59). The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi judicial body cannot, in general, be' impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts strito sensu but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of res judicata has been applied to such decisions. (See Living stone v. Westminister Corporation (1) Re Birkenhead Corporation (2) Re 56 Denton Road Twickenham(3) Society of Medical Officers of Health v. Hope(4). In Burn & Co. Calcutta v. Their Employees(5) (1) [1904] 2 K.B. 109. (2) (1952) Ch. 359, (3) [1953] Ch. 51. (4) [1959] 2 W.L.R. 377, 391, 396, 397, 402. (5) [1956] S.C.R. 781: (S) AIR 1957 SC 38) this Court said that although the rule of res judicata as enacted by s. 11 of the Code of Civil Procedure did not in terms apply to an award made by an industrial tribunal its underlying principle which is founded on sound public policy and is of universal application must apply. In Daryao v. The State of U. P. (1) this Court applied the doctrine of res judicata in respect of application under Art. 32 of the Constitution. It is perhaps pertinent to observe here that when the Allahabad High Court was moved by the petitioner under Art. 226 of the Constitution against the order of assessment, passed on an alleged misconstruction of the notification of December 14, 1957, the High Court rejected the petition on two grounds. The first ground given Was that the petitioner had the alternative remedy of getting the error corrected by appeal the second ground given was expressed by the High Court in the following words:

> *"We have, however, heard the learned counsel for the petitioner on merits also, but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even handmade biris, have been subject to Sales Tax since long before the dated of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act No. 58 of 1957, was to levy an additional excise duty on certain important articles and with the*

> *concurrence of the State Legislature to abolish Sales Tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957, to (1) [1961] 2 S.C.A. 591.*
>
> *30th June, 1958, the petitioner was liable neither to payment of excise duty nor to pay- ment of Sales Tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the notification is to 'apply only to those goods on which an addi- tional Central excise duty had been levied and paid".*

If the observations 'quoted above mean that the High Court rejected the petition also on merits, apart from the other ground given, then the principle laid down in Daryao v. The State of U. P. (1) will apply and the petition under Art. 32 will not be maintainable on the ground of res judicata. It is,' however, not necessary to pursue the question of res judicata any further, because I am resting my decision on the more fundamental ground that an error of law or fact committed by a judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends.

16. In Malkarjun Narhari (2) the Privy Council dealt with a case in which a sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment. debtor's estate, and the executing court had erroneously decided that he was to be treated as such representative. The Privy Council said:

> *"In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right;*
>
> *(1) (1961) 2 S.C.A. 591.*
>
> *(2) [1950] L.R. 279, A, 216. 225.*

and if that course is not taken the decision, however wrong, cannot be disturbed".

17. The above view finds support from a number of decisions-of this Court.

1. Aniyoth Kunhamina Umma v. Ministry of Rehabilitation , Petn No.32 of 1959, D/- 22.3.1961 (AIR 1962 SC 1616). In this case it had been held under the Administration of Evacuee Property Act, 1950, that a certain person was an evacuee and that certain plots of land which belonged to him were, therefore, evacuee property and vested. in the Cus- todian of Evacuee Property.' A transferee of the land from the evacuee then presented a petition under Art. 32 for restoration of the lands to her and complained of an infringement of her fundamental right, under Art. 19 (1) (f) and Art. 31 of the Constitution by the aforesaid order under the Administration of Evacuee Property Act. The petitioner had been a party to the proceedings resulting in the declaration under that Act earlier-mentioned. This Court held that as long as the decision under the Administration of Evacuee Property Act which had become final stood, the petitioner could not complain of any infringement of any fundamental right. This Court dismissed the petition observing :

> *" We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an. appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the. infringement of a fundamental right, for she has no such right".*

2. Gulabdas & CO. v. Assistant Collector, of Customs (S) AIR 1957 SC 733. In this case certain imported goods had been assessed to customs tariff. The assessee

continued in a petition under Art. 32 that the duty (1) [1962] 1 S.C.R. 505. (2) A.LR. [1957] S.C. 733, 736. should have been charged under a different item of that tariff and that its fundamental right was violated by reason of the assessment order charging it to duty under a wrong item in the tariff. This Court held that there was no violation of fundamental right and observed :

> *"If the provisions of law under which impugned orders have been passed are with jurisdiction, whether they be right or wrong on fact,' there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal".*

3. Bhatnagar & Co. Ltd. v. The Union of India, 1957 SCR 701: (S) AIR 1957 SC 478). In this case the Government had held that the petitioner had been trafficking in licences and in that view confiscated the goods imported under a licence. A petition had been filed under Art. 32 challenging this action. It was held :

> *"If the petitioner's grievance is that the view taken by the appropriate authority in this matter is erroneous, that is not a matter which can be legitimately agitated before us in a petition under Art. 32".*

4. The Parbhani Transport Co-operative Society. Ltd. v. Regional Transport Authority, Aurangabad, 1960-3 SCR 177: (AIR 1960 SC 801). In this case it was contended that the decision of the Transport Authority in granting a permit for a motor carriage service had offended Art. 14 of the Constitution. This Court held that the decision of a quasi-judicial body, right or wrong, could not offend Art. 14."

14. Once the Settlement Collector had the jurisdiction to make the necessary corrections and such order was affirmed by the Divisional Commissioner who too had the jurisdiction, then even if it is assumed that the order passed was wrong, the same would not make such order a nullity or having been passed without jurisdiction and would , therefore, be binding on the parties.

15. Accordingly, question No.1 is answered in favour of appellant by holding that the order passed by Collector Settlement was required to be assailed by the respondents before a competent authority or court and in absence of any challenge to the same, the learned lower appellate court could not have gone into the validity of the order passed either by the Settlement Collector or the Divisional Commissioner and thereafter reverse the judgment and decree passed by the learned Trial Court.

16. Since question No.1 has been answered in favour of appellant, the appeal succeeds on this sole count alone. Therefore, in such circumstances, there is no requirement or even necessity to answer the remaining two other substantial questions of law framed by this Court on 1.8.2007 which have now only become academic.

17. In view of the aforesaid discussion, appeal succeeds and is accordingly allowed and the judgment and decree passed by the learned lower appellate court is set aside and that of the learned trial court is affirmed. The appeal is allowed in the aforesaid terms, leaving the parties to bear their own cots.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Jaspal Singh s/o Sh. Kehar Singh ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 235 of 2006
Judgment Reserved on : 27.04.2016
Date of Decision : June 2, 2016

N.D.P.S. Act, 1985- Section 58- Search of the bags being carried by the accused on a scooter was conducted during which 2.5 kg. Bhukki was recovered - the accused was tried and convicted by the Trial court- held, in appeal that one independent witness had not supported the prosecution version - other independent witness was not examined - conviction can be based on the testimonies of police official if they inspire confidence and are found to be trustworthy and reliable - however, in the present case the testimonies of police officials were contradictory – sample of 100 grams was taken on the spot- however, weight of the sample was found to be 73 grams in laboratory- this discrepancy was not explained - seal put on the samples was not proved- in these circumstances, the prosecution case was not proved beyond reasonable doubt- the accused was wrongly convicted by the Trial court- Appeal allowed. (Para-10 to 28)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Gurmej Singh and others versus State of Punjab, 1991 Supp (2) SCC 75
State of Rajasthan vs. Om Parkash (2002) 5 SCC 745
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338

For the appellant	:	Mr. Ramakant Sharma, Senior Advocate with Mr. Basant thakur, Advocate, for the appellant.
For the respondent	:	Mr. R. S. Verma, Addl. Advocate General with Mr. Puneet Rajta, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 25.7.2006, passed by the learned Sessions Judge, Solan, H.P. , in Case No. 20-NL/7 of 2004, titled as *State of Himachal Pradesh vs. Jaspal Singh*, whereby the appellant-accused stands convicted for having committed an offence punishable under the provisions of Section 15(B) 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 one year and pay fine of Rs.10,000/-, 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 30.6.2004, ASI Dharam Dass (PW-8) recovered contraband substance (Bhukki) from the conscious possession of the accused. Police, on suspicion, searched the bags carried by the accused on his scooter bearing registration No. HP-12-6157. This was so done after associating independent witnesses namely Ramu Sahani (PW-3) and Bhag Singh (not examined) and in their presence contraband substance (bhukki), which upon weighment was found to be 2.5 k.g. recovered and taken into possession vide recovery memo (Ext. PW-3/A). On the basis of Ruka (Ext. PW-8/B), F.I.R. No. 115/04, dated 30.6.2004 (Ext. PW 2/A) came to be registered at Police Station Nalagarh, Distt. Solan, H.P., against the accused under the provisions of Sections 15 of the Act. With the completion of proceedings on the spot, including filling up of NCB forms (Ext. PW-4/B), in triplicate, and arrest of the accused, case property was produced before SHO Jagdish Ram (PW-4), who after resealing the same with seal impression-R, deposited it with MHC Kamal Nain (PW-2) incharge of the Maalkhana. Constable Chanchal Kumar (PW-5) took the sample parcel for chemical analysis to C.T.L. Kandaghat and report (Ext. PZ) taken on record. Special report (Ext. PW-6/A) was sent

through Constable Raj Pal to the office of Superintendent of Police, Solan. With the completion of investigation, which prima facie revealed complicity of the accused person in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 15 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as eight witnesses and statement of the accused under Section 313 of the Code of Criminal Procedure 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 placed on record by the prosecution, trial Court convicted the accused for the charged offence and sentenced as aforesaid. Hence the present appeal.

6. Having heard learned counsel for the parties as also perused the record, I am of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on correct and complete appreciation of evidence and material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

7. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ....
>
> (Emphasis supplied)

8. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

9. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

10. In the instant case one of the independent witnesses namely Ramu Sahani (PW-3) has not supported the prosecution case at all and despite his extensive cross-examination nothing fruitful could be elicited from his testimony. In fact, he has come up with a totally different version than the one which the prosecution wants the court to believe. No search and seizure operations took place in his presence. Neither the scooter was stopped nor was accused searched by the police in the manner in which the prosecution wants the court to believe. He has explained the signatures on the papers which were obtained on blank papers not on the spot and somewhere else.

11. At this juncture, it be observed that prosecution has not examined other independent witness Bhag Singh, who was given up for having been won over by the accused. Now, there is nothing on record to even prima facie establish such fact. Presence of independent witnesses on the spot appears to be extremely doubtful.

12. In *Gurmej Singh and others versus State of Punjab,* 1991 Supp (2) SCC 75, the apex Court held that dropping a witness on the specious plea that he was won over without

laying the foundation therefor is generally to be frowned upon. But each case has to be considered on its separate facts.

13. In *State of Rajasthan vs. Om Parkash* (2002) 5 SCC 745, the Apex Court held as under:-

> "14. In State of H.P. v Gian Chand [2000(1) SCC 71] Justice Lahoti speaking for the Bench observed that the Court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined."

14. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in the success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

15. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

16. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

17. Apex Court in *Tahir v. State (Delhi),* (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the

locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

18. In view of the aforesaid statement of law, we shall now examine the testimony of police officials.

19. ASI Dharam Dass (PW-8) states that on 30.6.2004 he along with HC Neelam and Constable Santosh Kumar was present outside Police Station Nalagarh. At about 9.30a.m. , accused was seen riding scooter bearing No. HP 12-6157. On suspicion the vehicle was stopped and two – three bags carried by him checked. One bag contained 'bhukki' which when weighed was found to be 2.5 kilograms. Two samples of 100 grams each were drawn from the recovered contraband. Samples as also the bulk parcel were sealed with seal impression-A and the seal was handed over to witness Bhag Singh. Recovery was effected vide memo (Ext. PW-3/A). Ruka prepared on the spot was sent through Constable Santosh Kumar (PW-1). NCB forms were filled on the spot and after completion of other proceedings on the spot, case property entrusted to SHO Jagdish Ram (PW-4) who resealed the case property with his seal impression-R. He also sent the Special Report (Ext. PW-6/A) to the superior officer.

20. Constable Santosh Singh (PW-1) tries to corroborate the version of this witness. But then there are contradictions in their statements. As already observed, independent witness Bhag Singh has not been examined in Court and Ramu Sahani (PW-3) is running a tea stall just in front of the police station. He is a stock witness and under the influence of police. Though Constable Santosh Singh states that Ramu Sahani is running a tea stall in front of the Police Station but ASI Dharam Dass denies such fact. Wherefrom weights were brought by the police also remains unexplained on record. There is also variation in the statements of these witnesses with regard to the specification of the weights brought on the spot along with the scale.

21. But what renders the prosecution story to be fatal is the contradictions in the testimonies of the police officials and the difference in weight of the sample taken on the spot and the one analyzed in the laboratory.

22. It is a matter of record that the sample was sent to the laboratory on 1.7.2004 but when weighed in the laboratory, the sample was found to be of 73 grams. Reduction of more than 25% in the weight remains unexplained by the prosecution. It is not that the contraband substance was wet and would have dried over a period of time.

23. Further as per the version of Const. Santosh Singh he had called the independent witnesses from their shops whereas as per the Investigating Officer witnesses Ramu Sahni and Bhag Singh were present there. There is also contradiction with regard to the time at which the case property was deposited with SHO Jagdish Ram (PW-4). As per this witness the case property was produced before him by the Investigating Officer ASI Dharam Dass at about 1.00 p.m. whereas as per Dharam Dass the same was produced before SHO Jagdish Ram at 12.30 noon. The difference in timings gains significance in the given facts and circumstances.

24. The link evidence in the instance case is also weak. In the report of the chemical analysis, what was the nature of the seals the sample was having is not so disclosed. Also Constable Chanchal Kumar (PW-5) does not state that he took the NCB form to the laboratory. In the road certificate there is no reference of such forms. Whether they were kept safe or not tampered with, itself is in doubt. Further the original seal remains unproven on record. In the given facts and circumstances it has gained significance rendering the prosecution case to be fatal.

25. Trial Court heavily relied upon the photographs allegedly taken at the time of carrying out the search and seizure operations. What needs to be considered is that police had no prior information. They never suspected the accused of carrying the contraband substance. Only on suspicion, but not related to the contraband substance, the school bags carried by the accused were searched. The photographs were taken much after recovery stood effected. The date

on which the photographs were taken is also not mentioned and not disclosed by the Investigating Officer. Hence presence of the accused in the photographs is of no significance. The Court erred in heavily relying upon the same.

26. Further, Santosh Singh (PW-1) admits that the contraband substance was recovered only from one bag and the other two bags were not taken into possession. Now Chanchal Kumar (PW-5), who himself is a police official has not supported the prosecution and version of the Investigating Officer (PW-8) of having checked the vehicle appears to be doubtful. According to him no other independent witness other than Ramu Sahani (PW-3) and Bhag Singh were called, which version stands contradicted by Ramu Sahani. Witness admits not to have given details of the case property before producing it before the SHO. As such, his version is rendered to be doubtful.

27. All these contradictions, improbabilities, embellishments stood ignored by the trial Court and as such, findings returned on all the points being perverse and contrary to law are unsustainable in law.

28. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

29. Since prosecution has not been able to establish its case of having recovered the contraband substance from the conscious possession of the accused, no statutory presumption as envisaged under Section 35 of the Act, can be drawn against the accused.

30. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence dated 25.7.2006, passed by the learned Sessions Judge, Solan, H.P. , in Case No. 20-NL/7 of 2004, titled as *State of Himachal Pradesh vs. Jaspal Singh*, is set aside and the accused is acquitted of the charged offence. Fine amount, if deposited, be refunded to the accused. Bail bonds furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

National Insurance Company Ltd. ... Appellant

Versus

Smt. Ritu Sharma & others ... Respondents

FAO No. 443 of 2014

Date of Decision : June 2, 2016

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the offending vehicle- vehicle met with an accident due to rash and negligent driving – deceased had died on the spot- An FIR was registered against the driver of the offending vehicle under Sections 279, 337 and 304-A of the Indian Penal Code - challan was filed against the driver before the Court of competent jurisdiction- Legal heirs of deceased claimed compensation of Rs. 45 lacs- deceased was 35 years old, who was M.A. in Economics, employed as Sales Executive in a private firm - his monthly income was Rs. 29,166/- salary certificate was proved- after statutory deduction, total annual income of the deceased for the purposes of determining the compensation would be Rs. 4,60,625/- [Rs. 5,25,000 – Rs. 62,500 (tax) – Rs. 1250 (Edu. Cess @ 2%) – Rs. 625 (Higher Edu. Cess @ 1%)] - multiplier of 15 was applied, which is correct- claimants are entitled to Rs. 46,06,260/- (Rs. 3,07,084 X 15) under the head 'loss of dependency', however, in view of the

principle of law laid down by the apex Court in **Ranjana Prakash & others vs. Divisional Manager & another, (2011) 14 SCC 639**, claimants shall be entitled to only a sum of Rs. 34,95,000/- on this count, as awarded by the Tribunal.

Cases referred:

Atma S Berar vs. Mukhtiar Singh, (2003) 2 SCC 3
Sarla Verma (Smt.) & others vs. Delhi Transport Corporation & another, (2009) 6 SCC 121
Neeta w/o Kallappa Kadolkar & others vs. Divisional Manager, Maharashtra State Road Transport Corporation, Kolhapur, (2015) 3 SCC 590
Oriental Insurance Company Ltd. vs. Ram Prasad Varma & others, (2009) 2 SCC 712
Shyamwati Sharma & others vs. Karam Singh & others, (2010) 12 SCC 378
Vimal Kanwar & others vs. Kishore Dan & others, (2013) 7 SCC 476
Amriti Devi & others vs. Kamal Kumar & others, 1991 ACJ 1127 (Vol. 2).
Ranjana Prakash & others vs. Divisional Manager & another, (2011) 14 SCC 639

For the appellant : Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Nishant Kumar, Advocate, Advocate, for the appellant.

For the respondent : Mr. Bimal Gupta, Sr. Advocate, with Mr. Vineet Vashista, Advocate, for respondents No. 1 to 3.
Mr. Vishal Bindra, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

In this appeal filed under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), the insurer (appellant herein) has assailed the award dated 22.3.2014, passed by learned Motor Accidents Claim Tribunal-II, Sirmaur District at Nahan, H.P., in Claim Petition No. 74-N/2 of 2009, titled as *Smt. Ritu Sharma & others vs. Sh. Pawan Verma & others.*

2. On 22.11.2008, vehicle bearing No. HP-18B-0008 owned by Pawan Verma (respondent No. 4) and driven by Atikant Verma (respondent No. 5) met with an accident. Ashish Sharma was one of the passengers who died on the spot. His legal heirs i.e. wife (respondent No. 1), minor child (respondent No. 2) and mother (respondent No. 3) claimed compensation to the tune of Rs.45 lacs by way of a petition filed under the provisions of Section 166 of the Act. Allegedly, deceased, aged 35 years, who was M.A. in Economics was gainfully employed as Sales Executive in a private firm and drawing a salary of Rs.29,166/- per month.

3. Based on the pleadings of the parties, Tribunal framed the following issues:-

"1. Whether Ashish Sharma @ Ashu had died on account of the rash or negligent driving of Car No. HP-18-B-0008 by respondent No. 2 Atikant Verma on 22.11.2008 at about 11.30 a.m. at Dhanoi Nala, as alleged? OPP

2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether the driver of the vehicle in question did not possess a valid and effective driving licence at the relevant time, as alleged? OPR

4. Whether the petition has been filed by the petitioners in collusion with respondent Nos. 1 & 2, as alleged? OPR

5. Relief."

4. Based on the material on record and the evidence led by the parties, the issues came to be decided in favour of the claimants and the petition allowed in the following terms:-

"26. In view of the aforesaid findings, the present petition is partly allowed and compensation of Rs.35,15,000/- (Rupees thirty five lacs fifteen thousand only) along with interest at the rate of 7.5% per annum from the date of filing the petition till the date of deposit of amount. The amount shall be deposited by respondent No. 3 within a period of two months from today failing which respondent would be liable to pay interest at the rate of 12% per annum from the date of award. Amount of compensation, if already awarded and released in favour of petitioners under Section 140 of Motor Vehicles Act shall be adjusted in the award."

5. Undisputedly, neither the claimants nor the owner and the driver have assailed the impugned award dated 22.3.2014.

6. The Insurer, in terms of the present appeal has laid challenge to the same on the following grounds:

(i) In the proceedings arising out of F.I.R. pertaining to the very same incident, the trial Court, while acquitting the accused, found the accident not as a result of rash or negligent driving on the part of driver Atikant Verma;

(ii) In relying upon the salary certificate (Ext. PW-3/A) the Tribunal committed grave illegality, which stands fortified from the report dated 25.9.2014 issued by the Insurance Investigator;

(iii) In any event, from the salary certificate, necessary income tax and professional tax deductions were required to be carried out, which was not so done; and

(iv) The appellant is a public sector undertaking and the amount of claim, which is highly exaggerated, is against public interest.

7. To justify the first two contentions, appellant in this appeal, has filed two applications being CMP No. 20800 of 2014 and CMP No. 7517 of 2015 seeking permission to place on record certain documents and lead additional evidence.

8. Record reveals that in the claim petition so filed on 28.5.2009, it stood specifically mentioned that the accident occurred purely on account of rash and negligent driving on the part of Atikant Verma. Also F.I.R. No. 71/2008 dated 22.11.2008 came to be registered at Police Station Renukaji, Distt. Sirmaour, under the provisions of Sections 279, 337, 304-A of the Indian Penal Code. Record further reveals that to establish the factum of negligence on the part of the driver, claimants examined eye witness Jitender Thakur (PW-5) and no evidence was led by the present insurer. The judgment so passed in proceedings arising out of F.I.R. No. 71/2008 came to be delivered on 21.10.2010 itself. Whether such judgment has attained finality or not is a different matter but it is fact that the insurer chose not to lead any evidence, much less place the said judgment on record before the Authority below. Record further reveals that the salary certificate came to be proved on record through the testimonies of claimant Ritu Sharma (PW-4) as also Vivek Sharma (PW-3), employer of the deceased, whose statement was recorded in the Court on 7.5.2010. The factum of employment of the deceased with M/s Rajat Minerals Pvt. Limited as Sales Executive came to be recorded in the claim petition to which, in response, the insurer simply denied the averments made in para-6. Record reveals that pursuant to the recording of the statement of Vivek Sharma (PW-3) on 7.5.2010, in whose testimony the salary certificate came to be exhibited as Ext. PW-3/A, additional witnesses of the claimants and one witness of the owner came to be examined. Despite opportunity afforded, the insurer chose not to lead any evidence and in fact on 26.7.2013, the learned counsel made the following statements:

"Statement of Sh. Mukul Garg Adv. counsel for the respondents No. 1 and 2.

W/oath

26.7.2013.

Stated that I tender in evidence copy of RC Ex. RA and closed the evidence on behalf of respondents No. 1 and 2."

AND

"Statement of Sh. P. S. Chauhan, Adv. counsel for respondent No. 3.

W/oath

26.7.2013

Stated that I tender in evidence copy of Insurance Policy Ext. RX."

9. The insurer ought to have taken due care in defending its case as is so required in law. It is not that the insurer was taken by surprise and was unaware of the case set up by the claimants. The claimants, at the threshold had set up a claim of Rs.45 lacs. They had attributed negligence to the driver. They had also disclosed the factum of employment in the claim petition. The insurer had ample opportunity of having the matter investigated/examined at its own level and produced the material or evidence in rebuttal. Decision rendered by the Criminal Court was not a new fact which came to be discovered by the appellant subsequent to the passing of the impugned award. It being a different matter that the said decision would be of no binding force in the instant proceedings. Insofar as the report of the Investigator is concerned, it reads as under:

"To
The Manager
National Insurance Co. Ltd.
CRO-II, T.P. HUB
8, India Exchange Place (7th Floor)
Kolkata – 700001

Sub: Verification of Income & Occupation of deceased "Mr. Ashish Sharma" from the employer RAJAT MINERALS PVT. LTD.

Your Ref: HO/Motor TP/2014-15/Misc/1

Sir,

Under signed hereby reported that as per your instruction I visited the address of employer RAJAT MINERALS PVT. LTD. of 9/12, Lalbazar Street, E-Block, 4th Floor, Kolkata 7000001 but not found any existence of such name of office a that floor and on my enquiry nobody could remember such name of office. At last being harassed and finding no other alternative, I was compelled to send a letter addressed to the said employer under Regtd. with A/D on 15.09.2014. But it was return by the post office with remarks "Insufficient address wanting room number hence Not Known" dated 17.09.2014 which is enclosed for your kind perusal and doing the needful.

Thanking you,
Yours faithfully,
Sd/-
Swaraj Bhattacharyya
Insurance Claim Investigator."

10. Significantly, it is not the report of the Investigator that as on the date of the occurrence of the accident, the employer company was not having its office at the address stated in the certificate (Ext. PW-3/A). The employer was a company incorporated under the Companies Act, 1956. It ought to have had its registered office. The Investigator chose not to examine the matter and the record of the registration of Company. Significantly no doubt with regard to the existence of the company or the company having its office at the place mentioned in the certificate was ever exhibited at the time of examination of Vivek Sharma (PW-3), CEO of the employer company. The Company, after few years may have shifted its address. All that the insurer now

wants to do, could have been done during the pendency of the claim petition which came to be decided after a period of five years. Hence insurer had sufficient long time for placing on record the evidence which is now sought to be done.

11. The language of Order 41 Rule 27 CPC is evidently clear. Except for certain exceptions, party is prohibited from placing on record additional evidence (oral or documentary). In the instant case, Authority below had not refused to admit evidence. This Court either for pronouncement of judgment or for other substantial cause does not require the documents sought to be produced on record to be produced. The only question which therefore needs to be considered is as to whether the insurer has been able to establish that notwithstanding insistence of due diligence, the evidence which is sought to be now produced "could not" after exercise of due diligence, be produced before the Court below.

2. The apex Court, after considering the principles laid down in its earlier decisions *K. Venkataramiah vs. A. Seetharama Reddy,* AIR 1963 SC 1526; *Municipal Corpn. of Greater Bombay vs. Lala Pancham,* AIR 1965 SC 1008; *Soonda Ram vs. Rameshwarlal,* (1975) 3 SCC 698; *Syed Abdul Khader vs. Rami Reddy,* (1979) 2 SCC 601; *Haji Mohammed Ishaq vs. Mohd. Iqbal & Mohd. Ali & Co.,* (1978) 2 SCC 493; *State of U.P. vs. Manbodhan Lal Srivastava,* AIR 1957 SC 912; *S. Rajagopal vs. C.M. Armugam,* AIR 1969 SC 101; *State of Orissa vs. Dhaniram Luhar,* (2004) 5 SCC 568; *State of Uttaranchal vs. Sunil Kumar Singh Negi,* (2008) 11 SCC 205; *Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity,* (2010) 3 SCC 732; and *Sant Lal Gupta vs. Modern Coop. Group Housing Society Ltd.,* (2010) 13 SCC 336, in *Union of India vs. Ibrahim Uddin & another,* (2012) 8 SCC 148 has observed that:

> "48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."
>
> [Emphasis supplied]

12. The apex Court in *Atma S Berar vs. Mukhtiar Singh,* (2003) 2 SCC 3 has held the power of the Court to take note of subsequent events to be well-settled and undoubted. However, it is accompanied by three riders: firstly, subsequent event should be brought promptly to the notice of the Court; secondly, it should be brought to the notice of the Court consistently with rules of procedure enabling Court to take note of such events and affording the opposite party an opportunity of meeting or explaining such events; and thirdly, the subsequent event must have a material bearing on right to relief of any party.

13. As already observed, claimants had already set out their claim based on (i) negligence of the driver and (ii) salary certificate issued by the employer. Now both of these facts were in the knowledge of the insurer and had they exercised due diligence, they could have had the matter followed up and investigated properly in opposition of the claim set up by the claimants. It was to their knowledge that the F.I.R., as a result of the accident, stood registered. It was a serious case and death had taken place. Despite complete paraphernalia available with the insurer, they chose not to ascertain the outcome of the proceedings and any evidence. In the

applications, it is not so disclosed as to when the factum of passing of the judgment in criminal proceedings came to their notice. Thus they have concealed relevant facts. As such, both the applications, devoid of any merit, are dismissed.

14. Now, coming to the merits of the case, one finds that in support of the claim petition, through the testimony of Dr. Parmesh Dogra (PW-1), claimants have proved on record the post mortem report of the deceased (Ext. PW-1/A). Death was on account of injury to brain due to blunt force or impact. To establish the accident, claimants have examined HHC Bhagmal (PW-2) and Jitender Thakur (PW-5). PW-2 has proved on record the F.I.R. No. 71/08, dated 22.11.2008 (Ext. PW-2/A) so registered against the driver. Now PW-5 is the spot witness. Categorically he has deposed that the accident in question was as a result of rash and negligent driving on the part of the driver of the vehicle in question. Upon being cross examined by the insurer, he denied having made a contradictory statement in the proceedings pending before the Court of Judicial Magistrate 1st Class, Nahan. Perhaps the insurer was aware of such fact yet no endeavour was made to confront the witness with such statement and from his testimony in the present proceedings, it cannot be said that the witness has not stated the truth. The conduct of the witness stands unimpeached. He is the one who got recorded the F.I.R. registered by reporting the first version to the police.

15. The decision in criminal proceedings, in the given facts and circumstances would have no persuasive, much less binding effect on the present proceedings.

16. It be also observed that neither the owner nor the driver stepped into the witness box to establish the fact other that the one which stands proved on record by the claimants. Only Bansi Ram (RW-1) stands examined for proving the genuineness of driving license (Ext. RW-1/A).

17. Hence, negligence on the part of the driver stands established on record.

18. The accident took place on 22.11.2008. Through the testimony of Ritu Sharma, wife of the deceased, who proved certificate (Ext. PW-4/B), it is evidently clear that the deceased was born on 27.8.1974. That claimants are his legal heirs also stand proved through the legal heir certificate (Ext. PW-4/C). Thus as on the date of death, age of the deceased was 34 years.

19. On oath, PW-4, has categorically deposed that her husband who was a Post Graduate in Economics was serving as a Sales Executive with M/s Rajat Miners Pvt. Ltd. Kolkata and drawing a salary of Rs.29,166/- per month. The witness has categorically denied the salary certificate to be fictitious or the deceased not to have been gainfully employed.

20. Salary certificate (Ext. PW-3/A) stands proved on record by Vivek Sharma (PW-3), CEO of the Company who has categorically deposed that since June, 2008 the deceased was working as a Sales Executive on monthly salary of Rs.29,000/-. According to this witness, the deceased who was M.A. (Economics) had rich experience in mineral. To prove salary certificate he had produced the original record. No suggestion with regard to either existence of the company or the address given on the certificate was put to this witness. Crucially this witness was cross examined by the insurer to a limited extent. His entire statement is reproduced as under:

> "PW-3 Vivek Sharma, CEO, M/s Rajat Minerals Pvt. Ltd. Calcutta.
>
> OSA
>
> 7.5.10.
>
> Stated that deceased Ashish Sharma s/o Sh. Sukhdev Raj Sharma was working as Sales Executive in our Com. on a monthly salary of `29000/-. He had joined in June 2008 and remained with us till his death. I had issued certificate Ext. PW 3/A. He was M.A. Economics & rich experience in Minerals. I have brought the original record of his salary.
>
> xx xx by Sh. P. S. Chauhan, Advocate, for No. 3

The original record shows the salaries of various employee & their signatures in token of the receipts of the salary. It is the computerized record which is not signed nor reqd. to be so. It is not a false certificate.

xx xx by 1 and 2

Nil. (opp. Afforded)."

21. The insurer could not extract from the witness as to whether the record produced by him did not bear the signatures of the deceased. The witness has categorically denied the suggestion of the certificate being false.

22. Keeping in view the settled principle of law, the burden which is required to be discharged by the claimants in the nature of proceedings with which the court is dealing, factum of employment and the salary drawn by the deceased stands established on record. To this extent no error can be found with the findings returned by the authority below.

23. Principle for determining compensation payable in a case of death stands reiterated by the apex Court in *Sarla Verma (Smt.) & others vs. Delhi Transport Corporation & another,* (2009) 6 SCC 121 in the following terms:-

"18. Basically only three facts need to be established by the claimants for assessing compensation in the case of death:

(a) age of the deceased;

(b) income of the deceased; and

(c) the number of dependants.

The issues to be determined by the Tribunal to arrive at the loss of dependency are:

(i) additions/deductions to be made for arriving at the income;

(ii) the deduction to be made towards the personal living expenses of the deceased; and

(iii) the multiplier to be applied with reference to the age of the deceased.

If these determinants are standardized, there will be uniformity and consistency in the decisions. There will be lesser need for detailed evidence. It will also be easier for the insurance companies to settle accident claims without delay."

24. Now significantly in the very same decision it is also held that the Court has to take into account the component of future prospects and as such, necessary additions are required to be made for the same. In para-24 of the report, Court held addition by 50% of actual salary in a case where the deceased is below 40 years to be reasonable.

25. In *Neeta w/o Kallappa Kadolkar & others vs. Divisional Manager, Maharashtra State Road Transport Corporation, Kolhapur,* (2015) 3 SCC 590 even in a case of private employment, future prospects were taken into consideration for determining the loss of dependency.

26. Now if 50% (age of the deceased being 34 years) is added to the aforesaid amount, the annual income of the deceased comes to Rs.5,25,000/- (Rs.3,50,000 + Rs.1,75,000).

27. However in the light of decisions rendered by the apex Court in *Oriental Insurance Company Ltd. vs. Ram Prasad Varma & others,* (2009) 2 SCC 712; *Sarla Verma (Smt.) & others vs. Delhi Transport Corporation & another,* (2009) 6 SCC 121; *Shyamwati Sharma & others vs. Karam Singh & others,* (2010) 12 SCC 378; and *Vimal Kanwar & others vs. Kishore Dan & others,* (2013) 7 SCC 476 the incidence of professional tax, statutorily deductible on the salary drawn by the deceased is to be accounted for.

28. The question which arises for consideration is as to what is that statutory deduction which is required to be carried out from the income of the deceased. To assist the

Court Sh. Bimal Gupta, learned Sr. Advocate, draws attention to the rates of income tax pertaining to the year in question (2009-2010), which reads as under:

Income Slab	**Rates of Income Tax**
Upto Rs.1,50,000	Nil;
Rs.1,50,000 to Rs.3,00,000	10 per cent of the amount by which the total income exceeds Rs.1,50,000;
Rs.3,00,000 to Rs.5,00,000	Rs.15,000 plus 20 per cent, of the amount by which the total income exceeds Rs.3,00,000;
Rs.5,00,000 and above	Rs.55,000 plus 30 per cent, of the amount by which the total income exceeds Rs.5,00,000.

29. Thus after statutory deduction, total annual income of the deceased, for the purposes of determining the compensation would be Rs. 4,60,625/- [Rs.5,25,000 – Rs.62,500 (tax) – Rs.1250 (Edu. Cess @ 2%) – Rs.625 (Higher Edu. Cess @ 1%)].

30. Since the deceased was married and claimants are his wife, mother and a minor child, deduction of 1/3rd is required to be carried out for his personal expenses. Hence for the purpose of determining compensation as well as dependency of the claimants, total annual income of the deceased works out to `3,07,084 (`4,60,625 – `1,53,541).

31. Now multiplier of 15 rightly stands applied by the Tribunal and as such loss of dependency which the claimants would be entitled to works out to be `46,06,260/- (`3,07,084 X 15)

32. It is not in dispute that the vehicle in question stood insured with the insurer. There is no challenge to the validity of the driving license of the person who was driving the vehicle at the time of occurrence of the accident. As such, liability is rightly fastened upon the . insurer.

33. The dependency of the claimants is not an issue.

34. Still further, two issues require consideration. In the absence of any specific challenge laid to the impugned award, is it just, proper and legal for this Court to have taken into account the component of future prospects or not?

35. Sh. Ashwani Sharma, learned Senior counsel invites attention of this Court to the provisions of the Himachal Pradesh Motor Vehicles Rules, 1999. While doing so it is contended that Rule 232 does not make the provisions of Order 41 Rule 33 CPC applicable to the proceedings before the Claim Tribunal. In support, reliance is sought on the decision rendered by this Court in *Amriti Devi & others vs. Kamal Kumar & others,* 1991 ACJ 1127 (Vol. 2).

36. The contention is not only misconceived but also fallacious. The relevant Rule applicable is not 232 but 233 which deals with the form and manner of appeals against the awards of Claims Tribunal, which in any event stand amended in the year 2005, making the provisions of Order 41 Rules 22 and 33 CPC specifically applicable therein.

37. Hence, in the absence of any appeal/objections having been filed, this Court has sufficient powers in passing an order, determining the amount of compensation which is just, fair and reasonable, more so, in the light of the ratio of law laid down by the apex Court in *Ranjana Prakash & others vs. Divisional Manager & another,* (2011) 14 SCC 639 to the effect that power entrusted to the appellate court is to enable it to do complete justice between the parties and provisions of Order 41 Rule 33 CPC can be pressed into service to make the award more effective

or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability. However, there is a caveat in exercise of such powers, and that being that it cannot be invoked to get a larger and/or higher relief. In terms of paras- 7 and 8 of the said report, this Court cannot award compensation higher than the one which stands awarded by the Tribunal. Of course, there is no bar for the Court to examine the facts and by applying the relevant principles, determine such compensation which is just, fair and reasonable, with the limitation of the sum not exceeding the amount awarded by the Tribunal in terms of the impugned award.

38. The fact that the insurer is a public sector undertaking would not make any difference in determining the compensation, due and admissible which is also just, fair and reasonable. Law does not create such distinction. The insurer, even as a public sector undertaking has ventured in the field of commercial transaction. It is a commercial venture undertaken to make profit. And above all, an instrumentality of a State cannot be allowed to adopt such a stand. They are duty bound to discharge their statutory/contractual obligations and not push a victim in distress to litigation for adjudication of his rights. Of their own, after proper investigation, they ought to have themselves paid the amount of compensation.

39. No other contention raised.

40. Hence for all the aforesaid reasons, impugned award 22.3.2014, passed by learned Motor Accidents Claim Tribunal-II, Sirmaur District at Nahan, H.P., in Claim Petition No. 74-N/2 of 2009, titled as *Smt. Ritu Sharma & others vs. Sh. Pawan Verma & others,* is modified only to the following extent:

(i) Loss of dependency stands determined as Rs.46,06,260/- as claimed by the claimants. However in view of the principle of law laid down by the apex Court in *Ranjana Prakash* (supra), claimants shall be entitled to only a sum of Rs.34,95,000/- on this count, as awarded by the Tribunal.

(ii) Rest of the award shall remain as it.

41. For all the aforesaid reasons, appeal filed by the insurer is disposed of accordingly.

Pending applications, if any, also stands disposed of accordingly.

****

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

Partap Singh ...Appellant.
Versus
State of HP & ors ...Respondents

LPA No.51 of 2011
Reserved on: 23.5.2016
Date of decision: 2 .6.2016

Persons with disabilities (equal opportunities) Protection of Rights and Full Participation Act, 1995- Section 33- Petitioner was appointed as a clerk against the vacancy reserved for physically handicapped persons- he filed a writ petition seeking direction to the State to grant reservation even while making promotions- the writ petition was dismissed by the Writ Court- held in appeal, that this question has already been decided by Rajasthan High Court in ***Arun Singhvi Vs. New India Assurance, Civil Special Appeal (W) No.628 of 2010, decided on***

4.11.2015 **-** every High Court must give due deference to the views expressed by other High Courts- writ court has taken a correct view- appeal dismissed. (Para 3-10)

Cases referred:

Union of India & anr Vs. National Federation of the Blind and ors (2013) 10 SCC 772
National Federation of The Blind Vs. Sanjay Kothari, 2015 (9) SCALE 611
Neon Laboratories Ltd Vs. Medical Technologies Ltd & ors, (2016) 2 SCC 672

For the Appellant:	Mr.Sunil Mohan Goel, Advocate.
For the Respondents:	Mr. Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr. M.A. Khan, Mr. R.M. Bisht, Additional Advocate Generals and Mr. Kush Sharma, Dy AG, for respondents 1 to 3. Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Sharma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The moot question involved in this appeal is as to whether reservation provided under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the 'Act', 1995) is available even on promotion.

2. Since the issue is predominantly a legal one therefore, it is not necessary to set out the facts in detail, suffice it to observe that the petitioner, after completing his matriculation, was appointed as Clerk in the office of Divisional Forest Officer, Renuka Division against vacancy reserved for physically handicapped person and had filed a writ petition seeking direction to the respondent-State to grant reservation even while making promotion to the next higher post. Petition came to be dismissed by the learned writ court, giving rise to the present appeal.

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

3. Sh.Sunil Mohan Goel, learned counsel for the appellant would vehemently argue that the issue involved in the appeal is no longer *res integra* in view of the judgment rendered by the learned Division Bench of the Punjab and Haryana High Court in ***Viklang Sang, Haryana*** *Vs* ***State of Haryana & ors, CWP No. 12741 of 2009,*** decided on 18th March, 2010, wherein it was held that that the court must adopt a liberal interpretation which advances the achievement of the object of the act and, therefore, denying reservation of 3% in promotional avenues would defeat the object of the act and at the same time would be contrary to the mandate of directive principles contained in Articles 38 and 41 of the Constitution of India.

4. We really need not delve any longer on the question raised in this petition, as the same stands squarely answered against the appellant by a learned Division Bench of the Rajasthan High Court in *Arun Singhvi Vs. New India Assurance*, Civil Special Appeal (W) No.628 of 2010, decided on 4.11.2015**.**

5. At the outset, we may note that the learned Division Bench of the Bombay High Court in ***National Confederation for Development of Disabled & anr*** *Vs***. *Union of India & ors*, (PIL) No.106/2000, decided on 4.12.2013,** based on its interpretation of the Hon'ble Supreme Court in ***Union of India & anr*** *Vs***. *National Federation of the Blind and ors* (2013) 10 SCC 772,** held that the Hon'ble Supreme Court had directed that 3% reservation under the Act is to be computed on the total number of vacancies in the cadre strength, the same would include the vacancies to be filled in by nomination and vacancies to be filled in by promotion. This decision was assailed in SLP (C)...CC No.13344/2014 in case titled Union of India & ors Vs. National Confederation for Development of Disabled & anr and was rejected vide order dated 12.9.2014.

6. We may also note that the judgment rendered by the learned Bombay High Court was thereafter considered by the Hon'ble Supreme Court in ***National Federation of The Blind*** *Vs***. *Sanjay Kothari*, 2015 (9) SCALE 611** and all these decisions have thereafter been considered by a learned Division Bench of the Rajasthan High Court in Arun Singhvi's case (supra). Relevant paras read thus:

> "Strong reliance was placed on judgment of Bombay High Court in National Confederation for Development of Disabled & Anr. v. Union of India & Ors. : Public Interest Litigation No. 106/2000 decided on 04.12.2013, wherein, Bombay High Court based on its interpretation of judgment of Hon'ble Supreme Court in Union of India & Anr. v. National Federation of the Blind & Ors. : (2013) 10 SCC 772 came to the conclusion that as Hon'ble Supreme Court has directed that 3% reservation under the Act is to be computed on the total number of vacancies in the cadre strength, the same include the vacancies to be filled in by nomination and vacancies to be filled in by promotion; it was submitted that Special Leave Petition (C)... CC No. 13344/2014 : Union of India & Ors. v. National Confederation for Development of Disabled & Anr. was rejected by Hon'ble Supreme Court on 12.09.2014 and, therefore, the issue raised in the writ petition stands squarely covered by the said judgment.
>
> Further reliance was placed on Government of India v. Ravi Prakash Gupta & Anr. : 2011 AIR SCW 416, Justice Sunanda Bhandare Foundation v. U.O.I. & Anr. : 2014 AIR SCW 3683, National Federation of the Blind v. Union of India & Ors. : Writ Petition (C) No. 15828/2006 decided on 12.09.2014 by Delhi High Court, Union of India & Anr. v. Hemraj Singh Chauhan & Ors. : 2010 AIR SCW 2103 and State of Kerala & Ors. v. K. Prasad & Anr. : 2007 (7) SRJ 493.
>
> It was prayed that in view of the interpretation put by Bombay High Court in the case of National Confederation for Development of Disabled (supra) on provisions of Section 33 of the Act based on the law laid down by Hon'ble Supreme Court in the case of National Federation of the Blind (supra), the appeal may be allowed and the respondents be directed to provide for reservation to persons with disabilities for promotion to the cadre of Class-I Officer and the Promotion Policy to the extent contrary be set aside with all consequential benefits to the appellant.
>
> The submissions made by learned counsel for the appellant were vehemently opposed by learned counsel for the respondent Company; it was submitted that the reservation for persons with disabilities is covered by the instructions issued by the Government in this regard from time to time and the Government instructions nowhere provide for grant of reservation to persons with disabilities in Group-A or Group-B posts and as admittedly cadre of Class-I Officer is Group-

A post, the appellant is not entitled to claim any reservation; it was further submitted that the provisions of the Act nowhere provides for grant of reservation in promotions and provisions of Section 47(2) of the Act only provides that persons with disabilities would not be discriminated against in promotion, which provision cannot be construed to mean that the same provides for reservation in promotions across the board; the Government instructions provide for reservation in promotions qua Group-C and D posts and the same has been provided for by the respondent Company.

Reference was made to the Policy instructions by the Government issued from time to time providing for reservations for persons with disabilities; it was submitted that subsequent to the judgment of Hon'ble Supreme Court in the case of National Federation of the Blind (supra), wherein, certain provisions of Office Memorandum ('OM') dated 29.12.2005 were struck down by Hon'ble Supreme Court nowhere provides for reservation in Group-A and Group-B posts and, therefore, the appellant cannot claim any right in this regard.

It was submitted that the judgment of Bombay High Court in National Confederation for Development of Disabled (supra) has apparently wrongly interpreted the judgment of Hon'ble Supreme Court in the case of National Federation of the Blind (supra) and, therefore, the same does not lay down correct law and merely because Special Leave Petition against the judgment of Bombay High Court has been rejected, the same does not become a binding precedent under Article 141 of the Constitution of India; it was prayed that the judgment passed by learned Single Judge does not call for any interference and the same deserves to be upheld.

We have considered the submissions made by learned counsel for the parties and have perused the material available on record and placed during the course of submissions.

The Promotion Policy of the respondent Company, in so far as relevant, regarding applicability of reservations for SC/ST employees and persons with disability and which has been challenged in the present proceedings, read as under:-

> "19. Special provisions for SC/ST employees and Persons with Disability:
>
> In order to increase opportunities of promotions and to safeguard the interests of employees belonging to Scheduled Castes, Scheduled Tribes and Persons with Disability, the following reservations, concessions and relaxations are made available to them in the matter of promotions from the Subordinate Staff, within Clerical Staff cadres and from clerical Cadres to Scale-I officers grade:

a)- ....

b)- As per the guidelines of Department of Personnel & Training, Govt. of India issued on the subject from time to time, 3% reservation for persons with disability (1% each of Visual disability, Hearing disability and Locomotor disability) (whilst undertaking promotion exercise for promotion to the cadre of Assistant/Senior Assistant.

The applicability of the reservation, will however, be limited to the promotion being made to those posts that are identified as being capable of being filled / held by appropriate category of Persons with Disability."

The Government OM dated 20.11.1989, which was issued prior to coming into force of the Act provided as under:-

> "The undersigned is directed to say that the Government has under consideration a proposal to introduce reservation in favour of the physically handicapped persons in posts filled by promotion. The matter

has been examined and it has now been decided that when promotion are being made.

(i) Within Group 'D', (ii) from Group 'D' to Group 'C' and (iii) within Group 'C' reservation will be provided for the three categories of the physically handicapped persons namely, the visually handicapped, the hearing handicapped and the orthopedically handicapped The applicability of the reservation, will, however, be limited to the promotions being made to those posts that are identified as being capable of being filled/held by the appropriate category of physically handicapped."

The said OM was clarified by another OM dated 16.02.2000, inter alia, indicating that there is no reservation in promotion for physically handicapped persons when promotions are made from Group-C to Group-B within Group-B and Group-B to Group-A.

The said OM dated 20.11.1989 was subsequently amended by OM dated 29.12.2005; the OM of 2005 provided the following qua the reservation in promotion:-

"QUANTUM OF RESERVATION

(i) ....

(ii) Three percent of the vacancies in case of promotion to Group D, and Group C posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision,

(ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability."

Further, Clause-14 of the OM of 2005 provided as under:-

> "14. Reservation for persons with disabilities in Group 'A' posts shall be computed on the basis of vacancies occurring in direct recruitment quota in all the identified Group 'A' posts in the establishment. The same method of computation applies for Group 'B' posts."

The OM dated 29.12.2005 was challenged by National Federation of the Blind before the Delhi High Court, which accepted the challenge and directed the Union of India to modify the OM dated 29.12.2005 being inconsistent with the provisions of Section 33 of the Act; the judgment of Delhi High Court was challenged before Hon'ble Supreme Court and Hon'ble Supreme Court in the case of National Federation of the Blind (supra) came to the conclusion that certain Clauses in the OM dated 29.12.2005 were contrary to the intention of the legislature and were liable to be struck down and directed the appropriate government to issue new OM consistent with its decision; it was, inter alia, directed as under:-

> "55. In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, it is necessary to issue the following directions:
>
> 55.1 We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29-12-2005 and the subsequent OMs consistent with this Court's order within three months from the date of passing of this judgment.
>
> 55.2 We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

> 55.3 The appellant herein shall issue instructions to all the departments/public sector undertakings/ government companies declaring that the non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and the Nodal Officer in department/public sector undertakings/ government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default."

After, the judgment of Hon'ble Supreme Court in National Federation of the Blind (supra), OM dated 03.12.2013 was issued by the Government and para 14 of the OM (quoted supra) was modified in the following manner:-

> "Reservation for persons with disabilities in Group 'A' or Group 'B' posts shall be computed on the basis of total number of vacancies occurring in direct recruitment quota in all the Group A posts or Group 'B' posts respectively, in the cadre."

Vide another OM dated 20.03.2014 it was indicated by the Government as under:-

> "4. All the Ministries/Departments/Organisations of the Government of India are requested to compute the reservations for persons with disabilities at the earliest and immediately identify the posts for disabled persons and implement the same without default. However, the following points may be kept in view while computing reservations:-
>
> (i) Three percent of the vacancies in case of direct recruitment to Group A,B,C and D shall be reserved for persons with disabilities of which 1% each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy; in the posts identified for each disability. Three percent of the vacancies in case of promotion to Group D and Group C posts in which direct recruitment, if any, does not exceed 75% shall be reserved for persons with disabilities of which 1% each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy; in the posts identified for each disability;"
>
> (emphasis supplied) From the above stipulations made in the various OMs, it is apparent that the OMs/instructions consistently since 1989 have provided for 3% reservation of the vacancies in case of promotion to Group-D and Group-C posts, in which, direct recruitment does not exceed 75% and the same does not provide for any reservation in Group-B or Group-A posts in case of promotion.

The Bombay High Court in the case of National Confederation for Development of Disabled (supra) after quoting the directions of Hon'ble Supreme Court, as noticed hereinbefore, came to the following conclusion:-

> "11. In view of the aforesaid decision of the Supreme Court, it is clear that reservation has to be computed with reference to total number of vacancies in the cadre strength and, therefore, no distinction can be made between the posts to be filled in by direct recruitment and by promotion. Total number of vacancies in the cadre strength would include the vacancies to be filled in by nomination and vacancies to be filled in by promotion."

It was directed that the respondents will have to give benefit of reservation to persons with disabilities in the matter of promotion to posts in the Indian Administrative Services and directed the respondents to act accordingly.

The National Federation of the Blind filed Contempt Petition (Civil) No. 499/2014 before Hon'ble Supreme Court alleging disobedience of the directions issued by it in the case of National Confederation for Development of Disabled (supra).

The contentions, inter alia, included that the judgment of Hon'ble Supreme Court provided for reservation in the matter of promotions, however, no steps in this regard were taken by Union of India and, therefore, they were in contempt of the directions issued by Hon'ble Supreme Court.

The contentions raised in this regard were considered by Hon'ble Supreme Court in National Federation of The Blind v. Sanjay Kothari : 2015 (9) SCALE 611, wherein, it was, inter alia, observed and held as under:-

> "3. Shri Rungta has primarily urged that contempt of this Court's order has been committed by the Respondent by not making provision for reservation in promotion and also by not identifying the posts against which the persons with disabilities can be appointed and in not making such appointments. Shri Rungta has submitted that notwithstanding the efflux of a long period of time since the Act came into force and the directions of this Court dated 8th October, 2013, a large number of vacancies remained unfilled and even those vacancies which have been filled up constitute a negligible percentage of persons with impaired vision. Drawing the attention of the Court to paragraph 51 of the judgment, Shri Rungta submitted that this Court had clearly and categorically held that the provisions of the Act with regard to reservation would apply in the matter of promotion;

however, no steps in this regard have been taken by the Union till date. All such acts and lapses on the part of the Union are in clear breach of this Court's order and, therefore, the appropriate authority of the Union including the impleaded Respondents are liable to be dealt with under the Contempt of Court's Act and Article 129 of the Constitution.

> 4. Shri Suri, learned senior Counsel appearing for the intervenor has submitted that in a writ petition before the Bombay High Court dealing with the issue of reservation in promotion, orders were passed holding that the decision of this Court in Union of India and Anr. v. National Federation of the Blind and Ors. (supra) provided for reservation in promotion and the special leave petition by the Union of India against the Bombay High Court judgment has been dismissed. In such circumstances, the issue with regard to reservation in promotion, according to Shri Suri, is no longer open and the Union is duty bound to give effect to such reservation.
>
> 5. Controverting the submissions advanced by Shri Rungta and Shri Suri, the learned Attorney has drawn our attention to Section 47 of the Act - The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which is in the following terms:
>
> 47. Non-discrimination in Government employment .....(2) No promotion shall be denied to a person merely on the ground of his 20 disability:
>
> Provided that the appropriate Government may having regard to the type of work carried on in any establishment, by notification and subject 25 to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this Section.

> 6. The learned Attorney General has contended that apart from the aforesaid, there is no other provision in the Act dealing with promotions. On the strength of Section 47(2) it cannot be contended that the Act provides for reservations in the matter of promotion. On the Other hand, Shri Ranjit Kumar, learned Solicitor General has placed before the Court the additional affidavit filed on behalf of the Union of India dated 29.05.2015 to show the steps taken by the Union to fill up over 15,000 identified vacancies. In this regard the learned Solicitor General has placed before the Court a compilation of the latest position which would go to show that 5629 posts earmarked for persons with disabilities have been so filled up whereas steps have been taken for filling up of over 6,000 posts whereas in respect of another about 3400 posts, the recruitment process is likely to be initiated shortly. The learned Solicitor General has further submitted that the Union is committed to fill up the 6,000 posts for which process has been initiated by the end of December, 2015 and for the 3400 posts for which process is yet to be initiated by February, 2016. Insofar as reservation in promotion is concerned, it is argued by the learned Solicitor General that nowhere in the judgment the Court had any occasion to deal with the said issue; neither the directions issued by this Court including those in paragraph 51 are capable of being construed in the manner in which Shri Rungta and Shri Suri have argued.
>
> 7. ....
>
> 8. ....

9.Insofar as the reservation in promotion is concerned, the issue can be viewed from the perspective of the questions that had confronted the Court in Civil Appeal No. 9096 of 2013 as set out in paragraph 24 of the order of the Court which is to the following effect:

> 24. Two aspects of the impugned judgment have been challenged before this Court:
>
> (a) The manner of computing 3% reservation for the persons with the disabilities as per Section 33 of the Act.
>
> (b) Whether post based reservation must be adhered to or vacancy based reservation.

10. Para 51 of the order on which reliance has been placed by Shri Rungta must be viewed in the context of the questions arising for answer before the Court i.e. the manner of computation of vacancies in case of Groups A, B, C and D posts. All that the Court in the aforesaid paragraph 51 has held is that the manner of such identification must be uniform in the case of all the groups viz. A, B, C and D. Nothing beyond the above should be read in paragraph 51 of the Courts' order as aforesaid.

11. Coming to the point urged by Shri Suri with regard to the dismissal of the Union's special leave petition all that needs to be noticed is that the order dated 12.09.2014 dismissing SLP(C) No...../2014 (CC No(s). 13344/2014) is an order of dismissal simpliciter. In the absence of any reasons, we cannot speculate as to the basis for the dismissal ordered by this Court.

12. Having answered the questions arising for determination in the manner indicated above we will have no reason to keep this contempt petition pending any further. The contempt petition is accordingly disposed of in terms of our conclusions and observations as above.

13. Having answered the issue of reservation in promotion in the manner indicated above, the application for clarification filed by the Union of India with regard to the said issue would stand answered in the above terms."

(emphasis supplied) Hon'ble Supreme Court after noticing the contentions raised and the response of the Union of India categorically observed that its judgment in the case of National Federation of the Blind (supra) should be read in the context of questions arising for answer before the Court and nothing beyond the above should be read in the Court's order and noticing the contention regarding the judgment of Bombay High Court in the case of National Confederation for Development of Disabled (supra) and dismissal of SLP against it, it was observed that in absence of any reasons the Court cannot speculate as to the basis for the dismissal ordered by it.

Further, based on its observations, the application filed by the Union of India regarding reservation in promotion was also directed to have been answered in terms of its order as noticed hereinbefore.

In view of categorical pronouncement of Hon'ble Supreme Court qua interpretation of its judgment in the case of National Federation of the Blind (supra) after noticing the judgment of Bombay High Court in the case of National Confederation for Development of Disabled (supra) that its judgment should be viewed in the context of the questions arising for answer and nothing beyond and further disposing of the application regarding clarification sought by Union of India for reservation in promotion in terms of its above determination, the interpretation put by Bombay High Court in the case of National Confederation for Development of Disabled (supra) on the judgment of National Federation of the Blind (supra), despite dismissal of SLP by the Hon'ble Supreme Court, cannot be said to be laying down correct law and, therefore, the submissions made by learned counsel for the appellant primarily based on the judgment of Bombay High Court in the case of National Confederation for Development of Disabled (supra) cannot be accepted. As the contentions regarding absence of reservation in promotions in the OM issued by the Government was specifically raised in the contempt petition before Hon'ble Supreme Court and the said contention was negated after noticing provisions of Section 47(2) of the Act, it cannot be said that the absence of reservation in Group-A and Group-B post in the OMs issued by the Government is bad; the Promotion Policy of the respondent Company clearly stipulates that the reservation would be provided to persons with disabilities based on the instructions of Government from time to time and as admittedly the instructions presently do not provide for any reservation in Group-A posts, in which the cadre of Class-I Officer of respondent Company falls, the appellant cannot claim any relief in this regard and it cannot be said that the judgment of learned Single Judge requires any interference."

7 It cannot be disputed that the ratio laid down by the learned Division Bench of the Rajasthan High Court in the aforesaid cases squarely applies to the case in hand.

8. We have minutely analyzed the judgment delivered by the Rajasthan High Court and are of the considered opinion that the issues involved before the Rajasthan High Court are absolutely identical to the issue involved in the present writ petition. We further are also of the same view as has been taken by the Rajasthan High Court.

9. It is apt to record herein that the Hon'ble Supreme Court in its recent decision in case titled ***Neon Laboratories Ltd*** *Vs.* ***Medical Technologies Ltd & ors*****,** **(**2016) 2 SCC 672, has directed that every High Court must give due deference to the law laid down by the other High Courts. It is apt to reproduce para 7 of the judgment, which reads thus:

"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.

10. Judged in the light of the aforesaid decision, the judgment rendered by the learned Division Bench of Punjab & Haryana High Court in Viklang Sangh case (supra) can conveniently be held to have lost its efficacy and cannot otherwise be considered to be laying down the correct law in teeth of the judgment rendered by the Hon'ble Supreme Court in Sanjay Kothari's case (supra), the ratio whereof has been duly considered by the learned Division Bench of Rajasthan High Court in Arun Singhvi's case (supra). We, therefore, respectfully disagree with the decision rendered by the learned Division Bench of Punjab & Haryana High Court in Viklang Sangh's case (supra).

11. In view of above discussion, we find no infirmity or illegality in the judgment passed by the learned writ court, whereby claim of the petitioner seeking reservation of 3% in promotional post came to be rejected.

Consequently, there is no merit in the appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any also disposed of.

****

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

Ram Gopal Sood .....Petitioner.

Versus

Jai Pal Chauhan .....Contemnor.

COPC No.390 of 2015.
Judgment reserved on:24.05.2016.
Date of decision: June 2 , 2016.

Contempt of Court Act, 1971- Section 10- Petitioner had sought eviction of the respondent - an ex-parte eviction order was passed – parties entered into compromise and the execution petition was ordered to be dismissed in view of the compromise- petitioner claimed that respondent had

failed to abide by the terms and conditions of the compromise and proceedings for contempt of courts be initiated against him - held, that the DH had only sought the withdrawal of the execution petition- the court had not added its mandate to compromise and had dismissed the petition as having been compromised - no undertaking was given by the counsel or the party- there is distinction between a compromise and a consent order on the basis of an undertaking - in case of former, party has to execute the compromise by filing execution application, while in the later case, proceedings for contempt can be initiated- since there was no undertaking, proceedings for contempt of court cannot be initiated- petition dismissed. (Para- 5 to 19).

Cases referred:
M/S Indo Farm Tractors and Motors Ltd. Versus R.K.Saini and another, I L R 2015 (VI) HP 790 (D.B.)
Babu Ram Gupta versus Sudhir Bhasin and another AIR 1979 SC 1528
Rama Narang versus Ramesh Narang and another (2009) 16 SCC 126,
Anil K.Surana and another versus State Bank of Hyderabad (2007) 10 SCC 257

For the Petitioner : Mr.Y.K.Thakur, Advocate.
For the Respondent : Mr.Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner has filed this petition under Section 10 of the Contempt of Courts Act, 1971 (for short the 'Act') readwith Rule 3(i)(ii) & (iii) and Rule 4 (i) (ii) & (iii) of the H.P. High Court Contempt Rules, 1996, for initiating contempt proceedings against the respondent for violating the order passed by the learned Rent Controller on 25.05.2010.

2. Undisputed facts are that the petitioner is the landlord and had sought eviction of the respondent under the provisions of the H.P. Urban Rent Control Act, 1987. Ex-parte eviction orders were passed on 05.06.2008. In execution, the parties entered into a compromise. Their statements were duly recorded and on the basis of the said compromise, the execution petition was ordered to be dismissed as withdrawn being compromised.

3. According to the petitioner, the respondent has flouted the conditions of the compromise and thereby committed contempt.

4. In reply filed by the respondent, a number of preliminary objections have been raised and thereafter on merits it is alleged that no case for contempt is made out as the petitioner himself had agreed for incorporation of a condition in the agreement that in case for any reason the premises are not vacated as agreed to by the respondent, then the petitioner shall after 31.05.2014 be entitled to Rs.6,000/- per month for the use and occupation charges from the respondent as against the earlier rent of Rs.1600/- per month.

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

5. Section 2(b) of the Act defines civil contempt as meaning "willful disobedience to any judgment decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to Court".

6. The question that arises for consideration is as to whether the Court while passing the impugned order dated 25.05.2010 had infact added its mandate to the compromise. For this purpose, it is necessary to advert to not only the compromise entered into between the

parties, but also their statements recorded on 25.05.2010 and thereafter to the order passed on the basis of such compromise.

7. A perusal of the application jointly filed by the parties for withdrawal of the proceedings under Order 23 Rule 1 readwith Section 151 of the Code of Civil Procedure would reveal that the same contains the following prayer:-

> *"It is, therefore, respectfully prayed that this application may be allowed and decree may kindly be passed in accordance with the agreement entered into between the parties after recording the satisfaction of the tenant in the interest of justice and in view of settlement arrived between the parties this execution petition may be dismissed as withdrawn."*

8. The aforesaid application came up before the executing Court on 25.05.2010 on which date, firstly, the statement of the landlord-petitioner was recorded and thereafter the statement of the tenant-respondent was recorded. Though, the same are in Hindi, the translated version reads thus:-

> *"Statement of Sh.Ram Gopal Sood, S/o Sh. Khushi Ram Sood, R/o Gopal Building, near LIC Building, Sanjauli, Shimla.*
>
> *On S.A.*
> 25.5.2010.
>
> It is stated that we, both the parties, have entered into a compromise. Agreement is Ex.PA, which I have heard and understood and admit the same as correct. I will be bound by the contents of the Agreement Ex.PA. My petition may be dismissed as withdrawn. Ex.PA bears my signatures which is marked as A and encircled with red ink.
>
> Sd/-
> Rent Controller,
> Court No.2, Shimla.
>
> Sd/-
> Ram Gopal Sood
> RO & AC.
>
> *Statement of Sh. Jai Pal Chauhan, S/o Sh. Surat Ram, age 49 years, R/o Khushi Ram Palada Mal Building, near old Police Post, Sanjauli, Shimla.*
>
> *On S.A.*
> 25.5.2010.
>
> *Stated that I have heard the statement of petitioner and admit it to be correct. Our Agreement is Ex.PA which I have heard and understood. It is correct. I will be bound by the contents of the Agreement Ex.PA. It (Ex.PA) bears my signatures which is marked as B and encircled with the red ink. We will be bound by the Agreement. Petition may be dismissed.*
>
> Sd/-
> Rent Controller,
> Court No.2, Shimla.
>
> Sd/-
> Jai Pal Chauhan
> RO & AC."

9. The learned executing Court then proceeded to pass the following orders:-

> *"An application under Order 23 Rule 1 CPC has been filed alongwith the agreement. DH has made separate statement that the parties have effected the compromise vide Ex.PA and he has admitted his signature on Ex.PA in red circle A. He has further stated that this petition be dismissed as withdrawn. Similar statement has been made by the respondent on oath in which he has also admitted the contents of the agreement Ex.PA to be correct. He has further admitted his signature on Ex.PA in red circle B.*

Since, the parties have effected the compromise and in view of the statement as made by the applicant/DH, this execution petition is dismissed as withdrawn being compromised. File after its due completion be consigned to record room."

10. Evidently the landlord by moving an application under Order 23 Rule 1 CPC alongwith agreement had only sought withdrawal of the petition in view of the compromise arrived at between them. Now, therefore, it would be necessary to advert to the agreement dated 17th May, 2010 entered into between the parties, more particularly, the default clause as contained in Clause 3 of the agreement which reads thus:-

"3. That the landlord-first party will withdraw all the cases against the tenant-second party except this case in the court of learned rent controller(II), Shimla which is compromised in terms of this agreement. The tenant-second party will also withdraw the cases/applications filed by him against the landlord-first party for setting aside the exparte judgment and decree and orders. Both the parties are agreed to modify exparte order dated 5.6.2008 to this extent. In case 2nd party failed to handover possession as agreed above 1st party shall have right to execute the order through court and 2nd party shall be liable to pay use and occupation charges @6000/- per month w.e.f. 1-6-2014 till handing over possession."

11. On the basis of para-3 of the agreement (supra), readwith the order passed on 25.05.2010, it can safely be concluded that while passing the order on the basis of the compromise of the parties, the Court below never added its mandate to the compromise and rather proceeded to dismiss the execution petition as having been compromised. Had it been a case of undertaking entered into or given to the Court by a party or his counsel, the matter would have been entirely different as the same would then be equivalent and would have the effect of the order of the Court. Its infringement could have then been made the subject of an application to the Court to punish for its breach as has been held by a Co-ordinate Bench of this Court in ***COPC No.1 of 2015 titled M/S Indo Farm Tractors and Motors Ltd. Versus R.K.Saini and another,*** decided on 10.12.2015**.**

12. However, in the instant case, the factual position is entirely different as no undertaking whatsoever has been furnished by the respondent, rather a separate and distinct clause has been incorporated in the agreement which clearly stipulates for the consequences in the event of the respondent failing to hand over the possession on or before the stipulated date in the agreement. Further, a perusal of the statement of respondent would also reveal that no undertaking whatsoever had been furnished by the respondent to the Court.

13. There is a clear-cut distinction between a compromise arrived at between the parties or the consent order passed by the Court at the instance of the parties and a clear and categoric undertaking given by any of the parties. In the former, if there is violation of the compromise or the order, no question of contempt of Court arises, but the party has a right to enforce the order or the compromise by executing the order or getting injunction from the Court.

14. This was precisely what has been held by the Hon'ble Supreme Court in ***Babu Ram Gupta*** *versus* ***Sudhir Bhasin and another AIR 1979 SC 1528*** in the following terms:-

7. Coming to the first point, the contention of Mr. Asthana was that there was no undertaking given by the appellant to the court at all. Our attention has not been drawn by counsel for the respondent to any application or affidavit filed by the appellant which contains an undertaking given by the appellant to hand over possession to the receiver appointed by the High Court by virtue of the impugned order. It is manifest that any person appearing before the Court can give an undertaking in two ways: (1) that he files an application or an affidavit clearly setting out the undertaking given by him to Court, or (2) by a clear and express oral undertaking given by the contemner and incorporated by the court in its order. If any of these conditions are satisfied then a wilful breach of the undertaking would

doubtless amount to an offence under the Act. Although the High Court observed that the consent order extracted above had been passed on the basis of various undertakings given by the contemner, we are unable to find any material on record which contains such undertakings. It seems to us that the High Court has construed the consent order itself and the directions contained therein as an implied undertaking given by the appellant. Here the High Court has undoubtedly committed an error of law. There is a clear cut distinction between a compromise arrived at between the parties or a consent order passed by the court at the instance of the parties and a clear and categorical undertaking given by any of the parties. In the former, if there is violation of the compromise or the order no question of contempt of court arises, but the party has a right to enforce the order or the compromise by either executing the order or getting an injunction from the court.

10. These are the tests laid down by this Court in order to determine whether a contempt of court has been committed in the case of violation of a prohibitive order. In the instant case, however, as indicated above, there is no application nor any affidavit nor any written undertaking given by the appellant that he would co-operate with the receiver or that he would hand over possession of the Cinema to the receiver. Apart from this, even the consent order does not incorporate expressly or clearly that any such undertaking had been given either by the appellant or by his lawyer before the Court that he would hand over possession of the property to the receiver. In the absence of any express undertaking given by the appellant or any undertaking incorporated in the order impugned, it will be difficult to hold that the appellant wilfully disobeyed or committed breach of such an under taking. What the High Court appears to have done is that it took the consent order passed which was agreed to by the parties and by which a receiver was appointed, to include an undertaking given by the contemner to carry out the directions contained in the order. With due respects, we are unable to agree with this view taken by the High Court. A few examples would show how unsustainable in law the view taken by the High Court is. Take the instance of a suit where the defendant agrees that a decree for Rs.10,000 may be passed against him and the court accordingly passes the decree. The defendant does not pay the decree. Can it be said in these circumstances that merely because the defendant has failed to pay the decretal amount he is guilty of contempt of court? The answer must necessarily be in the negative. Take another instance where a compromise is arrived at between the parties and a particular property having been allotted to A, he has to be put in possession thereof by B. B does not give possession of this property to A. Can it be said that because the compromise decree has not been implemented by B, he commits the offence of contempt of court? Here also the answer must be in the negative and the remedy of B would be not to pray for drawing up proceedings for contempt of court against B but to approach the executing court for directing a warrant of delivery of possession under the provisions of the Code of Civil Procedure. Indeed, if we were to hold that non compliance of a compromise decree or consent order amount to contempt of court, the provisions of the Code of Civil Procedure relating to execution of decrees may not be resorted to at all. In fact, the reason why a breach of clear undertaking given to the court amounts to contempt of court is that the contemner by making a false representation to the Court obtains a benefit for himself and if he fails to honour the undertaking, he plays a serious fraud on the court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution. The same cannot, however, be said of a consent order or a compromise decree where the fraud, if any, is practised by the person concerned not on the Court but on one of the parties. Thus, the offence committed by the person concerned is qua the party not qua the court, and, therefore, the very foundation for proceeding for

contempt of court is completely absent in such cases. In these circumstances, we are satisfied that unless there is an express undertaking given in writing before the court by the contemner or incorporated by the court in its order, there can be no question of wilful disobedience of such an undertaking. In the instant case, we have already held that there is neither any written undertaking filed by the appellant nor was any such undertaking impliedly or expressly incorporated in the order impugned. Thus, there being no undertaking at all the question of breach of such an undertaking does not arise.

11.For these reasons, therefore, we are of the opinion that however improper or reprehensible the conduct of the appellant may be yet the act of the appellant in not complying with the terms of the consent order does not amount to an offence under section 2(b) of the Act and his conviction and order of detention in civil prison for four months is wholly unwarranted by law. The appeal is accordingly allowed. The judgment of the High Court is set aside and the order passed by the High Court directing the appellant to be detained in civil prison for four months is hereby quashed and the appellant is acquitted of the offence under section 2(b) of the Act. Appeal Allowed."

15. What would amount to "an undertaking" has succinctly been outlined by the Hon'ble Supreme Court in ***Rama Narang*** *versus* ***Ramesh Narang and another (2009) 16 SCC 126***, the relevant portion whereof is reproduced hereinbelow:-

"35. Black's Law Dictionary, 5th Edition defines 'undertaking' in the following words:

> *"A Promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply a consideration. In a somewhat special sense, a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the Court or the opposite party. A promise or security in any form."*

36. Osborn's Concise Law Dictionary, 10th Edition defines 'undertaking' in the following words:

> *"A promise, especially a promise in the course of legal proceedings by a party or his counsel which may be enforced by attachment or otherwise in the same manner as an injunction."*

37. In M. v. Home Office (1992) 4 All ER 97 at p.132g, the expression 'undertaking' has been dealt with in the following manner:

> *"If a party, or solicitors or counsel on his behalf, so act as to convey to the court the firm conviction that an undertaking is being given, that party will be bound and it will be no answer that he did not think that he was giving it or that he was misunderstood."*

38. Hudson, In re, 1966 Ch. 209 the English Court observed as under: (All ER pp. 112-I-113 A)

> *"An undertaking to the court confers no personal right or remedy on any other party. The only sanctions for breach are imprisonment for contempt, sequestration or a fine."*

39. Similarly, in Shoreham-by-Sea Urban District Council v. Dolphin Canadian Proteins Ltd. (1972) 71 L.G.R. 261, the Court observed as under:

> *"Failure to comply with an undertaking to abate a nuisance may be visited with a substantial fine."*

40. The Division Bench of the Bombay High Court in Bajranglal Gangadhar Khemka & Anr. v. Kapurchand Ltd. reported in AIR 1950 Bombay 336 had an occasion to deal with similar facts. Chagla, C.J., speaking for the Court, observed as under: (AIR p. 337, para 4)

> *"4. We are not prepared to accept a position which seems to us contrary to the long practice that has been established in this Court, and, apparently, also in England. There is no reason why even in a consent decree a party may not give an undertaking to the Court. Although the Court may be bound to record a compromise, still, when the Court passes a decree, it puts its imprimatur upon those terms and makes the terms a rule of the Court; and it would be open to the Court, before it did so, to accept an undertaking given by a party to the Court. Therefore, there is nothing contrary to any provision of the law whereby an undertaking cannot be given by a party to the Court in the consent decree, which undertaking can be enforced by proper committal proceedings."*

41.In Noorali Babul Thanewala v. K.M.M. Shetty (1990) 1 SCC 259, a tenant committed breach of undertaking given by him to the Supreme Court to deliver vacant possession of certain premises. The Supreme Court held the tenant guilty of contempt. Hon'ble V. Ramaswami, J., delivering the judgment observed: (SCC pp.265-66, para 11)

> *"11. When a court accepts an undertaking given by one of the parties and passes orders based on such undertaking, the order amounts in substance to an injunction restraining that party from acting in breach thereof. The breach of an undertaking given to the Court by or on behalf of a party to a civil proceedings is, therefore, regarded as tantamount to a breach of injunction although the remedies were not always identical. For the purpose of enforcing an undertaking that undertaking is treated as an order so that an undertaking, if broken, would involve the same consequences on the persons breaking that undertaking as would their disobedience to an order for an injunction. It is settled law that breach of an injunction or breach of an undertaking given to a court by a person in a civil proceeding on the faith of which the court sanctions a particular course of action is misconduct amounting to contempt."*

42. In Mohd. Aslam v. Union of India (1994) 6 SCC 442, this Court dealt with the contempt proceedings raising the issues as to the amenability of the State and of its Ministers for failure of obedience to the judicial pronouncements. In this case, the Chief Minister of Uttar Pradesh had made a statement before National Integration Council that the Government of Uttar Pradesh will hold itself fully responsible for the protection of the Ram Janma Bhumi-Babri Masjid structures. Upon this statement of the Chief Minister, this Court had passed an order. However, in the contempt proceedings it was alleged that the orders passed on the basis of the statements made have been deliberately and wilfully flouted and disobeyed by the State of Uttar Pradesh. While dealing with the expression "undertaking", this Court observed as under: (SCC p. 453, para 22)

> *"The Chief Minister having given a solemn assurance to the National Integration Council and permitted the terms of that assurance to be incorporated as his own undertaking to this court and allowed an order to be passed in those terms cannot absolve himself of the responsibility unless he placed before the Court sufficient material which would justify that he had taken all reasonable steps and precautions to prevent the occurrence."*

43. In Rita Markandey v. Surjit Singh Arora (1996) 6 SCC 14, this Court came to the conclusion that even if the parties have not filed an undertaking before the Court, but if the Court is induced to sanction a particular course of action or inaction on the basis of the representation of such a party and the court ultimately finds that the party never intended to act on such representation or such representation was false, even then the party would be guilty of committing contempt of court. The Court observed as under: (SCC p. 20, para 12)

> *"12. Law is well settled that if any party gives an undertaking to the Court to vacate the premises from which he is liable to be evicted under the orders of the Court and there is a clear and deliberate breach thereof it amounts to civil contempt but since, in the present case, the respondent did not file any undertaking as envisaged in the order of this Court the question of his being punished for breach thereof does not arise. However, in our considered view even in a case where no such undertaking is given, a party to a litigation may be held liable for such contempt if the Court is induced to sanction a particular course of action or inaction on the basis of the representation of such a party and the Court ultimately finds that the party never intended to act on such representation or such representation was false."*

44. In K.C.G. Verghese v. K.T. Rajendran (2003) 2 SCC 492, this Court dealt with the "undertaking" in contempt proceedings arising out of eviction proceedings. This Court held that when at the time of giving the undertaking, the tenant did not indicate that he was in possession of a part of the premises and not the other portion nor was such a stand taken in any of the pleadings before the High Court or rent controller, the order of eviction passed against the tenant is equally binding upon the occupant of the other portion.

45. This Court again had occasion to deal with a case in Bank of Baroda v. Sadruddin Hasan Daya (2004) 1 SCC 360. In that case, the Court clearly observed as under: (SCC p. 361g)

> *"The wilful breach of an undertaking given to a court amounts to "civil contempt" within the meaning of Section 2(b) of the Contempt of Courts Act. The respondents having committed breach of the undertaking given to the Supreme Court in the consent terms they are clearly liable for having committed contempt of court."*

46.The respondents placed reliance on Babu Ram Gupta v. Sudhir Bhasin (1980) 3 SCC 47. In this case admittedly no application, affidavit or any undertaking were given by the appellant. Therefore, this case is of no assistance to the respondents. In this case, the Court observed that: (SCC p.53, para 10)

> *"Even the consent order does not incorporate expressly or clearly that any such undertaking had been given either by the appellant or by his lawyer before the Court that he would handover possession of the property to the receiver. In the absence of any express undertaking given by the appellant or any undertaking incorporated in the order impugned, it will be difficult to hold that the appellant wilfully disobeyed or committed breach of such an undertaking".*

The Court even in this case observed that :(SCC p.53, para 10)

> *"In fact, the reason why a breach of clear undertaking given to the court amounts to contempt of court is that the contemnor by making a false representation to the court obtains a benefit for himself and if he fails to honour the undertaking, he plays a serious fraud on the court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution." (emphasis in original)"*

16. Applying the ratio of the aforesaid judgments to the facts of the instant case, it would be noticed that even the so-called consent order does not incorporate expressly or even impliedly any undertaking which may have been given either by the respondent or by his counsel before the Court to the effect that he would hand over the possession of the property. Rather, the execution petition had been ordered to be dismissed as withdrawn in view of the compromise entered into between the parties.

17. As already observed, the default clause in the agreement with respect to failure on the part of the respondent to vacate the premises is already envisaged and covered under para 3 of the agreement as reproduced in para-10 (supra). Therefore, in such circumstances, the consent order passed on the basis of the compromise arrived at between the parties cannot be construed to be an undertaking given by the respondent to vacate the premises.

18. Once, it is found that there was no undertaking given by the respondent, the question of contempt does not arise. Similar issue came up before the Hon'ble Supreme Court in ***Anil K.Surana and another*** *versus* ***State Bank of Hyderabad (2007) 10 SCC 257*** and it was held as under:-

> *"6. We are not inclined to go into the question as to whether or not the High Court could have imposed a sentence higher than that which has been provided under the Contempt of Courts Act. We find that no undertaking was given by the appellant either on that date or on a subsequent date. The directions to pay by instalments can at best be treated as a decree. We hold that by consent of parties an executable decree was passed in favour of the respondent Bank. The remedy of enforcing the decree can only be by way of execution proceedings. We thus clarify that it will be open to the respondent to take out execution proceedings.*
>
> *7. In our view, the contempt proceedings were not the correct remedy. We, therefore, set aside the impugned order to the extent that it punishes the appellants for contempt and sentences them as stated above."*

19. In view of the foregoing discussion, we do not find any offence to have been committed by the respondent so as to initiate proceedings under Section 2(b) of the Act. Accordingly, there is no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. However, the petitioner is at liberty to execute the order in accordance with law.

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

Rasheed. ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Appeal No.: 440 of 2015
Date of Decision: 02.06.2016

N.D.P.S. Act, 1985- Section 15- Accused was found in possession of 1.6 kg poppy straw- accused was tried and convicted by the trial Court- held, in appeal, that testimonies of prosecution witnesses are corroborating each other- there are no material contradictions in the same- there is no evidence that Investigating Officer had prior information regarding the possession of contraband by the accused- evidence was properly appreciated by the trial Court- appeal dismissed - however, sentence modified, keeping in view the time lapsed from the date of the incident. (Para-9 to 13)

For the Appellant: Mr. M.S. Kanwar, 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 appeal is directed against the judgement rendered on 28/31.08.2015 by the learned Special Judge, Ghumarwin, District Bilaspur, Himachal Pradesh in Sessions Case No.25/3 of 2013/12, whereby the appellant stands convicted and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.10,000/- and in default to undergo simple imprisonment for three months for commission of offence punishable under Section 15(b) of the NDPS Act.

2. The prosecution story, in brief, is that on 8.4.2012, SI Ram Dass, along with C. Dinesh Kumar, C. Sunil Kumar and HHC Pradeep Kumar were on patrolling duty in an official vehicle bearing No.HP-69A-0310 on NH-21 at Kainchi Mor. While they were moving towards Kainchi Mor, the accused was moving on scooter bearing No.HP-69-0955 ahead of them. The accused on seeing the police started driving the scooter in high speed. At about 7.15 PM on suspicion the said scooter was intercepted and on inquiry the accused disclosed his name as Rashid. All the police officials had given their personal search to the accused vide memo Ext.PW-6/A but nothing incriminating was recovered from them. Thereafter, the scooter was searched and from inside its front dickey, a transparent plastic bag Ext.P-2 was recovered, which on opening was found to be containing poppy straw Ext.P.3. HHC Pradeep Kumar was sent by SI Ram Dass to bring the scale and weights, who brought the same from the shop of Jaimal Singh. On being weighed, the poppy straw was found to be 1 kg 600 grams in weight along with the plastic bag. The contraband and plastic bag were sealed with seal impression "T", which bears the signatures of the witnesses and of accused. Ruka Ext.PW-5/A was prepared and on the basis of same FIR Ext.PW-5/B was registered. The site plan Ext.PW-11/A was prepared and the accused was arrested. The samples were sent to SFSL, Junga for chemical examination. The result of chemical analysis Ext.PW-4/A was issued in which it was shown that exhibit stated as poppy straw was a sample of poppy straw.

3. On completion of investigation into the offence allegedly committed by the accused a report under Section 173 Cr.P.C. stood prepared and filed in the competent Court.

4. The accused-appellant herein stood charged for committing an offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The accused-appellant pleaded not guilty and claimed trial.

5. 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 stood recorded wherein he pleaded innocence and claimed false implication. Though he opted to adduce defence evidence, yet he failed to adduce evidence in defence.

6. The accused-appellant stands aggrieved by the judgment of conviction recorded by the learned trial Court. Shri M.S. Kanwar, learned counsel 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, 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 appearing for the State has with considerable force and vigour contended qua the findings of conviction recorded by the Court below being based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

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 are bereft of any vice of inter se contradictions comprised in their respective examinations in chief vis-à-vis their respective cross examinations, besides their respective depositions are shorn off any intra se contradictions. Consequently, their testimonies qua the prosecution case are credible besides inspiring. Moreover, the depositions of the official witnesses qua the recovery of contraband Ext.P.3 effectuated under recovery memo Ext.PW-6/C by the Investigating Officer at the site of occurrence from the exclusive and conscious possession of the accused/appellant stands lent corroborative vigor by the deposition of an independent witness, who stood associated by the Investigating Officer at the site of occurrence at the time contemporaneous to his holding thereat the apposite proceedings.

10. The learned counsel for the appellant has contended with vigor of the independent witness associated by the Investigating Officer in the apposite proceedings held by him at the site of occurrence is vulnerable to skepticism as with an acquiescence emerging in the testimony of PW-10 qua availability of independent witnesses in close proximity to the site whereat the ill-fated occurrence took place, whereupon the Investigating Officer stood also enjoined to associate them also as independent witnesses to the occurrence rather his solitarily associating PW-10 as an independent witness to the apposite proceedings by eliciting his presence from some distance vis-à-vis the site of occurrence, thereupon renders the investigation conducted by the Investigating Officer to be slanted. However, even if apart from PW-10 standing associated by the Investigating Officer as an independent witness in the apposite proceedings held by him at the site of occurrence, participation whereof of PW-10 though stood elicited by him by summoning him from some distance vis-à-vis the site of occurrence, of independent witnesses besides PW-10 being available in immediate proximity of the site of occurrence, nonetheless the aforesaid facet would yet not ingrain his testimony to be tainted nor would render his testimony qua the underscorings occurring therein of his corroborating the version of the official witnesses to be bereft of any credibility predominantly when he has been subjected to a grueling cross examination. Consequently, this Court would not render the testimonies of the official witnesses qua the occurrence to be incredible nor the factum of the omission of the Investigating Officer to associate in exclusion to PW-10 or in addition to him, independent witnesses present at the site of occurrence would beget an inference of the Investigating Officer holding a slanted investigation qua the occurrence. Accordingly, the aforesaid purported omissions/infirmities do not make any deep percolation qua the veracity of the genesis of the prosecution case.

11. The learned counsel for the appellant has contended with vigor of the testimony of PW-1 whereform HHC Pardeep Kumar on 8.4.2012 at about 7.30 PM carried weights and grams of 1 kg., 500 grams and 100 grams, communicative of HHC Pradeep Kumar asking him to purvey to him weights and grams of 1kg., 500 grams and 100 grams, request whereof acceded to by him, sequelling a deduction of the Investigating Officer holding prior information qua the accused holding in his conscious and exclusive possession contraband weighing 1 kg. 600 grams especially when the weight of contraband as stood recovered from the conscious and exclusive possession of the accused carries a similar weight. He contends with the Investigating Officer, hence holding prior information qua the accused holding contraband in his conscious and exclusive possession, it was incumbent upon him to beget compliance with the mandate of Section 41 of the NDPS Act, whereas his palpably omitting to beget compliance thereto renders the entire prosecution version embodied in the FIR to stand stained with a vice of inveracity. However, the aforesaid submission made by the learned counsel for the appellant holds no force, in the face of PW-1 while reneging from his previous statement recorded in writing whereupon at the request of the learned Public Prosecutor concerned, the learned trial Court permitted his standing subjected to cross examination by the learned Public Prosecutor concerned. Predominantly the reason for his reneging from his previous statement recorded in writing by the Investigating Officer emanates from his acquiescing in his cross examination held by the learned

Public Prosecutor concerned qua the accused holding his residence at a distance of 8 K.M. from his shop, also with his disclosing therein of the accused being a milk vendor concomitantly with PW-1 holding his shop in proximity to the house of the accused/appellant, whereupon the possibility of PW-1 standing influenced by the accused/appellant stands reared, hence PW-1 standing constrained to in his examination in chief make a partisan, influenced communication therein of HHC Pradeep Kumar on visiting his shop requesting him to purvey to him weights and grams comprised of 1 kg., 500 grams and 100 grams, request whereof stood acceded to by him, as a corollary an influenced partisan version by PW-1 qua the facet aforesaid holds no tenacity. Moreover, the deposition aforesaid qua the aforesaid factum comprised in the examination in chief of PW-1 may also not hold any truth given the factum of the Investigating Officer not seizing weights and grams comprised of 1 kg., 500 grams and 100 grams. Only in the event of the Investigating Officer seizing weights and grams carried by HHC Pradeep Kumar from the shop of PW-1, would this Court be constrained to hold an inference of the Investigating Officer holding a prior information qua the accused holding conscious and exclusive possession of contraband, holding of prior Information thereof by him enjoined him to revere the mandatory provisions of Section 41 of the NDPS Act, compliance whereof when stands palpably not begotten would thereupon coax this Court to conclude of the prosecution version in its entirety being liable to be axed. Consequently, it cannot be concluded of the Investigating Officer holding any prior information qua the accused holding conscious and exclusive possession of contraband nor it can be concluded of his standing enjoined to mete adherence to the mandatory provisions of Section 41 of the NDPS Act nor it can be held of his not meting adherence thereto staining the prosecution case.

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, there is no merit in this appeal which is accordingly dismissed. Keeping in view the fact that the appellant/accused is undergoing sentence of imprisonment and has already undergone about nine months of imprisonment, it is just and appropriate to modify the sentence of imprisonment imposed upon him by the learned trial Court to the term already undergone by him. However, he is directed to pay a fine of Rs.10,000/-, as imposed by the learned Court, within a period of one month before it, in default he shall undergo simple imprisonment for two months. He be set at liberty only if he deposits fine of Rs.10,000/- within the period aforesaid before the learned trial Court, if not already deposited. Release warrant be issued accordingly. 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.

Residents of village Jatain, Dochi and Reha ....Petitioner

Versus

State of H.P. & Others. ...Respondents

CWP No.4890 of 2015
Judgment Reserved on: 19.05.2016
Date of decision: 02.06.2016

Constitution of India, 1950- Article 226- Petitioners claimed that Sewerage Treatment Plant (STP) was being constructed in violation of the instructions- land on which STP is being constructed is a common area and the forest land which cannot be diverted to any other use- respondents denied the allegations - held, that process of construction started in the year 2006-

writ petition was filed in the year 2015- even as per petitioners they became aware of the construction of STP in the year 2012- no explanation was given for the delay- no material was placed on record to show that the damage was caused to the ecology- NOC was taken from Nagar Parishad, Theog- writ petition has been filed to stop the public work – petition dismissed with cost of Rs. 25,000/-. (Para-17 to 33)

Cases referred:

Vijay Kumar Gupta vs. State of Himachal Pradesh and Others , decided on 09.01.2015

Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo and Others (2014)1 SCC 161

For the Petitioners:	Mr.Sanjeev Bhushan, Senior Advocate with Mr.Rakesh Chauhan, Advocate.
For the Respondents:	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.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

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

"(i) That respondents No.1 to 3 may very kindly be directed not to construct the sewerage treatment plant in land denoted by Khasra No.963/1, situate in Mauza Rai Ghat, Tehsil Theog, District Shimla, Himachal Pradesh measuring 3377.50 square meters since same is against instructions on the subject and is being construction on a forest land apart from the same is constructed virtually in a residential area.

(ii) That the order annexure P-5 passed by Divisional Commissioner may very kindly be quashed and set aside since same is completely and factually incorrect, in the interests of justice and fair play.

(iii) That records of the case may be summoned for the kind perusal of this Hon'ble Court."

2. Present petition has been filed in the representative capacity by Shri Jai Prakash on behalf of villagers of villages Jatain, Dochi and Reha, who has been duly authorized by way of Resolution (Annexure P-1).

3. By way of present petition, petitioner, being aggrieved with the construction of a Sewerage Treatment Plant *(in short `STP')* in village Jatain, approached this Court invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. Petitioner averred that respondents No.1 to 3 are in the process of constructing a STP in village Jatain, which action of them is being opposed by the villagers of villages Jatain and Dochi. These villages fall in the Gram Panchayat, Diyarighat, whereas village Reha falls in Municipal Council, Theog. Petitioner has specifically averred that STP is being constructed in complete violation of the guidelines issued by competent Authority for the purpose of construction of STP. It has also been contended that respondent No.4 illegally transferred the land in the name of Irrigation and Public Health Department *(in short I&PH Department)* that too on completely wrong and false pretext because it has been clearly stated in the report that there exists no trees on the land, no common place i.e. school, water sources and cremation ground. The petitioner averred in the petition that on spot there exists number of trees, which have been destroyed by the respondents for the construction of STP. It is specifically averred that at a distance of about 100 meters of the proposed site, there is a cremation ground and there are about five water sources around the land and a few of them are just at a distance of 10-20 meters. Petitioner specifically averred that while transferring the land in the name of I&PH Department for the construction of aforesaid

Plant, these aforesaid facts have not been taken into consideration and as such, STP should not be allowed to be constructed on Khasra No.963/1, area measuring 3377.50 square meters, situate in Mauza Rai Ghat, Tehsil Theog, District Shimla, being detrimental to the residents of area as well as ecology. It is also averred that the villagers of the area came to know in the beginning of the year 2014 that I&PH Department has started construction activities of STP. It is also alleged that in the beginning of the year 2014, number of trees were standing on Khasra No.963/1, which were later cut by the respondents for construction of the STP and when it came to the knowledge of the villagers, they opposed the same by passing various resolutions against construction of STP. By way of Resolutions passed by various Organizations as well as Gram Panchayats, respondents-State, has been repeatedly requested not to construct STP on the proposed site i.e. Khasra No.963/1, but all in vain. Petitioner also placed on record Resolutions passed by Organization as well as Panchayat and cutting of newspaper reflecting therein the protest lodged by the residents of that area that at proposed site of construction of STP many trees have been cut and the land being used for grazing of cattle has been destroyed. Apart from this, few water sources situated at spot have also been destroyed. Petitioner stated that by way of information received under Right to Information Act, 2005, *(In short RTI Act)*, it came to their notice that the Divisional Commissioner, Shimla has transferred that land in the name of I&PH Department for construction of storage tank of STP vide order dated 2.4.2012 (Annexure P-5), perusal whereof suggests that while transferring the land in question for the purpose of construction of storage tank of STP, respondents placed wrong facts before the Divisional Commissioner, Shimla, who, also without verifying the factual position on the spot, approved transfer of land in the name of I&PH Department for the aforesaid construction of STP. Petitioner averred that though in the order dated 2.4.2012 there is mention that there is no cremation ground in or around the land and there was no tree standing on the land, but such mention in the letter is totally contrary to the records as well as position on the spot. Petitioner also stated that perusal of order dated 2.4.2012, Annexure P-5, shows that the land was transferred in the name of I&PH Department was required to put to use within a period of 2 years for the purpose, failing which same would become surplus and would revert to the Revenue Department, Himachal Pradesh.

4. In the present case, the aforesaid period of two years have elapsed, as such, no construction of STP can be allowed to be made on the spot after completion of two years and land is required to be transferred to surplus pool of the Revenue Department. Petitioner specifically stated that the land on which STP is being constructed as well as adjoining land is always used by the villagers being common land and some land is used for grazing cattle by the villagers. It is also submitted that since there are number of trees standing on the land and as per judgment passed by Hon'ble Apex Court in ***T.N. Godavarman Thirumulkpad vs. Union of India and Others, (1997)2 SCC 267***, held that it is a forest land and, thus, cannot be put to any non-forestry purpose. Thus, any proposal to make STP in forest land cannot be allowed to sustain. Petitioner also averred that since there are lot of objections from the residents of that area, respondents should have taken steps moving STP to some other alternative place, where there is no population around the land and where there are no trees on the land. It is also submitted that the land on which STP is being constructed, there are lands and properties of the villagers and virtually it falls within the residential area and any construction of STP in and around this area would be causing lot of inconvenience to the residents of that area. It is also averred that otherwise also it is the fundamental duty of all the citizens as per Article 51-A of the Constitution of India to protect, water sources and other amenities available.

5. In the aforesaid background, petitioner prayed that the respondents may be restrained from constructing the STP in the land denoted by Khasra No.963/1, Mauza Rai Ghat, Tehsil Theog, measuring 3377.50 square meters and permission granted by the Divisional Commissioner transferring the land in favour of I&PH Department may kindly be quashed and set aside being based upon incorrect report.

6. Respondents No.1 to 3 filed their reply, duly supported by the affidavit of Superintending Engineer, I&PH Circle, Shimla, wherein specific objection of delay and latches has been taken. It is stated that the petition suffers from delay and latches because construction of the STP for Theog town started on 22.2.2014, whereas present petition has been filed after the lapse of two years. It is also averred that more than 67.88% work of construction has already been completed and approximately an amount of Rs.357.16 lacs has been spent on the construction of STP, which is being constructed in the interest of general public. However, during the arguments, learned Advocate General, informed that by now more than 75% work on the site has been completed. It is specifically averred by the respondents No.1 to 3 in their reply that STP has been/is being constructed over the barren land and no villages would be affected by the construction of STP, moreover it would be beneficial to the entire area of Theog Sub Division. It has also come in the aforesaid reply that in the year 2006, the competent Authority approved the construction of STP for Theog town at a cost of Rs.423.17 lacs vide its letter NO.I&PH-B(F) 07.06.2006.

7. In this behalf, respondent No.4 sought necessary report from the SDO(C), Theog, who, after verifying the record, site etc., submitted a report to the respondent No.4, requesting therein for transfer of land in question in the name of I&PH Department. It has also come in the reply that land in question is a Government land, located at a distance of 400 meters down the hill from the National Highway-22 *(In short `NH-22'),* which was in possession of the Municipal Council, Theog. The land proposed for construction of STP is vacant on spot and no trees whatsoever exist upon it. Rather, it has come in the reply that no common place i.e. school, water sources exists/situate upon the proposed land. Hence, in view of the independent report of the SDO(C), respondent No.4 transferred the said Government land comprised in Khasra No.963/1, measuring 3377.50 square meters in the name of I&PH Department to enable it to construct the STP for the Theog town, which is admittedly in the public interest. It has also come in the reply that consequent upon transfer of the land in the name of I&PH Department, tenders were floated and work for the construction of said STP for Theog town was awarded to one M/s.Dogra Construction Private Limited Company, Bhoranj, District Hamirpur for Rs.2,64,43,731/- i.e. Annexure R-2. The contractor has already started construction of STP on 22.2.2014. Apart from above, work relating to laying of sewerage pipe was awarded to another contractor vide letter dated 29.12.2007, amounting to Rs.1,90,97,165/-, who actually started laying of pipes on 13.1.2008 and till date of filing of affidavit about 68% of the whole work has been completed. It is specifically denied that the villagers, who are residents of villages Jatain, Dochi and Reha actually started opposing construction of the said STP at the very beginning of the starting of work, whereas, they started opposing the Project in April, 2014, when work of laying sewerage pipes was at the stage of completion. By way of reply it is also stated that consent from Himachal Pradesh State Pollution Control Board, Shimla, under the provisions of Water (Prevention & Control of Pollution) Act, 1974 to establish the said STP of 1.5 MLD capacity at Theog for the residents of Theog town has already been obtained vide Annexure R-3.

8. Hence, there is no violation of Rules, if any, as has been alleged by the petitioner in constructing the STP and same is being constructed strictly within the norms laid in this regard. It has been specifically submitted that cremation ground of the village is located at a distance of 3-4 Kilometers away from the site of STP. Existence of five water sources, as alleged, by the petitioner has also been denied by the respondents. It has come in the reply that village Jatain is located on the opposite side of the valley, which is at a distance of 1 KM from the site, where STP is being constructed. Even village Dochi is also located on the opposite side of the valley and same is at a distance of 1.5 KM. from the proposed site of STP. As per reply of the respondents only one house is located near the site of STP which is also situated on the upper side of the STP and as such no villagers are going to be affected from the construction of said STP. Respondents have categorically stated that the work of site was started through contractor on 22.2.2014, meaning thereby that same was started within a period of two years from the date of issuance of Annexure P-5 i.e. order dated 2.4.2012 passed by the Divisional Commissioner, hence, averments with regard to non-use of the land within stipulated period of two years is

devoid of any merit. It is also stated that even after constructing the STP, land would be available for grazing animals, if any, for the residents of village Jatain, which is otherwise located on the opposite side of the valley. By way of reply, photographs of the spot have also been annexed, perusal whereof suggest that a substantial work has already been done on the site.

9. Respondent No.4 i.e. Divisional Commissioner, Shimla, who had actually issued order dated 2.4.2012 of transferring the land in the name of I&PH Department also filed reply to the writ petition, wherein it is stated that pursuant to the request submitted by the Executive Engineer, I&PH Division No.1, Shimla, for the transfer/ possession of the Government land, comprised in Khasra No.963/1, measuring 3377.50 square meters, situated in Mauza Rai Ghat, Tehsil Theog, District Shimla in the name of I&PH Department for construction of STP was acceded only on the basis of report submitted by SDO(C), Theog. It is further averred that the Deputy Commissioner, Shimla recommended the case for transfer of the possession of the Government land, as referred above, and after getting the matter inquired through SDO(C), Theog, he granted permission. As per report of the SDO(C), Theog, the proposed land was owned by Government of Himachal Pradesh and possession was recorded in the name and style of "*Kabza Nagar Parishad, Theog"* and classification of land was *"Gair Mauroosi"* in revenue record and proposed land was vacant on spot and there were no trees upon it and no common place, water resources, cremation ground existed on the proposed land. As per report, proposed land is 400 meters away from NH-22 and Nagar Parishad, Theog, has/had no objection for transfer of possession of the proposed land. The estate right holders has/had no objection for transfer of possession of the proposed land as the copy of statement of right holders, duly countersigned by the Tehsildar, Theog, was attached with the case file.

10. Apart from above, it also appears that pursuant to the notice issued by this Court, respondent No.4 directed the SDO(C), Theog vide letter No.(SML)E(1)11/2012-Vol-11-209, dated 21.1.2016 to inquire into the matter personally alongwith technical staff/officer of I&PH Department and submit the enquiry report to this office. In compliance to the office order, the SDO(C) visited the spot alongwith Assistant Engineer and Junior Engineer, I&PH Sub Division, Theog, and reported as under:

> ***"The land in question is 400 meters away from NH-5 and the land is vacant on spot and there exist no trees upon it, there exists no common place i.e. School, Water Resources and Crematory ground etc. on the land transferred for the purpose." He has further observed that "the village of Jatain, Dochi and Reha are situated at the distance of about 1 Kilometer from the place of plant (Annexure R-5)"***

11. In the aforesaid background, petitioner approached this Court for the relief(s) as have been enumerated hereinabove invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

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

13. Mr.Sanjeev Bhushan, learned Senior Counsel, appearing for the petitioner, vehemently argued that the action of the respondent-State in constructing the STP on Khasra No.963/1, measuring 3377.50 square meter, is in complete violation of the guidelines/instructions issued in this regard by the competent Authority. He contended that the aforesaid Project is being constructed by the respondents in complete violation of the Rules in vogue and land in question has been wrongly transferred in the name of I&PH Department that too by concealing material facts. He contended that on spot there exists trees, water sources, school and cremation ground, but despite aforesaid, respondents by concealing material facts got the land transferred in the name of I&PH Department for the construction of STP.

14. Mr.Bhushan, strenuously argued that respondents, before taking any steps for construction of STP at proposed site, failed to take into confidence the residents of that area as

`No Objection Certificate' whatsoever was obtained from the Gram Panchayats despite there being lot of resistance from the local residents, who would be put to lot of inconvenience by construction of STP. Residents are not happy with the construction of the STP on the proposed site, which is otherwise not suitable for the construction of the same. During argument, he invited the attention of this Court to various documents placed on record to suggest that there is lot of opposition from the residents of the area as well as of Panchayats. He also invited the attention of this Court to Annexures P-7 and P-8 i.e. Jamabandies for the years 1997-98 and 2003-2004 filed with the rejoinder to substantiate his arguments that the land proposed for construction of STP is a common land being used by people of that area.

15. Mr.Bhushan also vehemently argued that villagers of the area have been opposing the construction of STP at proposed site from day one. Since they (residents of the area) came to know only after issuance of order dated 20.4.2012, whereby land was ordered to be transferred to the I&PH Department, all steps thereafter were taken to oppose the construction of the sewerage tank of STP on Khasra No.963/1, measuring 3377.50 square meters. He also contended that in case STP is allowed to be constructed on the proposed site, great injustice would be caused to the residents of that area as well as to the ecology of the area as number of trees have been cut by the respondents in the process of construction, all the natural sources of water have been destroyed and no place has been left for the villagers for grazing their cattle. Hence, he prayed that appropriate writ or direction may be issued to the respondents restraining them from raising any construction on the land in question.

16. Shri Shrawan Dogra, learned Advocate General, appearing on behalf of the respondents-State, forcefully contended that present writ petition is not maintainable at all because the petitioner has not been able to establish/ prove the locus to file the present petition on behalf of the petitioners. He stated that in the garb of so called Public Interest Litigation *(in short `PIL')*, few interested people are trying to stall the construction of STP on the given site, which is admittedly being constructed for the benefit of public of Theog town at large. He further contended that while constructing STP respondents complied with each and every instruction issued in this regard by the concerned Authorities so that no damage is caused to the residents of that area as well as ecology of that area. During arguments he invited the attention of this Court to various documents annexed with the pleadings to substantiate his plea that respondent No.4, before issuing orders for transfer of land in the name of I&PH Department, actually obtained report from the revenue authorities, wherein it is categorically informed that land is barren and there exists no trees, school, water sources and cremation ground. He forcefully contended that the STP is being constructed solely in the interest of residents of Theog town and in this regard already huge amount has been spent by the respondents and on going construction on the spot cannot be ordered to be stopped that too at the behest of some vested interests. He also contended that the present petition is barred by delay and latches because as has been pointed out in the reply that work actually commenced on the site in the year 2008, when the contractor started laying sewerage pipes, now when more than 75% work has been completed after spending huge amount, petitioner cannot be allowed to obstruct the construction work of STP by sheer abuse of process of law. He prayed for dismissal of the writ petition.

17. It is ample clear from the pleadings on record that process of construction of STP for Theog town started in the year 2006, when necessary steps were taken by the respondents for transferring the land in question in the name of I&PH Department. Record further reveals that order of transferring land in the name of I&PH Department was passed in the year 2012, and thereafter tender was floated and work for construction of STP was awarded to the contractor on 29.10.2013 and the work started at the site on 22.2.2014. Apart from above, it is also on record that before starting the construction of aforesaid STP, work of laying sewerage pipes was already allotted to another contractor in the year 2007, who actually started the work of laying of pipes on 13.1.2008. It also remains fact that as of today more than 75% work has been completed by the respondents as far as construction of STP is concerned.

18. In the present case, respondents have taken specific objections of delay and latches as well as the locus to file PIL, accordingly with a view to test the aforesaid submissions made by the respondents, it would be necessary for us to prefer the documents available on record to verify that when petitioner for the first time raised issue with regard to construction of STP with the respondents-Authorities. As per the case of the petitioner, factum with regard to construction of STP came to their notice, when order dated 2.4.2012, passed by the Divisional Commissioner, transferring the land in the name of I&PH Department, was supplied under RTI Act. The aforesaid statement of the petitioner cannot be accepted solely for the reasons that as has come in the reply of the State that decision to construct the STP on the given site was taken in the year 2006, whereafter steps were taken to obtain the permission from respondent No.4 for transfer of land in the name of I&PH Department. Moreover, there is ample evidence on record to suggest that work of laying sewerage pipes was started in the year 2008. Moreover, as per own case of the petitioner that they had acquired the knowledge of construction of STP in the year 2012 but admittedly the present petition has been filed in the year 2015 i.e. after three years of acquiring knowledge and there is no explanation worth the name, except of making representations with the respondent-Department. It is undisputed that the STP, being constructed by the respondents, is in the interest of residents of Theog area and it cannot be believed that petitioner and residents of the area were not aware of the decision as well as steps taken thereafter for construction of STP. Hence, explanation rendered by the petitioner for filing the present petition, after a considerably delay, is not worth credence and cannot be accepted.

19. Apart from delay and latches, petitioners have not placed on record any documentary evidence to substantiate their claim with regard to damage caused to the ecology. Though petitioner has stated that in the process of construction of STP, number of trees have been cut and damages have been caused to the water sources but there is no documentary evidence worth name, which could indicate that trees were cut on the spot by the respondents for the construction of STP. Petitioners have alleged that great damage has been caused to the water sources in and around the proposed site of STP and there is one cremation ground. But, as has been stated above, we have not been able to find any document on record which could substantiate the aforesaid submissions as well as arguments raised on behalf of the petitioners. Admittedly, some resolutions as well as newspaper cuttings have been placed on record by the petitioner to show that people of that area agitated against the decision of the respondents to construct the STP on the given site but certainly that cannot be a ground for this Court for restraining the respondents from constructing the STP, which is otherwise appears to be in the interest of public at large.

20. To the contrary, respondents-State by way of reply have categorically stated that the construction of STP Project was in the knowledge of the general people of that area and same is being constructed in their interest by spending huge amount. Allegations with regard to cutting of trees, destruction of water sources, existence of school and cremation ground etc. have been specifically denied by the respondents and this Court do not see any reason to disbelieve the version put forth by the respondents by way of reply which is duly supported by an affidavit of competent officer of the State.

21. Allegations with regard to the irregularities committed by the respondent No.4 at the time of ordering transfer of land also appears to be ill-founded and without any basis because all the respondents have unequivocally stated in their reply(s) that no tree has been damaged in the process of construction of STP and no damage, as such, has been caused to the water sources, rather it has been stated that the land in question was barren and there was no tree on the spot. Respondents have also stated that in the vicinity of 1.5 to 2 KMs, there are no houses except one house, which is also situated on the upper side of the STP. Factum with regard to the existence of cremation ground, school and water sources have been categorically denied. It is important to notice here that before filing reply, pursuant to the notice issued by the Court, respondent No.4, who had ordered for transfer of the land in the name of I&PH Department, again got the matter inquired from the SDO(C), Theog, with regard to existence of tree, school,

water sources and cremation grounds on the proposed site of construction of STP but, as has been reproduced above, the SDO(C), Theog, again reported that on the proposed site there are no trees, school, water sources and cremation grounds. Moreover, this Court cannot loose sight of the fact that aforesaid STP is being constructed for the interest of public at large and, as such, any contention of the petitioner to the contrary that same is being constructed in violation of Rules and against the interest of public cannot be accepted and same deserves to be rejected out-rightly. As has been observed above, petitioner has not placed on record any document which could compel this Court to restrain the respondents from constructing STP on the given site.

22. Petitioner, by way of rejoinder, has placed on record Jamabandies for the years 1997-98 and 2003-2004 indicating therein that owner of land in question is State and the same has been shown as "common village land". It has come in the reply of the respondents-State that as far as grazing of cattle is concerned, people of that area can always use that land which is otherwise a barren land. Moreover, revenue record suggests that owner of the land is State and the NOC was obtained from the Nagar Parishad, Theog, who has been shown in possession of the land, by the respondents and, as such, the petitioner cannot have any grouse, whatsoever, with regard to the construction of STP which is admittedly being constructed on the land of Municipal Council, Theog in the public interest.

23. At this stage, it is observed that such petitions, that too in the name of PIL, cannot be allowed to be used as a tool that too by some vested interests, who for some ulterior motive do not want this Project to come up. In the present case, except the resolution passed by residents of Gram Panchayats of the area authorizing the petitioner to file present petition, no other material has been placed on record to point out that Project in question is not in public interest and the same is being constructed in violation of the guidelines framed by the respondent-State as well as Courts from time to time.

24. Though, this Court vide judgment in ***CWP No.9480 of 2014, titled: Vijay Kumar Gupta vs. State of Himachal Pradesh and Others, decided on 09.01.2015,*** has already issued the following guidelines as far as filing of PIL is concerned:-

> ***"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 interloper 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."

but in the present case there is no compliance whatsoever, of the guidelines, referred herein above, and, as such, present petition cannot be termed as PIL in any manner and the same deserves to be dismissed.

25. Though, by way of present petition, it has been claimed that the same has been filed in public interest but as clearly emerges from the record, as has been discussed hereinabove, there is no material whatsoever available on record which could persuade this Court to believe that the petitioner is a *`Pro Bono Publico'* and petition is filed in public interest. Rather, careful perusal/analysis of the documents available on record suggests that it is a handy work of some vested interests who certainly for extraneous reasons do not want the Project like the present STP to come up in the area which is admittedly need of hour in the present scenario.

26. During the arguments, this Court had an occasion to sift the entire documentary evidence made available on record as well as pleadings of the parties, perusal whereof clearly suggests that the Project which is being sought to be closed by invoking extra ordinary jurisdiction of this Court is in larger public interest. Careful reading of the specific reply given by the respondent-Department to the averments made in the writ petition clearly depicts that the petitioner has not approached this Court with clean hands, rather attempt has been made to hoodwink the Court by concealing material facts that too solely with a view to obtain orders from the Court restraining the respondents from constructing STP at Theog town. None of the averments, with regard to cutting of trees, existence of school, water sources and cremation ground, have been admitted by the respondents in their respective replies. To the contrary, the reply filed by the respondents which is duly supported by an affidavit of responsible officer of the State suggests that necessary precautions/measures have been taken by the Department to protect the ecology/environment before granting necessary permission for the construction of STP at Theog. It has also been brought to the notice of this Court that at the time of hearing more than 75% of work of STP is completed by spending huge amount and there is no specific denial, whatsoever, on behalf of the petitioner to the aforesaid assertions made by the respondents in their reply, meaning thereby that the contentions, put forth by the petitioner in the petition in the shape of PIL, are not correct. Moreover, as has been noticed above, except for one resolution authorizing the petitioner to file petition, which is available on record, no document whatsoever has been made available on record, by the petitioner to substantiate the averments contained in the writ petition. Hence in view of the facts and circumstances enumerated hereinabove, this Court has no hesitation to conclude that by no stretch of imagination present petition can be termed to be as PIL. Rather contents of the same appear to be frivolous, vexatious and far-far away from the correct position on the spot. This court as well as Hon'ble Apex Court have repeatedly expressed their concern with regard to growing menace of so called PIL, whereby some vested interests by concealing material facts attempts to rope in the Courts in the name of public interest.

27. Hon'ble Apex Court expressing its serious concern over misuse of PIL has repeatedly observed that use of the PIL has to be done with care, caution and circumspection so that it is not misused by certain people having vested interest.

28. Hon'ble Apex Court in case ***Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo and Others (2014)1 SCC 161***, observed as under:

> ***"24. Ordinarily, after so stating we would have proceeded to scan the anatomy of the Act, the Rules, the concept of the Scheme under the Act and other facets but we have thought it imperative to revisit certain authorities pertaining to public interest litigation, its abuses and the way sometimes the courts perceive the entire spectrum. It is an ingenious and adroit innovation of the judge-made law within the constitutional parameters and serves as a weapon for certain purposes. It is regarded as a weapon to mitigate grievances of the poor and the marginalized sections of the society and to check the abuse of power at the hands of the Executive and further to see that the necessitous law and order situation, which is the duty of the State, is properly sustained, the people in impecuniosities do not die of hunger, the national economy is not jeopardized; the rule of law is not imperiled; human rights are not endangered, and probity, transparency and integrity in governance remain in a constant state of stability. The use of the said weapon has to be done with care, caution and circumspection. We have a reason to say so, as in the case at hand there has been a fallacious perception not only as regards the merits of the case but also there is an erroneous approach in issuance of direction pertaining to recovery of the sum from the holder of the post. We shall dwell upon the same at a later stage.***
>
> ***25. As advised at present, we may refer to certain authorities in the field in this regard. In Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161 Bhagwati, J., (as his Lordship then was) had observed thus: (SCC p.183, para 9)***
>
> > ***"9. ....When the Court entertains public interest litigation, it does not do so in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programme, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realization of the constitutional objectives."***
>
> ***"26. In Dr. D.C. Wadhwa and others v. State of Bihar (1987) 1 SCC 378 the Constitution Bench, while entertaining a petition under Article 32 of the Constitution on behalf of the petitioner therein, observed that it is the right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions. It has also been stated therein that the rule of law constitutes the core of our Constitution and it is the essence of rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitation and if any practice is adopted by the executive which is in flagrant violation of the constitutional limitations, a member of the public would have sufficient interest to challenge such practice and it would be the constitutional duty of the Court to entertain the writ petition.***

27. In Neetu v. State of Punjab (2007) 10 SCC 614 the Court has opined that it is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigation. Commenting on entertaining public interest litigations without being careful of the parameters by the High Courts the learned Judges observed as follows: (SCC p. 617, para 5)

> ***"5. `16....Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, [High Courts] are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. (Ashok Kumar Pandey v. State of West Bengal (2004) 3 SCC 349, SCC p.358, para 16)"***

Thereafter, giving a note on caution, the Court stated:

> ***"6. `12. 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 publicity 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." (B.Singh versus Union of India (2004)3 SCC 363, SCC p.372, para 12)"***

(pp.175-176)

29. Hon'ble Apex Court in ***State of Uttaranchal vs. Balwant Singh Chaufal and Others, (2010)3 SCC 402,*** while dealing with the issue of growing menace of Public Interest in the Country, observed as under:-

> ***"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non- monetary directions by the courts.***
>
> ***144. In BALCO Employees' Union (Regd.) v. Union of India & Others (2002)2 SCC 333, this Court recognized that there have been, in recent times, increasing instances of abuse of public interest litigation. Accordingly, the court has devised a number of strategies to ensure that the attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. Firstly, the Supreme Court has limited standing in PIL to individuals "acting bonafide." Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against frivolous and vexatious public interest litigations. Thirdly, the Supreme Court has instructed the High Courts to be more selective in entertaining the public interest litigations.***
>
> ***153. In J. Jayalalitha v. Government of T.N. (1999) 1 SCC 53, this court laid down that public interest litigation can be filed by any person challenging the misuse or improper use of any public property including the political party***

in power for the reason that interest of individuals cannot be placed above or preferred to a larger public interest.

155. In Dattaraj Nathuji Thaware V. State of Maharashtra (2005) 1 SCC 590, this court expressed its anguish on misuse of the forum of the court under the garb of public interest litigation and observed (SCC p.595, para 12) that the

> ***"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 publicity 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. The court must not allow its process to be abused for oblique considerations...."***

30. Perusal of the observations made hereinabove as well as law laid down by Hon'ble Apex Court as well as this Court, PIL cannot be allowed to be used as a tool by irresponsible unscrupulous litigants to serve their vested interest in the garb of public interest.

31. In the present case we are constrained to observe that no material whatsoever has been made available from where it could be inferred that the present petition has been filed in the Public Interest, rather, careful perusal of the pleadings on record persuaded this Court to draw a conclusion that the present petition with some vested interests have made an attempt by filing this frivolous petition to obtain illegal orders from the Court on the name of PIL. Moreover, careful perusal of the pleadings on record nowhere suggests that petitioner fulfill the criteria as has been identified/laid down by this Court in *Vijay Kumar Gupta's* case *supra* which can persuade this Court to consider the instant petition as a PIL.

32. As has been noticed above that respondents have already incurred huge amount in the construction of STP, which otherwise appears to be being constructed strictly in conformity with the Rules and guidelines issued by the competent authorities in that regard, petitioner cannot be allowed to make sheer abuse of the process of law by filing such frivolous petitions. It is seen that work is being hampered at the spot which would have been completed by now but for illegal/unjust approach adopted by certain people like petitioner, who without there being sufficient material on record resorted to legal proceedings as in the instant case to halt the developmental activities being taken up by the respondents-State, rather such practice deserves to be deprecated and such persons need to be dealt with sternly.

33. Consequently, in view of the aforesaid discussion, we do not see any reason to invoke extra ordinary jurisdiction of this Court to issue writ of mandamus, commanding respondents to stop the construction of STP. Hence the present petition is dismissed being devoid of any merit with costs of Rs.25,000/- to be paid to the H.P. State Legal Services Authority.

34. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Scancraft Grafiks Pvt. Limited & Another. ...Petitioners

Versus

The State of Himachal Pradesh & others. ...Respondents

CWP No. 264 of 2016
Judgment reserved on: 17.5.2016
Date of Decision: 02.6.2016.

Constitution of India, 1950- Article 226- Respondent no. 2 issued a notice inviting tender for laundary service for a period of five years - tender was awarded in favour of the respondent no. 8- the petitioners challenged the same on the allegations of mala-fide -held, that mala-fide has to be established through cogent evidence and an inference/conclusion of mala-fide cannot be drawn on the basis of some vague and unsupported material- burden of proving mala-fide is on the person making the allegation- mala-fide can be established if the action is taken with the specific object of damaging the interest of aggrieved party or helping another party- merely because the rates of the respondents no. 8 are marginally lower than the rates quoted by other persons cannot lead to an inference of mala-fide - rates quoted by different persons show that the rates of the petitioners were not second lowest - the petitioners do not have any locus standi as they will not get the tender even if the tenders are cancelled- petition dismissed with a cost of Rs. 50,000/-

(Para-10 to 30)

Cases referred:

E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3)
Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800
State of A.P. and others Vs. Goverdhanlal Pitti (2003) 4 SCC 739,
Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760

For the Petitioners:	Mr.R.L. Sood, Senior Advocate with Mr.Arjun Lall and Mr. Sanjeev Kumar, Advocates.
For the Respondents:	Mr. Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K. Verma, Deputy Advocate General, for respondent No. 1. Mr. Manohar Lal Sharma, Advocate, for respondent No. 2. Mr.B.S. Ranjan, Advocate, for respondents No. 3 to 7. Ms.Seema K. Guleria, Advocate, for respondent No. 8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by the award of tender in favour of respondent No. 8 for providing of mechanized laundry service in Indira Gandhi Medical College and Hospital (for short IGMC & Hospital), Shimla, the petitioners have filed the instant petition with the following substantive prayers:-

> *"(a) Quash the process of selection/acceptance of the tender bid pertaining to providing of mechanized laundry services in the Indira Gandhi Medical College and Hospital Shimla on Install, Operate and removal basis through the respondent No. 2 Rogi Kalyan Smiti.*
>
> *(b) Quash and set aside the work Contract awarded by the respondents No. 2 to 7 in favour of respondent No. 8 vide Contract Award letter dated 19th January, 2016.*
>
> *(c) Quash Annexure PK as being highly arbitrary and incapable or being acted upon.*
>
> *(d) Direct the respondents to produce the entire record relating to the submission of the Technical and Financial bids pertaining to and arising out of the NIT Annexures PC, including the record relating to the Constitution of the Evaluation Committee, its evaluations and other record up to the award of the work contract in favour of respondent No. 8. The respondents further directed to produce the record pertaining to the earlier NIT for the years 2003 and 2009.*

(e) Direct the respondents to award the aforesaid contract work in favour of the petitioner No. 1, Company."

2. Respondent No. 2, Rogi Kalyan Samiti (herein after referred to Samiti) IGMC and Hospital, Shimla issued notice inviting tender in November, 2015 for the aforesaid laundry service for a period of five years which stands awarded in favour of respondent No. 8 and the same has been questioned on the ground of mala fides as also the eligibility of respondent No. 8.

3. Official respondents (respondents No. 2 to 7) have opposed the petition by filing joint reply, raising therein a number of preliminary objections, questioning the very maintainability of the writ petition. On merits it has been averred that the award of contract in favour of respondent No. 8 is strictly on merits and therefore, there was no question of the petitioners having arrayed the respondents 3 to 7 in their personal capacity, when no mala fides are established.

4. Respondent No. 8 in whose favour the tender has been awarded filed separate reply, wherein again a number of preliminary objections regarding the maintainability of this petition has been raised and the averments as contained in the writ petition have been vehemently denied.

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

5. It is vehemently argued by Mr.R.L. Sood, Senior Advocate, assisted by Mr.Arjun K. Lall, Advocate that initially the technical and financial bid had to be submitted in sealed envelopes on or before 28th November, 2015, which had been duly submitted by the petitioners in a sealed envelope within the stipulated time. However, vide letter dated 7.1.2016, respondent No. 2 informed the petitioner company that the sealed Financial Bids would be opened on 11th January, 2016 at 4:00 P.M. For the said purpose the petitioner company through its representative was called upon to be present in the office of respondent No. 2 for the same. Petitioner No. 2 reached the office of respondent No. 3 at 3.45 P.M. on 11th January, 2016, so as to be present in person on behalf of the petitioner company at the time of opening of the sealed financial bids at 4:00 P.M. on the said date. However, respondent No. 3 at the relevant time was not in his office and upon inquiry it was revealed that the financial bid had already been opened much before arrival of petitioner No. 2 and was lying in the office of respondent No. 4, as respondent No. 2 had to rush to attend some urgent meeting. It is apt to reproduce the relevant pleadings qua these allegations and the same are set out in paras 7 and 8 of the writ petition and read thus:-

"7. That initially the Technical and Financial Bid had to be submitted in sealed envelopes on or before the 28th November, 2015. The petitioner submitted its bid within the stipulated time, subject to correction on the production of the record in all probabilities the respondent No. 7 may not have submitted its bids within the stipulated time and date. However, vide letter No. RKS (M.S) Society-Laundry-4035 dated 7.01.2016, copy is annexed hereto as ***Annexure PF*** *the respondent No. 2 informed the petitioner company that the sealed Financial Tender would be opened on 11th January, 2016 at 4:00 P.M. For the said purpose the petitioner company through its representative was called upon to be present in the office of respondent No. 2 for the same. At this stage it would be pertinent to mention that perusal of the aforementioned letter will show that respondents No. 7 as the Chairman of respondent No. 2 constituted a convenient Committee comprising respondents No. 3 to 6 for opening of the Financial Bids at the aforementioned time and date.*

8. That petitioner No. 2, reached the office of respondent No.3 at 3.45 PM on the 11th of January, 2016, so as to be present in person on behalf of the petitioner company at the time of opening of the sealed financial bids at 4:00 PM on the said date. However, respondent No. 3 was not in his office at that relevant time. His

inquiry from the dealing hand revealed that the Financial bids had already been opened, much before the petitioner No. 2's arrival and were lying in the office of respondent No. 4, since the respondent No. 2 had to rush to attend some urgent meeting. He was taken initially to the office of respondent No. 4 by the dealing hand. To his utter surprise he found that the financial bids had already been opened. Respondent No. 4 directed the dealing hand to take him to the office of the Medical Superintendent, i.e. respondent No. 3 and to ask him to sign the papers pertaining to his alleged presence before the opening of the financial bids and also that he should compared the rates offered by the other bidders and particularly that of respondent No. 8. None was present in the office of respondent No. 3, the dealing hand showed the open financial bids to petitioner No. 2 and told him to sign the documents pertaining to the opening of the bid, in order to reflect therein that it was opened in his presence. However, the petitioner No. 2 refused to sign the document since the financial bids had already been opened in his absence. It would be pertinent to mention at this stage, that before any financial bid is opened, the signatures of the bidders are always obtained, in order to mark their presence before the time of the opening of the financial bids. It is only after such signatures are obtained (as per established practice and procedure) that the financial bids are opened. Since the financial bids had already been opened in the absence of petitioner No. 2, he has not signed any document reflecting his presence at the time of opening of the financial bids."

6. On the basis of the aforesaid allegations, it is claimed by the petitioners that respondents No. 3 to 7 have acted in a mala fide manner and have purposely connived with respondent No. 8 to the disadvantage of the petitioners. These averments according to the petitioners stand proved from the fact that in the financial bids tendered by respondent No. 8 the same reflect that the quoted rates for each item of laundry have been marginally reduced as against the rates quoted by the petitioners by 5 to 10 paise per item and this could only be possible when the bid of the petitioners had already been opened much in advance in connivance with respondent No. 8.

7. It is apt to reproduce relevant pleadings qua mala fides, which read thus:-

"9. That it is obvious that respondents No. 3 to 7 have acted in a malafide manner and they purposely connived with respondent No. 7 to the disadvantage of the petitioner. This averment is further proved by the fact that a perusal of the financial bid allegedly tendered by respondent No. 8 and will show that she has quoted rates for each item of laundry by marginally reducing the rates quoted by the petitioner by a mere between 5 to 10 paise per item. The same was possible, since the Financial bid of the petitioner No. 1 Company had already been opened much in advance for the convenience of respondent No. 8. It would be significant to mention that commencing from 3:45 PM to 4:15 PM on 11th of January, 2016 no other bidder except the petitioner No. 2 who was representing petitioner No. 1, was present in the aforesaid offices of respondents No. 3 and 4. Hence, the entire action of the respondents 2 to 7 in the matter of opening and ultimate acceptance of the financial bid of respondent No. 7 is highly arbitrary and a against the mandatory provisions pertaining to the opening of the financial bid its acceptance and consequent award of work contract in favour of the respondent No. 7, is liable to be quashed. Therefore, the entire process being arbitrary and discriminatory and being in violation of Article 14 of the Constitution of India deserves to be quashed and set-aside."

We may observe that though the petitioners in the aforesaid paragraph has repeatedly made reference to respondent No. 7, but it is clarified during the course of hearing by the learned counsel for the petitioners that the reference in fact is to respondent No. 8 and the same, therefore, be read as such.

8. Respondents No. 2 to 7 have in their reply disputed the allegations levelled by the petitioners and it has been submitted that the petitioners were required to be present in the office of respondent No. 2 on 11.1.2016 before the schedule time of 4:00 P.M., whereas petitioner No. 2 himself has admitted that he reached the office of respondent No. 3 and not the office of respondent No. 2, which otherwise was the scheduled venue for opening of the tenders by the committee at 4:00 P.M. The relevant submissions are contained in para 8 of the reply, which read thus:-

> *"8. That the contents of this para are wrong, hence denied. It is submitted that the petitioners were required to be present in the office of the respondent No. 2 before the scheduled time of 4.OO P.M, on 11.01.2016 whereas, the petitioner No. 2 himself has admitted that he reached in the office of respondent No. 3 not in the office of respondent No. 2, which was scheduled venue for opening of tenders by the committee at 4.00 P.M. on 11.01.2016 in the presence of all committee members & the representatives of firms who may wish to be present. The petitioner No. 2 reached in the office of the RKS, i.e. respondent No. 4, about 4.15 P.M. and enquired about the opening of the tenders, who told that tenders have been opened at 4.00 P.M. in the office of respondent No-2 as per letter of intimation dated 07.01.2016. However, the petitioner No. 2 was allowed to inspect and peruse the bids even on his late coming to the office of respondent No. 2. So far as the conduct of the petitioner No. 2 is concerned, he himself did not reach well in time in the office of respondent No. 2, therefore, the Rogi Kalyan Samiti cannot be held liable for his own wrong. So far as the signature of petitioner No. 2 is concerned, his signatures were not required as he did not reach at 4:00 O'clock in the office of respondent No. 2, where financial bids of all the firms were opened by the committee in the presence of members of the committee and representatives of the firms."*

9. In so far as respondent No. 8 is concerned, it also denied the allegations levelled by the petitioners and has supported the stand of respondents No. 2 to 7, as would be evident from para 8 of the reply, which reads thus:-

> *"8. That the contents of para-8 of the civil writ petition are wrong and hence the same are denied. It is submitted that on 11.01.2016 all the functionaries as well as the participants who had participated in the tender were present and the meeting was held at 4:00 PM, as was informed to the tenderers. However, the petitioner did not attend the said meeting and remained absent. Now, it seems that the petitioner deliberately did not attend the meeting of opening of financial bids and as he was collecting evidence allege the same later in case he does get the award. Copy of meeting of purchase committee for opening of price bid is filed herewith as* ***Annexure R-7*** *along with typed copy, which shows the attendance of all the members and tenderers who were present at that very time which was obtained and kept for record by the replying respondent for his official purposes. The petitioner now is trying to gain undue advantage of his own deliberate negligence and has concocted a false story of having reached the office of respondent No. 3 at 3:45 PM and then having been rushed to Medical Superintendent etc. The financial bids were opened at 4:00 PM on 11.01.2016 in the presence of members and other tenderers but the petitioner remained absent despite being informed and now has taken a false ground just to oust the replying respodnent who was found the eligible and lowest bidder after opening of financial bids which was done in accordance with law. Rest of the contents of this para are denied in toto being wrong and false."*

10. Mala fides according to Black's Law Dictionary 10th Edition means "*with bad faith*". Malafide is said to be an intentional doing of a wrong act without just cause or excuse, it

is done with an intention to inflict an injury or under such circumstances that the law will imply an evil motive to the act.

11. It is more than settled that mala fides have to be established on the basis of cogent evidence and material as may be available on record and merely on the basis of some vague and unsupported material, writ Court cannot draw an inference, much less, a conclusion about the existence of mala fides. When the allegations of mala fides are made and when the prayer is to interfere with a particular action of the State Government or its functionaries on the ground of mala fides, the allegations of mala fides have to be established and proved to such an extent that the Court can record a positive finding to the effect that mala fides as pleaded are established in the given set of circumstances.

12. Indisputably, it is always open for the Court to go into the question of mala fides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of mala fides are not sustainable and that mala fides must be specifically pleaded and proved. It is equally settled that when such allegations of mala fides are made, they should be made with all sense of responsibility, otherwise, the maker of such allegations should be ready to face consequences.

13. It is equally well settled that the burden of proving mala fides is on the person making the allegations and the burden is 'very heavy." (***E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3***)

14. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fides are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As observed by the Hon'ble Supreme Court in ***Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800*** *"It (mala fides) is the last refuge of a losing litigant."*

15. In ***State of A.P. and others Vs. Goverdhanlal Pitti (2003) 4 SCC 739***, the question of mala fides was considered by the Hon'ble Supreme Court in paras 12 to 14 in the following manner:-

> *"**12**. The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others. (See Words and Phrases legally defined in Third Edition, London Butterworths 1989).*
>
> ***13**. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in its authoritative work on Administrative Law (Eighth Edition at pg. 414) based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seek to 'acquire land' 'for a purpose not authorised by the Act'. The State, if it wishes to acquire land, should exercise its power bona fide for the statutory purpose and for none other.*
>
> ***14.** Legal malice, therefore, on the part of the State as attributed to it should be understood to mean that the action of the State is not taken bona fide for the purpose of the Land Acquisition Act and it has been taken only to frustrate the favourable decisions obtained by the owner of the property against the State in the eviction and writ proceedings."*

16. In ***Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760***, it is held by the Hon'ble Supreme Court that seriousness of allegations of mala fides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

> *"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR 1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."*

17. There can be two ways by which a case of mala fides can be made out. Firstly, that the action which is impugned has been taken with the specific object of damaging interests of aggrieved party and secondly such action is aimed at helping another party which results in damage to the party alleging mala fides.

18. Adverting to the facts, it would be seen that there is no allegation whatsoever in the pleadings that the case falls within the first category, but an inference of mala fides has been sought to be drawn in the second category on the basis of vague and unsubstantiated pleadings.

19. As per the admitted case of the petitioners, instead of visiting the office of respondent No. 2, its representative, i.e. petitioner No. 2 is alleged to have visited the office of respondent No. 3, therefore, the petitioners in such circumstances cannot fasten any blame upon the respondents for the mistake on their part.

20. The basis and foundation for leveling allegations of mala fides is the rates offered by respondent No. 8, which are marginally lower than those offered by the petitioners and this according to him would only be possible when the financial bids of the petitioners had already opened before the stipulated time.

21. Though we were not prima facie convinced with the allegations of mala fides, however, in order to satisfy ourselves and to ensure that complete justice is done between the parties, we called for the records of the case.

22. We have thoroughly and meticulously gone through the records and find that it was not only respondent No. 8, but there were other two tenderers M/s Corporate Care New Shimla and M/s Shimla Cleanways, New Shimla who had participated in the tender process. The comparative statement of the price bid reads thus-

"Comparative Statement of price bid of tender for providing Mechanized Laundry Services in Indira Gandhi Medical College & Hospital Shimla on Install, Operate & Removal Basis opened on 11-01-2016 at 4:00 P.M. in the office of Principal Indira Gandhi Medical College Shimla.

Sr. No.	*Name of Items*	*M/s Corporate Care New Shimla*	*M/s Shimla Cleanways New Shimla*	*M/s Scancraft Grafiks Pvt. Ltd. New Delhi*	*M/s A.B. Enterprises Sanjauli Shimla.*
		1	***2***	***3***	***4***
1.	*Bed Sheet*	*9.80*	*9.75*	*9.79*	***9.60***
2.	*Draw Sheet*	*5.50*	*5.40*	*5.50*	***5.30***
3.	*Pillow Cover*	*3.50*	*3.30*	*3.30*	***3.25***
4.	*Patient Dress/Kurta/Pyajama Cotton/TC*	*6.75*	*6.50*	*6.60*	***6.40***
5.	*Door Curtains*	*17.70*	*17.50*	*17.75*	***17.25***
6.	*Window Curtains*	*9.70*	*9.70*	*9.75*	***9.50***
7.	*Screen Curtains*	*4.70*	*4.50*	*4.75*	***4.30***
8.	*Surgical Gown/ Ward/Cotton/TC/ Ladies Gown*	*9.80*	*9.75*	*9.79*	***9.60***
9.	*Split Sheet*	*3.80*	*3.75*	*3.90*	***3.60***
10.	*Abdominal Sheet*	*9.80*	*9.75*	*9.79*	***9.60***
11.	*Legging (Coloured)*	*3.20*	*3.25*	*3.10*	***3.00***
12.	*Hand Towel, Skin/OT*	*2.20*	*2.15*	*2.20*	***2.10***
13.	*Doctor's Dress (Shirt & Pyajama)*	*5.80*	*5.75*	*6.00*	***5.60***
14.	*Doctor's Coat/Technician Coat (White/Coloured)*	*7.80*	*7.75*	*7.80*	***7.60***
15.	*Cap and Masks (Per Set)*	*1.00*	*0.95*	*1.00*	***0.90***
16.	*Turkish Towel (Medium Size)*	*3.75*	*3.75*	*3.75*	***3.60***
17.	*Bath/O.T. Towel (Big Size)*	*6.45*	*6.40*	*6.49*	***6.20***
18.	*Big Wrapper (White/Coloured)*	*3.15*	*3.10*	*3.00*	***3.00***
19.	*Small Wrapper*	*2.00*	*2.00*	*2.00*	***2.00***
20.	*Ortho Sheets*	*2.40*	*2.00*	*2.50*	*2.40*
21.	*Eye Sheets*	*1.20*	*1.10*	*1.25*	*1.20*
22.	*Sponge (O.T.)*	*1.00*	*1.00*	*1.00*	***0.90***
23.	*X-ray Covers*	*2.10*	*2.00*	*2.00*	***2.00***
24.	*Head Tie*	*1.10*	*1.00*	*1.00*	***0.90***

25.	*Petticoat*	*2.00*	*2.20*	*2.25*	***2.00***
26.	*Baby dress*	*1.75*	*1.80*	*1.90*	***1.75***
27.	*Baby blanket*	*4.75*	*4.50*	*4.50*	***4.25***
28.	*Blanket Big (Dry Cleaning only) Blanket Small (Dry Cleaning only)*	*24.50 7.90*	*24.00 7.75*	*24.75 8.00*	***23.00 7.00***
29.	*Apron*	*7.90*	*7.75*	*7.80*	***7.50***
30.	*Gynae Sheet*	*8.30*	*8.20*	*8.25*	***8.00***
31.	*Chair Cushion Cover*	*5.00*	*4.80*	*4.75*	***4.50***
32.	*Stretcher Dari*	*16.00*	*15.70*	*15.75*	***15.50***
33.	*Cradle Cover*	*2.05*	*2.00*	*2.10*	***2.00***
34.	*Gudri*	*2.30*	*2.25*	*2.10*	***2.00***
35.	*Hamper*	*2.60*	*2.50*	*2.75*	***2.00***
36.	*Consultion Sheet*	*7.80*	*7.75*	*7.90*	***7.50***
37.	*Curtain Screen*	*5.50*	*5.40*	*5.45*	***5.25***
38.	*Gloves Bag*	*2.30*	*2.20*	*2.25*	***2.10***
39.	*Baby Sheet*	*2.80*	*2.75*	*2.75*	***2.50***
40.	*Trolly Mattresses Cover*	*6.75*	*6.70*	*6.75*	***6.50***
41.	*Binder round blue*	*2.00*	*1.85*	*1.90*	***1.75***
42.	*Nurses Shirt/Pyajama fone*	*5.75*	*5.50*	*5.50*	***5.40***
43.	*Canvace Bag (Hamper)*	*2.70*	*3.00*	*2.75*	***2.50***
44.	*Cut Sheet*	*2.15*	*2.10*	*2.10*	***2.00***
45.	*Doctors Gown White/Blue*	*9.80*	*9.75*	*9.79*	***9.50***
46.	*Bed Cover*	*18.00*	*16.50*	*16.50*	***16.00***
47.	*Wrapper baby*	*3.00*	*2.75*	*2.95*	***2.50***
48.	*Curtain Big*	*2.75*	***2.00***	*2.95*	*2.50*
49.	*Curtain Small*	*2.50*	***1.90***	*2.30*	*2.00*
50.	*Sofa Cover*	*15.00*	***14.00***	*14.75*	*14.50*
51.	*Mask*	*1.00*	*0.95*	*1.00*	***0.90***

M/s A.B. Enterprises Plot No.-6, Block No.-12 HBC Sanjauli, Shimla-6 has quoted the lowest rates of washing of linens articles. Hence, M/s A.B. Enterprises being the lowest quoter is recommended for award of this contract.

Sd/-
Sh.Maneet Verma
Assistant Controller (F&A)
IGMC, Shimla
(Member)

Sd/-
Sh. K.R. Negi
C.E.O.-cum-Dy. Controller(F&A)
RKS IGMC & Hospital, Shimla.
(Member)

Sd/-
Dr. Ramesh
Sr. Medical Superintendent
IG Hospital, Shimla (Member)

Sd/-
Dr. S.S. Kaushal
Principal
IGMC, Shimla.
(Chairman)"

23. Evidently, the aforesaid comparative statement indicates that the difference of price offered by the petitioners viz-a-viz the other competitors including respondent No. 8 is absolutely marginal. But, that apart, it would also be noticed that the petitioners are not even next in merit i.e. not below the respondent No. 8 and therefore, this clearly belies the wild allegations of the mala fides made by the petitioners to soil the reputation of respondents No. 3 to 7.

24. Now when the petitioners cannot any longer be held to be in the race, as they are not even placed in the next in the merit and the other tenderor M/s Shimla Cleanways, New Shimla is admittedly the second bidder, the other allegations regarding the eligibility etc. of the respondent No.8 need not be gone into. We say so because even if it is assumed that the petitioner succeeds even then the tender cannot be awarded to it and would be required to be awarded to the next in merit i.e. M/s Shimla Cleanways, who has neither been arrayed as a party nor are there any allegations similar to those levelled by the petitioners against respondent No.8 or for that matter against respondents No. 3 to 7 as is evident from the pleadings quoted in extenso above.

25. Now adverting to the allegations of the petitioners that its tender had earlier been opened in order to help respondent No. 8, we find the allegations to be too farfetched. After all why would respondents No. 2 to 7, who are holding and manning high posts of Senior Medical Superintendent, IGMC, Shimla, Deputy Controller (F&A)-cum-CEO Rogi Kalyan Samiti IGMC, Shimla, Assistant Controller (F&A)-IGMC and Hospital Shimla and Chairman of the Rogi Kalyan Samiti-cum-Principal IGMC and Hospital, Shimla, illegally or mala fidly try to ensure that the tender is awarded in favour of respondent No. 8.

26. On the basis of the aforesaid discussion, we have no hesitation to conclude that the petitioners in their quest to succeed in this petition at any cost have without carrying out any verification whatsoever, made disparaging and slanderous attack on the official respondents who are holding offices with high responsibility in the administration. There is absolutely no material placed before the Court or otherwise available, which may even remotely suggest that the role of the official respondents in awarding the tender in favour of respondent No. 8 was in any manner partisan.

27. This Court in exercise of its extra ordinary jurisdiction, is a Court of equity and any person approaching it is expected to come not only 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. To say the least the petitioners have abused the judicial process, that too on the name of vindicating their legal rights by resorting to half-truths, misleading representations wild and irresponsible allegations, wasting the precious time of Courts, that too in the name of justice.

28. It is further obvious from the reading of pleadings quoted above that only vague allegations of mala fides have been levelled and that too without any basis. The allegations of mala fides as analyzed in the backdrop of the aforesaid requirement of law would reveal that these are totally baseless, unfounded and unsubstantiated. The grounds appear to be not only wholly misconceived, but rather ill conceived and therefore, deserves to be rejected.

29. The Hon'ble Supreme court in its recent decision in SLP (C) Nos. 33429-33434 of 2010, ***Messer Holdings Ltd. Vs. Shyam Madanmohan Ruia and others*** with SLP (C) Nos.

23068 -23090 of 2012, decided on 19th April, 2016 took notice of abuse of judicial process by unscrupulous litigants with money power, that too, all in the name of legal rights by resorting to half -truths, misleading representations and suppression of facts, wasting the precious time of Courts, that too in the name of "fight for justice" and then proceeded to impose exemplary costs of Rs.25,00,000/- (Rupees Twenty five lakhs) to be paid by each of the three parties. This judgment was recently relied by us in CWP No.3131 of 2014 titled Dr. J.S. Chauhan vs. State of Himachal Pradesh and others, decided on 6.5.2016 and this Court dismissed the writ petitions with costs of Rs.50,000/- each. Similar reiteration of law is found in judgment delivered by this Court in CWP No. 4240 of 2015 titled Om Prakash Sharma vs. State of H.P. and others, decided on 19.4.2016.

30. In view of the aforesaid discussion, not only this petition sans merit, but the same is also frivolous and has only resulted in precious time of the Court being wasted. That apart, the petitioners have irresponsibly and recklessly levelled unfounded, unsubstantiated and above all unwarranted allegations against respondents No. 3, 4, 5 and 7, who as observed earlier, are senior and reputed officials of the State and this practice can neither be countenanced nor encouraged. Accordingly, the petition is dismissed with costs of Rs. 50,000/- to be paid by the petitioners to respondents No. 3, 4, 5, 7 and 8 in equal shares i.e. Rs. 10,000/- each to them.

The petition is disposed of in the aforesaid terms, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh .....Appellant.

Vs.

Shashi Pal alias Babu .....Respondent.

Cr. Appeal No.: 276 of 2007
Reserved on : 17.05.2016
Date of Decision: 02.06.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 kg. charas - he was tried and acquitted by the Trial Court- held, in appeal that one independent witness had not supported the prosecution version- other independent witness was not examined- there are major contradictions in the statements of police officials regarding the manner in which the accused was apprehended and the manner in which search was conducted- the link evidence was not proved - the court had rightly acquitted the accused - appeal dismissed. (Para-20 to 30)

For the appellant : Mr. V.S. Chauhan, Addl. A.G., with Mr. J.S. Guleria, Assistant A.G.
For the respondent : Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

This appeal has been filed by the State against judgment of acquittal passed by the Court of learned Special Judge, Chamba, District Chamba in Sessions Trial No. 11/2007/06 dated 26.04.2007 vide which, the accused has been acquitted of the charge of having committed an offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. The case of the prosecution was that on 17.03.2006, a police party comprising of ASI Abhey Singh, Incharge Police Post, Banikhet, HC Roop Singh, Constable Mazid Mohammad, Constable Sanjay Kumar, Constable Vikas Dhawan and Constable Kamal Kishor was on *nakabandi* and traffic checking duty at Mail Road Chowk near *Nanikhud* at around 4:00 p.m. S/Shri Ranjeet Singh and Harbans Lal were also present there. They also joined the said police party. Further story of the prosecution is that at around 4:00 p.m., the accused who had hung a bag on his right shoulder came from Mail Road side towards *Nanikhud* and on seeing the police party, he (accused) got perplexed and tried to turn back. On suspicion that he might be carrying something illegal, ASI Abhey Minhas (PW-7) stopped him for checking. The accused disclosed his name as Shashi Pal and the bag which the accused was carrying was opened for checking. A polythene lifafa having charas in the shape of sticks was recovered from the said bag. ASI Abhey Minhas (PW-7) immediately deputed PW-2 Constable Mazid Mohammad and Harbans Lal to bring the weights and scale at the spot, who brought the same and thereafter, the charas which was recovered from the accused was weighed which turned out to be 2 Kgs. From the said recovered charas, two samples of 25 grams each were separated and the sample parts of the charas were put into two empty boxes of four square cigarettes which were then wrapped and sealed by affixing seal impression 'C'. The remaining/bulk charas weighing 1.950 Kgs. was put in the same polythene lifafa which was recovered from the accused and then it was put in the same bag which was recovered from the accused. The same was also wrapped and sealed by affixing seal impression 'C'. The specimen impression Ex. P3 of the seal used was taken separately on a piece of cloth and the seal after its use was handed over to Shri Ranjeet Singh. The parcels of charas were taken into possession vide memo Ex. PW7/A in the presence of witnesses. The same was read over to them by PW-7, ASI Abhey Minhas and after admitting its contents to be correct, the said memo was signed by the accused and the witnesses. Copy of the recovery memo was supplied to the accused free of cost. Thereafter, ASI Abhey Minhas (PW-7) wrote *ruqua* Ex. PA and sent it through Constable Kamal Kishore (PW-3) to Police Station, Dalhousie for registration of FIR. On the said basis, FIR Ex.-PC was registered against the accused. Copy of *ruqua* which is Ex. PK was also dispatched by PW-7 to Superintendent of Police, Chamba through Constable Vikas Dhawan. Thereafter, PW-7 handed over the accused alongwith the case property and documents relating to the said case to HC Roop Singh (PW-9) vide inventory Ex.-PB for carrying out further investigation in the matter. Site map Ex. PW9/A was prepared by PW-9 Head Constable Roop Singh showing the place of recovery and arrest. The accused was informed about grounds of his arrest vide memo Ex. PW9/C. *Jamatalashi* of the accused was conducted by Head Constable Roop Singh PW-9 vide memo Ex. PW9/D and then the parcels of charas were produced before SI/Additional SHO Swaru Ram for resealing. SI Swaru Ram (PW-4) resealed the same vide memo Ex. PD and thereafter deposited the case property with MHC Ramesh Chand of Police Station after preparing reseal memo Ex. PD. One part of the sample alongwith relevant documents was sent by the police to the Composite Testing Laboratory, Kandaghat for analysis. Report of the Chemical Examiner was obtained and the said report for the trial of the accused was submitted in the Court.

3. As a prima facie case was found against the accused, he was charged 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 substantiate its case, the prosecution in all examined nine witnesses. PW-1 Ranjeet Singh who was an independent witness of the prosecution and who according to the prosecution was the witness to recovery stated in the witness box that in the month of March, 2005, he was called by the police. The police had come to his shop in *Nanikhud* and nothing transpired in his presence. He was declared hostile and in his cross-examination, he refuted the entire story of the prosecution and maintained that nothing had happened in his presence and that the accused was neither apprehended in his presence not any charas was recovered from the bag of the accused in his presence. According to him, his signatures were taken on the document in the shop.

5. PW-2 Constable Mazid Mohammad stated in his deposition that on 17.03.2006, he alongwith ASI Abhey Minhas and other police officials was on patrol and traffic checking duty at *Nanikhud* mail road. At about 3:45 p.m., ASI Abhey Minhas was talking to independent persons and in the meanwhile, one person came from Mail road side, on whose right shoulder, a bag was hanging. When he saw police party, he turned back and on the basis of suspicion, that man was stopped for checking. On being asked, he disclosed his name as Shashi Pal (accused) and bag which the accused was carrying was opened and checked. During search, a polythene lifafa having charas was found in the bag. Thereafter, he alongwith Harbans Lal went to a shop to bring the weights and scale. He brought the weights and scale, whereafter the charas was weighed, which was 2 kgs. In his cross-examination, he has stated that Ranjeet Singh and Harbans Lal reached at the spot after about five minutes and the *naka* was laid at around 3:00 p.m. He had stated that he does not know Ranjeet Singh. He has further deposed that ASI Abhey Singh caught hold of the accused and bag of the accused was searched in the presence of the witnesses. He has also stated that no villager except Ranjeet Singh and Harbans Lal were on the spot. He has further stated in his cross examination as under:

> *"Firstly, the consent memo for searching the person of the accused was prepared and, thereafter, his bag was searched. This fact was even mentioned in the seizure memo Mark 'A'."*

6. PW-3 Kamal Kishor has reiterated the story of the prosecution about the apprehension of the accused and charas being recovered from him. He has deposed that the parcels of the charas were taken into possession and recovery memo was prepared and thereafter, ASI Abhey Singh wrote the *ruqua* Ex. PA and gave it to him. He took ruqua to Police Station, Dalhousie and handed over to MHC in Police Station. Thereafter, the FIR was registered and the case file was handed over to him by MHC and he returned to the spot alongwith the case file and handed over it to HC Roop Singh. In his cross-examination, he has stated that Ranjit Singh and Harbans Lal were having a *stroll* nearby and they were called by ASI Abhey Singh and then they joined the police party. He has further stated that no option under Section 50 of the Act was extended to the accused by ASI Abhey Sigh before searching the bag of the accused. He has also deposed that consent memo was prepared on the spot and before searching the bag of the accused, ASI Abhey Singh did not give his personal search to any of the witnesses. He has also stated that no document was prepared in his presence.

7. PW-4 Swaru Ram has deposed that on 17.06.2006, *ruqua* Ex. PA was received in the Police Station through Constable Kamal Kishor and he made an endorsement Ex. PB on *ruqua* and registered FIR Ex. PC on its basis. He has also deposed that on the same day, HC Roop Singh produced a big parcel and two small parcels of charas duly sealed with seal impression 'C' with him. These parcels were resealed by him by affixing the seal impressions 'S'. Memo Ex. PD in this regard was prepared and resealing was done in the presence of MHC Ramesh Chand. The specimen impression of the seal used by him was taken on the piece of cloth Ex. P3. The same after its use was handed over to HC Ramesh Chand and the case property was also deposited by him with MHC Ramesh Chand of Police Station, Dalhousie to keep it in *malkhana* in safe custody.

8. PW-5 HC Ramesh Chand has stated that he was posted as MHC in Police Station, Dalhousie. On 17.03.2006, a big parcel and two small parcels alongwith NCB forms were produced by HC Roop Singh before SI Swaru Ram for resealing purpose. Sample seal was also produced by HC Roop Singh and the parcels of charas were resealed by SI Swaru Ram by affixing seal impression 'S' in his presence. He has stated that memo Ex. PD bears his signatures as a witness. He has also deposed that thereafter the case property was deposited with him by SI Swaru Ram. On 18.03.2006, one part of the sample alongwith NCB form and sample seal as well as the copy of the recovery memo were sent by him vide RC No. 32/06 through Constable Tilak Raj to CTL, Kandaghat for chemical test. On his return to the Police Station, Constable Tilak Raj handed over the copy of the RC to him. During the period, the case property remained in his possession, the same remained intact.

9. PW-6 Constable Naresh Kumar has deposed that on 17.03.2006, Constable Vikas Dhawan had brought a copy of the *ruqua* to the office of Superintendent of Police, Chamba and he placed it before Additional Superintendent of Police. Thereafter, Additional Superintendent of Police signed the same after going through the same and the copy of the said *ruqua* Ex. PK was given to him by the Addl. Superintendent of Police. He has also deposed that on the next day, i.e. 19.03.2006, special report Ex. PL was received in the office through Constable Vikas Dhawan, which was also placed by him before the Addl. Superintendent of Police and the Addl. Superintendent of Police after going through the special report, signed it and gave it back to him.

10. PW-7 ASI Abhey Minhas has reiterated the story of the prosecution with regard to the apprehension of the accused and the recovery of charas from him. He has also deposed in the Court about the preparation of *ruqua*, the manner in which the recovered charas was weighed and sealed and handing over of the necessary documents to the accused, search and seizure memos etc. In a nut-shell, in his deposition, he has narrated the entire incident which took place at the spot and all the actions taken by him at the spot on the recovery of charas from the accused person. In his cross-examination, he has stated that;

> *"S/Shri Ranjeet Singh and Harbans Lal are the local persons. They were not called by him. When they saw that the police officials have laid the Naka, they came of their own and joined them. There are 8-10 other shops near the shops of S/Shri Ranjeet Singh and Harbans Lal. The accused was caught by them on the bifurcation of Mail road and main Chamba-Pathankot road. No notice under Section 50 of the Act was given to the accused as the recovery was effected suddenly/per-chance. When the bag of the accused was searched, Constable Mazid Mohammad and Constable Kamal Kishor were present there."*

11. PW-8 Constable Tilak Raj has deposed that on 18.03.2006, MHC Ramesh Chand has handed over a sample part of the charas sealed with seal impressions 'C' and 'S', copy of FIR, NCB form and the copy of the recovery memo vide RC No. 32/06 to him, which he deposited in CTL, Kandaghat on 20.03.2006 and on his return to the Police Station, the RC was handed over by him to MHC. He has further deposed that during the period the case property remained in his possession, the same remained intact.

12. PW-9 HC Roop Singh has also reiterated the story of the prosecution with regard to the apprehension of the accused and the manner in which the recovery of the charas was made from him and the procedure which was thereafter followed by the police party. In his cross-examination, he has stated as under:

> *"The shops of S/Shri Ranjeet Singh and Harbans Lal are about 200-300 metres away from the spot. They were not called by anyone. They were coming from Mail side and were joined in the police party."*

He has also deposed that though the vehicles were checked by them, but no vehicle was challaned under the Motor Vehicles Act.

13. On the basis of the material which was placed on record by the prosecution, the learned trial Court concluded that having regard to the entire evidence on record and keeping in view the infirmities in the chain of link evidence, major contradictions in the statements of the prosecution witnesses and serious snag in the filling of NCB form as well as independent witness having not supported the prosecution case on material particulars, it can safely be concluded that the prosecution has miserably failed to bring home the guilt of the accused beyond any shadow of doubt and, as such, the accused was entitled to benefit of doubt and accordingly, learned trial Court acquitted the accused by giving him benefit of doubt.

14. Feeling aggrieved by the said judgment, the State has preferred the present appeal.

15. Learned Additional Advocate General has argued that the judgment passed by the learned trial Court whereby it had acquitted the accused by giving him benefit of doubt was not sustainable in the eyes of law. According to the learned Additional Advocate General, the prosecution had successfully established the guilt of the accused and there was no break in the chain commencing from the moment the accused was apprehended by the police party and ending with the report of the Chemical Analyst of C.T.L., Kandaghat, where the samples of the charas recovered from the accused were analyzed. According to him, the discrepancies, if any, were minor and further it was not as if the case of the prosecution could have been believed only if the same has been supported by the independent witnesses in each case. Mr. Chauhan argued that it is settled principle of law that the case of the prosecution can be believed even in the absence of independent witnesses, if the same inspires confidence. According to him, in the present case, the testimony of the prosecution witnesses inspired confidence and there was no contradiction in the testimonies of police witnesses. The police party, as per him, followed the procedure prescribed under the Narcotic Drugs and Psychotropic Substances Act, 1985 and keeping in view the fact that all the procedural regularities were followed in the present case and it stood proved beyond any reasonable doubt that the accused was guilty under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, the learned trial Court had erred in acquitting him by concluding that the prosecution had not been able to prove its case beyond reasonable doubt. Accordingly, he prayed that the judgment passed by the learned trial Court be set aside and the accused be convicted for an offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

16. Mr. Vivek Sharma, learned Advocate was requested by this Court on 16.05.2016 to assist the Court as Amicus Curiae. Learned Amicus Curiae has submitted that in the present case there were major discrepancies borne out from the record as far as the case of the prosecution was concerned. He submitted that it cannot be said that there was any infirmity in the judgment passed by the learned trial Court. Thus, according to him, judgment of the trial Court did not warrant any interference.

17. We have heard the learned Additional Advocate General and learned Amicus Curiae and also gone through the records of the case as well as the judgment passed by the learned trial Court.

18. According to the prosecution, the accused was apprehended in the presence of two independent persons, namely Ranjeet Singh and Harbans Lal. Both of them were witnesses to the recovery, which was effected from the accused as per the story of the prosecution. Out of these two witnesses, Harbans Lal has not been produced in the witness box and Ranjeet Singh has not supported the story of the prosecution at all. According to PW-1 Ranjeet Singh, no recovery whatsoever was effected by the police in his presence nor the accused was apprehended in his presence as alleged by the prosecution. Thus, this independent witness has rendered the entire story of the prosecution unbelievable in view of the fact that he was the witness to the recovery of charas and the factum of his having refuted the recovery in his presence makes the entire case of the prosecution highly doubtful. Now, it is in this background that we have to see the statements of the police witnesses as to whether they inspire any confidence or not and whether the accused can be convicted solely on the basis of the testimonies of police officials.

19. A perusal of the statements of three important witnesses, i.e. PW-2 Constable Mazid Mohammad, PW-3 Kamal Kishor and PW-7 ASI Abhey Minhas demonstrate that there are major contradictions in the statements of these witnesses with regard to the manner in which the accused was apprehended and with regard to the manner in which his search was conducted.

20. PW-2 Constable Mazid Mohammad in his cross-examination has stated that consent memo for searching the person of the accused was prepared and thereafter his bag was searched. He has further stated that they had laid *naka* at about 3:00 p.m. and Ranjeet Singh and Harbans Lal reached there after about five minutes and they remained at the spot from 3:05 p.m. till the time the accused reached there. PW-3 Kamal Kishor in his cross-examination has

deposed that Ranjeet Singh and Harbans Lal were called by ASI Abhey Singh and they then joined the police party. He has further deposed that no option under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was extended to the accused by ASI Abhey Singh before searching the bag of the accused. He further deposed that consent memo was prepared on the spot and before searching the bag of the accused, ASI Abhey Singh did not give his personal search to any of the witnesses. PW-7 ASI Abhey Minhas has deposed that Ranjeet Singh and Harbans Lal were not called by him. He has also stated that no notice under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was given to the accused as the recovery was effected suddenly/ perchance.

21. Now a perusal of the testimonies of these three witnesses when read in harmony demonstrates that there are major contradictions between them in the manner in which the accused was apprehended and search was made as well as with regard to the manner in which Harbans Lal and Ranjeet Singh were associated by the police party. These factors undoubtedly cloud the truthfulness of the version of the prosecution coupled with the fact that Harbans Lal has not been produced in the witness box and Ranjeet Singh has turned hostile and denied the entire version of the prosecution. Thus, it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt.

22. Besides this, there are other major discrepancies in the case of the prosecution. PW-2 Constable Mazid Mohammad and PW-3 Kamal Kishor have stated that the consent memo was prepared, whereas ASI Abhey Singh has denied having given option to the accused, as according to him, it was a case of chance recovery. ASI Abhey Singh (PW-7) has stated that the original and two other copies of the recovery memo were handed over by him to HC Roop Singh as per inventory Ex. PW-7/B and recovery memo as well as ruqua were got written by him from Constable Mazid Mohammad while inventory was written by HC Roop Singh. However, when HC Roop Singh appeared in the witness box, he has contradicted the said points by stating that original and three copies of the recovery memo and four sample seals were handed over to him by ASI Abhey Singh. If that is so, it is not understood as to how the original and three copies of recovery memo were received by HC Roop Singh when the first I.O ASI Abhey Singh has handed over only original and two copies of the memo. ASI Abhey Singh has stated that he has filled in all the columns of NCB form Ex. PE on the spot. He has also stated that he reached Mail road chowk near Nanikhud on 17.03.2006 at around 4:00 p.m. However, a perusal of NCB form Ex. PE reveals that column Nos. 1 to 4, 6 and 7 were filled in by one person while column No. 5 was filled in by MHC who has mentioned the dispatch No. 32/06 dated 18.03.2006. HC Ramesh Chand (PW-5), the then MHC Police Station, Dalhousie while appearing in the Court has not stated about the said column having been filled up by him. If the version of ASI Abhey Singh (PW-7) is to be believed, then it is not understood as to how in the column of the NCB form FIR number could have also been filled in by him at the spot when the FIR was obviously not yet registered at the time when he filled the said form at the spot. This also creates major doubt with regard to the fairness in which the investigation has been carried out by the police.

23. All these aspects of the matter have also been gone into in detail by the learned trial Court and in fact, learned trial Court has also concluded that even the link evidence as demonstrated by the prosecution was highly doubtful in nature. We are also of the considered view that the findings arrived at in this regard by the learned trial Court are correct findings and indeed the link evidence in this case is of highly doubtful nature.

24. As is evident from the above discussion, it is apparently clear that there is neither any infirmity nor any perversity in the judgment passed by the learned trial Court vide which, it has acquitted the accused of charge under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1085. According to us, the prosecution in the present case has miserably failed to prove its case against the accused beyond any reasonable doubt.

25. Not only the independent witnesses/witness of recovery has turned hostile, even the statements of police officers taken independently, do not inspire confidence and do not prove

beyond any reasonable doubt that indeed the accused was guilty of the offence which was alleged against him.

26. Therefore, in our considered view, the learned trial Court has rightly concluded that the prosecution has miserably failed to prove its case beyond all reasonable doubts against the accused and has rightly acquitted the accused of the offence alleged against him. We uphold the judgment passed by the learned trial Court and dismiss the present appeal being without any merit.

27. We place on record our appreciation for the Learned Amicus Curiae who has very ably assisted the Court in the adjudication of the present appeal.

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

LPA No. 295 of 2011 a/w LPAs No. 180, 212, 250 and 591 of 2011, LPA No. 121 of 2012 and LPA No. 54 of 2015.
Judgment reserved on 24th May, 2016.
Date of decision: 2nd June, 2016.

1. LPA No. 295/2011.
Sudesh Kumari .....Appellant
Versus
The State of H.P. and others .....Respondents.
2. LPA No. 180/2011.
Yogeshwar .....Appellant
Versus
The State of H.P. and others .....Respondents.
3. LPA No. 212/2011.
Surjit Kumar .....Appellant
Versus
The State of H.P. and others .....Respondents.
4. LPA No. 250/2011.
Pankeshwar .....Appellant
Versus
The State of H.P. and others ....Respondents.
5. LPA No. 591/2011.
Kuldeep Singh .....Appellant
Versus
The State of H.P. and others ...Respondents.
6. LPA No. 121/2012.
The State of H.P. and others .....Appellants
Versus
Manu Mahajan ...Respondent.
7. LPA No. 54/2015.
The State of H.P. and others .....Appellants
Versus
Prithi Singh .....Respondent.

Constitution of India, 1950- Article 226- Writ petitioners were selected for the post of library assistant - their services were terminated on the ground that interviews were not held in

accordance with the procedure and certain irregularities were committed - applications were filed before the Administrative Tribunal which were allowed - State was left with liberty to hold proper inquiry- Civil Writ petitions were filed which were disposed of with a direction to issue show cause notices to the petitioners and to pass final orders- show cause notices were issued and services of the petitioner were terminated- original applications were filed which were transferred to the High Court - on transfer some of the applications were allowed while others were dismissed- held, in appeal that termination orders were stigmatic- A regular inquiry was to be conducted - the inquiry was not conducted and directions were not followed – appeals allowed with a direction to permit the petitioners who are out of service to join their duties- period spent during these proceedings is to be computed for all service benefits, except monetary benefits- liberty granted to conduct regular inquiry. (Para-8 to 23)

For the appellant(s):	Mr. R.K. Gautam, Sr. Advocate with Ms. Archana Dutt, and Ms. Megha Kapur Gautam, Advocates for the appellants in LPA No. 295, 180 and 250 of 2011. Mr. Dushyant Dadhwal, Advocate, for the appellant in LPA No. 591 of 2011. Onkar Jairath, Advocate, for the appellant in LPA No.212/2011. Mr.Shrawan Dogra, Advocate General with Mr. M.A. Khan, Mr. Anup Rattan and Additional Advocate Generals with Mr. Kush Sharma, Deputy Advocate General for the appellants in LPA No. 121 of 2012 and 54 of 2015.
For the respondent(s):	Mr.Shrawan Dogra, Advocate General with Mr. M.A. Khan, Mr. Anup Rattan and Additional Advocate Generals with Mr. Kush Sharma, Deputy Advocate General for the respondents in LPA No.295, 180, 212, 250 and 591 of 2011. Mr. Dushyant Dadhwal, Advocate, for respondents in LPA No. 121 of 2012 and LPA No.54 of 2015.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Five appeals have been preferred by the private petitioners, whose writ petitions have been dismissed vide judgment made in CWP(T) No. 9718 of 2008 dated 5.5.2011, CWP(T) No. 9717 of 2008, dated 20.4.2011, CWP(T) No. 9707 of 2008, dated 5.5.2011, CWP(T) No. 9716 of 2008 dated 26.4.2011 and in CWP(T) No. 9725 of 2008, dated 19.8.2011 and two appeals have been preferred by the State against the private petitioners, whose writ petitions came to be allowed, vide judgment dated 28.9.2011 in CWP(T) No. 9723 of 2008 and CWP(T) No. 9724 of 2008 dated 16.10.2012, by the Writ Courts, on the foundation of same set of facts, hereinafter referred to as "the impugned judgments" for short, on the grounds taken in the memo of the appeals.

2. The common questions of law and facts are involved in all these appeals hence; we deem it proper to dispose of all these appeals by this common judgment.

3. In order to clinch the issue, it is necessary to give a brief resume of the relevant facts, which has given origin to the appeals in hand.

4. It appears that writ petitioners alongwith other similarly situated persons were interviewed by a Selection Committee for the posts of Laboratory Attendants/Assistants on 20.2.2000. They were offered appointment letter on 8th March, 2000, and joined as such. It is averred that vide order dated 7.1.2002, the services of the petitioners were terminated as it was pointed out that their interviews were not held in accordance with the established procedure and

certain irregularities had been committed and that the entire selection process was not fair. It was further stated that the record was tampered with.

5. Feeling aggrieved, the writ petitioners approached the HP State Administrative Tribunal, hereinafter referred to as "the Tribunal" for short, by filing Original Applications for quashing their termination orders. The Tribunal granted the Original Applications filed by the petitioners and disposed of the same by a common order alongwith other similarly situate persons on 1.3.2002. However, respondents-State was left with the liberty to hold proper enquiry and take action in accordance with rule. It is apt to reproduce para 16 of the judgment made by the Tribunal dated 1.3.2002 herein.

> *"16. Admittedly, no opportunity was given to the applicants before terminating their services. Not all the applicants are related to the DEO and to the then office Superintendent. The interest of justice, fair play and equity demands that opportunity should have been given to the applicants before terminating their services. The impugned termination is not simpliciter and it castes stigma. In view of the above discussions, the present Original Applications are allowed and the impugned order of termination is quashed. Applicants will be adjusted against their salary. However, the respondent department is at liberty to hold proper enquiry and take action in accordance with rule. With these observations, the Original Applications are disposed. Copy of this order be place in every Original application which has been tagged with this Original Application. No order as to costs." [emphasis supplied]*

6. The Respondent-State, feeling aggrieved by the said judgment made by the Tribunal, filed Civil Writ Petitions Nos. 1035, 1036, 1037, 1066, 1076, 1077, 521 and 678 of 2002, before this Court. This Court, vide common judgment dated 13.5.2003, upheld the judgment made by the Tribunal, with the following observations:

> *"Because we do not feel that any interference is warranted in the judgment of the Tribunal, by upholding the Tribunal's judgment, we dismiss these petitions but, to ensure proper safeguards with respect to the interests of the respondents as also of the petitioner-State, we issue the following directions:*
>
> > *1. The petitioner-State shall issue show cause notices individually to all the respondents, detailing therein the reasons, factors, grounds and circumstances etc. etc. which the petitioner-State thinks are such which warrant the termination of the services of the individual respondents. The respondents individually through the medium of show cause notices would be called upon to submit their replies within a specified period, which shall not be less than two weeks.*
> >
> > *2. In the show cause notices, the respondents should also be asked as to whether they would like to be heard in person.*
> >
> > *3. If the respondents or any one of them opt to be heard in person, the petitioner-State shall after hearing the respondents or such respondents, who opt for personal hearing and after considering the replies submitted by them to the show cause notices, on proper application of mind, pass appropriate final orders, which shall be both reasoned as well as speaking. In the final order, the petitioner-State shall clearly spell out the reasons or grounds (if any) upon which it considers the termination of services of the respondents, or any one of them (if so decided).*
> >
> > *4. The termination orders if issued in accordance with the aforesaid procedure would be liable to be implemented in accordance with law."*
> >
> > *[Emphasis supplied]*

7. Respondent-State, in compliance to the judgment dated 13.5.2003, issued show-cause notices to the writ petitioners on 25.8.2003. The writ petitioners also filed reply to the said show cause notices. However, without considering the reply submitted by the petitioners and without giving any opportunity of being heard, the services of the petitioners came to be terminated by the respondents vide orders dated 29th September, 2003.

8. Feeling aggrieved, the petitioners challenged the same before the Tribunal, by the medium of the Original Applications. The said Original Applications, on abolition of the Tribunal, in the year 2008, came to be transferred to this Court and diarized as CWP(T)s, mentioned hereinafter.

9. The Original Application filed by ***Sudesh Kumari*** applicant before the Tribunal, came to be registered as ***CWP(T) No. 9718 of 2008*** titled ***Sudesh Kumari versus State of HP and others***, which was dismissed by the learned Single Judge of this Court vide judgment dated 5.5.2011, subject matter of ***LPA No. 295 of 2011.*** The Original Application filed by ***Yogeshwar*** applicant came to be registered as ***CWP(T) No.9717/2008*** titled ***Yogeshwar versus State of HP and others***, which was dismissed by the learned Single Judge of this Court vide judgment dated 20.4.2011, subject matter of ***LPA No. 180/2011***. The Original Application filed by applicant ***Surjit*** came to be registered as ***CWP(T) No. 9707 of 2008***, titled ***Surjit versus State of HP and others***, which was dismissed by the learned Single Judge of this Court vide judgment dated 5.5.2011, subject matter of ***LPA No. 212 of 2011.*** The Original Application filed by applicant ***Pankeshwar*** came to be registered as ***CWP(T) No.9716 of 2008***, titled ***Pankeshwar versus State of HP and others***, which was dismissed by the learned Single Judge of this Court vide judgment dated 26.4.2011, subject matter of ***LPA No. 250 of 2011***. The Original Application filed by applicant ***Kuldeep Singh*** before the Tribunal, came to be registered as ***CWP(T) No.9725 of 2008***, titled ***Kuldeep Singh versus State of HP and others,*** which was dismissed by the learned Single Judge of this Court vide judgment dated 19.8.2011, subject matter of ***LPA No. 591 of 2011.***

10. It is worthwhile to mention here that the Original Application filed by applicant ***Manu Mahajan*** which came to be registered as ***CWP(T) No.9723 of 2008***, titled ***Manu Mahajan versus State of HP and others***, and which is also based on the same facts, as that of above five Original Applications, came to be ***allowed*** by the learned Single Judge of this Court vide judgment dated 28.9.2011, subject matter of ***LPA No. 121 of 2012*** and the Original application filed by applicant *Prithi Singh* which came to be registered as ***CWP(T) No.9724 of 2008***, titled ***Prithi Singh versus State of HP and others***, was also allowed by the learned Single Judge of this Court vide judgment dated 16.10.2012, on the basis of judgment rendered by this Court in ***CWP(T) No. 9723 of 2008,*** decided on 28.9.2011 titled ***Manu Mahajan versus State of HP and others,*** supra, subject matter of ***LPA No. 54 of 2015.***

11. We have examined the impugned judgments made by the learned Writ Courts.

12. It is evident that two sets of contradictory judgments came to be made by the learned Writ Courts, on the foundation of same set of facts of the cases.

13. Be that as it may. Let us stop and take stock.

14. In the LPAs filed by the State, the selectees/ appointees, who were selected and appointed through the selection process initiated by the department are enjoying the status but at the same time, the appellants in other appeals, whose writ petitions came to be dismissed and who were also selected through the same selection process, are not in position from the date of the impugned judgments. This is how, under these peculiar circumstances, one set of petitioners is suffering and one set is enjoying. However, less said is better.

15. Unfortunately, the writ petitioners, whose writ petitions came to be dismissed have been dragged from pillar to posts and post to pillar, is a clear cut example of travesty of justice for the following reasons.

16. Admittedly, the State has not questioned the order made by the Division Bench of this Court dated 13.5.2003. The fact that the termination orders were stigmatic, has attained finality, thus, in the facts and circumstances of the case, a regular inquiry was required. The State has neither conducted regular inquiry nor followed the directions contained in the judgment delivered by the Division Bench dated 13.5.2003, supra.

17. It appears that without hearing the petitioners, aforesaid termination orders came to be passed and one of the learned Single Judges, while deciding CWP(T) No. 9723 of 2008, dated 28.9.2011, quashed the said termination order, subject matter of LPA No. 121 of 2012. It is apt to reproduce operative portion of the said judgment herein.

> *"13. The only reason or circumstance indicated against the petitioner, in the Show Cause Notice Annexure A-5, is that he had not been issued interview letter. That is demonstrated to be untrue by the earlier order of termination Annexure A-2. There is no other allegation against the petitioner in the Show Cause Notice, though in the order of termination it is stated that his name did not figure in the list of total 95 candidates sponsored by the Employment Exchanges. This reference in the order of termination is incorrect, because, as noticed above, in reply to the earlier Original Application the total number of candidates sponsored by the Employment Exchanges was stated to be 184 and not 95. Also, the Show Cause Notice and the order of termination, copies Annexures A-5 and A-7, respectively, show that lists of sponsored candidates sent by only two Employment Exchanges had been tampered with. Those were Employment Exchanges of Jawali and Baijnath and tampering with was also only to the limited extent of incorporation of the names of Pankeshwar and Yogeshwar, two sons of the Superintendent in the Office of District Education Officer.*
>
> *14.In view of the above discussion, it cannot be said that there was any hanky-panky in the matter of selection and appointment of the petitioner to the post of Laboratory Attendant. Consequently, the present writ petition is allowed and the order of termination of services of the petitioner, copy Annexure A-7, is quashed."*

18. The aforesaid judgment was followed by another judgment made by the learned Single Judge dated 16.10.2012 in CWP-T No. 9724 of 2008, subject matter of LPA No. 54 of 2015. This is how the writ petitioners in the aforesaid LPAs are in position till today.

19. In second batch of writ petitions, the learned Single Judge, has fallen in an error in dismissing the writ petitions for the reasons that the State had not followed the directions contained in the judgment delivered by the Division Bench of this Court dated 13.5.2003 and even the State had not conducted regular inquiry as required, under law.

20. Having said so, the impugned judgments made by the learned Single Judge, subject matter of LPAs No. *295 of 2011, 180 of 2011, 212 of 2011, 250 of 2011 and 591 of 2011,* merit to be set aside and LPAs merit to be allowed. Accordingly, the impugned judgments are set aside and the LPAs are allowed.

21. The impugned judgments, subject matter of LPAs No.121 of 2012 and LPA No. 54 of 2015 merit to be upheld and LPAs merit to be dismissed. Accordingly, the LPAs No. 121 of 2012 and LPA No. 54 of 2015 filed by the State are dismissed and impugned judgments are upheld.

22. The question is what order is to be passed in the given circumstances.

23. Admittedly, some candidates are in position till today and some of the candidates are out. Thus, it is ordered that the petitioners, who are not in position today are allowed to join forthwith. The period spent during these proceedings is to be computed for all service benefits, except monetary benefits. However, it is made clear that State/ respondents are at liberty to

conduct regular inquiry, if they choose to do so. The said inquiry, if any conducted, be concluded within six months, as per the rules, occupying the field.

24. Accordingly, the appeals filed by the State are dismissed and that of the private petitioners are allowed, as indicated hereinabove, alongwith all pending applications.

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

Vikas Gupta ....Appellant

Versus

H.P.S.E.B & Another ....Respondents

LPA No.98 of 2010
Judgment Reserved on: 26.05.2016
Date of decision: 02.06.2016

Constitution of India, 1950- Article 226– Petitioner was appointed as Junior Engineer (Electrical) in the year 1990 on daily wages - he qualified Sections `A' and `B' of AMIE examination conducted by the Institute of Engineers (India) in 1990 and 1994, and became Bachelor of Engineers in Electrical Trade-108 JE's were promoted for the post of Assistant Engineer but the case of the petitioner was not considered-representations made by him were rejected-writ petition filed by him was dismissed holding that the claim of the petitioner was hit by the delay and laches as he had approached the court in the year 2002 whereas, cause of action had accrued to him in the year 1997- held, in appeal that the petitioner has not challenged the decision taken by the department to promote other JE's and has acquiesced to the same-promoted persons were not arrayed as parties - seniority list was also not brought on the record to show the actual order of the seniority- writ petition rightly dismissed by the writ court- appeal dismissed. (Para-23 to 25)

For the Appellant: Mr.Dushyant Dadwal, Advocate.

For the Respondents: Mr.Satyen Vaidya, Senior Advocate with Mr.Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.:

Present appeal is directed against the judgment dated 24.05.2010 passed by the learned Single Judge of this Court in CWP(T) No.31 of 2008 (TA No.20/2003), whereby the writ petition filed by the petitioner (appellant herein) was dismissed, *(for short 'impugned judgment').*

2. Briefly stated, the facts necessary for adjudication of the case are that the petitioner being qualified diploma holder in Electrical Engineering was appointed as Junior Engineer (Electrical) *[For short `J.E.(E)]* on daily wages on 8.1.1990 in the office of respondent No.1. However, subsequently he qualified Sections `A' and `B' of AMIE examination conducted by the Institute of Engineers (India) in 1990 and 1994, as a result whereof, he became Bachelor of Engineers in Electrical Trade.

3. Record reveals that pursuant to order passed by this Court in CWP No.100 of 1988, services of the petitioner were regularized as J.E.(E) on temporary basis on 27.1.1996. As per Recruitment and Promotion Rules *(in short `R&P Rules')* applicable to respondent-Board, petitioner claimed that he became entitled to the promotion to the next higher post of Assistant Engineer(Electrical) *[in short `A.E.(E)']*, wherein, after amendment of R&P Rules on 14.2.1986, 6%

quota for promotion was provided for J.E.(E), who had passed Sections `A' and `B' of examination of Institution of Engineers (India) during service period and have one year minimum service in the grade for the post of A.E.(E). As per amended R&P Rules, the quota for promotion for the post of A.E.(E) for qualified J.Es.(E) having 7 years service in the grade was fixed at 28%. Whereas, the quota for promotion to J.Es.(E) unqualified with ITI qualification having 12 years service in the grade was fixed at 8% and the quota for the promotion of J.Es.(E) unqualified having 15 years service in the grade was collectively kept 4%. However, aforesaid R&P Rules were further amended on 23.6.1999 (Annexure PC) whereby quota was again altered.

4. As per averments contained in the writ petition, respondent-Board vide letter dated 31.12.1997 (Annexure-PD) relaxed the R&P Rules/Regulations, whereby 50 AMIE/Graduate J.Es.(E) and 56 J.Es.(E) from other category were promoted as A.Es.(E) on regular basis. It also emerges from the record that the aforesaid relaxation was made in pursuance to some directions issued by the Hon'ble Apex Court. Thereafter, respondent-Board relaxed the R&P Rules for 106 J.Es.(E) for the post of A.Es.(E) on regular basis. Consequent upon the aforesaid relaxation in the R&P Rules, 104 promotions were made to the post of A.Es.(E) vide Annexure PD/1. Record further reveals that on 7.3.1998 three more Engineers were promoted to the post of A.E.(E). Similarly, on 9.2.2000 one more promotion was made effective from 6.1.1998. Since in total 108 promotions were made, as referred above, and petitioner was only left out from the category, he filed several representations dated 17.2.1998, 8.11.1998, 5.1.2000 and 2.8.2001 to the respondent-Board, but all in vain.

5. Aggrieved with the rejection of the aforesaid representations filed by the petitioner, he approached this Court by way of CWP No.971 of 2001, which came to be decided by this Court on 4.10.2001. In the petition, referred above, petitioner sought directions to the respondents to consider his case for promotion to the post of A.E.(E) against 6% quota meant for AMIE J.E.(E), in accordance with the R&P Rules, which were amended on 14.2.1986. Pleadings on record further suggests that after disposal of aforesaid writ petition, on 31.10.1998 petitioner again filed CWP No.1013 of 2001, wherein direction was sought against the respondents for considering the case of the petitioner for the post of A.E.(E) in terms of relaxation granted to the entire cadre of J.E.(E) in 1997, pursuant to the judgment passed by the Hon'ble Apex Court.

6. It appears that all the J.Es.(E), except the petitioner, who had qualified AMIE Degree prior to his appointment in the Department, were considered and promoted. However, this Court, while disposing of the aforesaid writ petitions preferred by the Petitioner only issued direction to the respondents to consider the representations filed by the petitioner, which were rejected by the respondents on 26.2.2002 (Annexure PL). However, petitioner was promoted to the post of A.E.(E) on 18.3.2002 (Annexure PM).

7. A specific case of the petitioner has been that when the order of relaxation was made on 31.12.1997, 109 J.Es.(E) were having qualification of AMIE Graduation obtained either prior to joining of the service or during the service with the respondent-Board. The relaxation was applied to entire batch of J.Es., while promoting them to the post of A.Es.(E). Though, petitioner had qualified AMIE in the year 1994, but he was not considered in the very first batch for promotion made by the respondents-Board, pursuant to the order of relaxation made on 31.12.1997, which was admittedly taken in terms of order passed by Hon'ble Apex Court.

8. It is also the case of the petitioner that even in the second category wherein 56 J.Es.(E), who had qualified AMIE in June, 1997, were granted promotion in December, 1997 and even at that time case of the petitioner was not considered. Hence, action of the respondents in ignoring the petitioner for promotion to the post of A.E.(E), in pursuance of office order dated 31.12.1997 (Annexure-PD), being illegal and arbitrary, deserves to be quashed and set aside.

9. It was also alleged that Departmental Promotion Committee *(in short `DPC'),* which was required to be held annually and vacancies were to be filled in accordance with the Rules prevalent on the date when the vacancies arise, was convened in violation of instructions dated 16.11.1994 (Annexure PN).

10. Respondents refuted the averments made by the petitioner and a specific objection with regard to delay and latches has been taken. It is submitted on behalf of the respondents that it was brought to the notice of Whole Time Members *(in short `W.T.M.')* that respondent-Board intends to appoint 106 AMIEs (Electrical) and 49 AMIEs (Civil/Mechanical) J.Es. as A.Es against the quota of direct recruit A.Es. It was also brought to the notice of W.T.M. that while promoting J.Es AMIE of both Electrical/Civil/ Mechanical, the minimum criteria of 7 years for promotion from J.Es to A.Es as per R&P Rules would be enforced. Since promotions were to be made in bulk, respondents-Board agreed for the aforesaid proposal to enforce minimum criteria of 7 years regular service as J.Es.(E) as per R&P Rules. Since petitioner had put in only one year service as regular J.E. and was much below in cadre of J.Es.(E), he could not be promoted. Respondents specifically stated that J.Es.(E), who had put in minimum 7 years service, were promoted and all the promotions were made strictly in accordance with the decision dated 20.12.1997 and thereafter office order dated 31.12.1997 was issued with regard to relaxation. It also emerges from the record that before promoting certain officers as A.Es on 18.3.2002 (Annexure PM), decision was taken on 14.9.2000 (Annexure R-1) to promote petitioner as well as one Shri Ram Prakash in relaxation to the Rules. However, fact remains that the petitioner could not be promoted prior to 18.3.2002 because posts meant for AMIE category were not available and only senior persons to the petitioner were promoted before 18.3.2002. Later-on, when post became available, petitioner was promoted vide order dated 18.3.2002.

11. Learned Single Judge, after appreciating the material available on record, dismissed the petition specifically observing therein that the petitioner miserably failed to make his case for relaxation in terms of order dated 31.12.1997 vide which 56 J.Es were to be promoted. Moreover, the petitioner had not challenged his promotion made vide order dated 18.3.2002 from J.E.(E) to A.E.(E), rather he acquiesced and accepted the same.

12. Mr. Dushyant Dadwal, learned counsel representing the petitioner-appellant, vehemently argued that the judgment passed by Hon'ble Single Judge is not sustainable and is not based upon the correct appreciation of the documentary evidence available on record. He forcefully contended that learned Single Judge has failed to acknowledge that vide Notification dated 31.12.1997 quota prescribed in the R&P Rules was abolished and the entire cadre of J.Es having AMIE qualification/degree obtained before or after joining the service was required to be considered for promotion. It is contended on behalf of the petitioner that pursuant to the aforesaid relaxation dated 31.12.1997, number of promotions were effected by the respondents ignoring the rightful and genuine claim of the petitioner. Since petitioner had passed Sections `A' and `B' examination of the AMIE in 1990 and 1994, other persons who had passed their Sections `A' and `B' examination in 1996 and 1997 could not be promoted ahead of him. It is also contended that very purpose of notification dated 31.12.1997 was to grant benefit to all J.Es in Electrical as well as Civil/Mechanical trades, but while effecting promotions quota, rules were not adhered to and promotions were made after the period of relaxation amongst the diploma holders and others in the access of the quota prescribed for the promotion to the post of A.E.(E). It was strenuously argued on behalf of the petitioner that all other promoted J.Es, who were similarly situated and in the same category as of the petitioner, as such he could not be ignored for promotion in terms of the notification dated 31.12.1997.

13. Mr.Dadwal contended that since petitioner was qualified to hold the post, he was required to be considered and promoted from amongst the quota meant for AMIE/degree holders. Had this quota been considered & enforced strictly, he would also have been promoted much before 1997 ahead of other persons who admittedly acquired qualification on the later date.

14. Lastly, Mr.Dadwal pointed out that the learned Single Judge has failed to acknowledge the fact that when the benefit of relaxation, which was granted to entire category possessing the same qualifications and are in same trade, cannot be denied to any individual belonging to that particular category and therefore, the case of the petitioner could not be ignored and, as such, great injustice has been caused to him. He prayed for setting aside and quashing of the judgment passed by the learned Single Judge.

15. Per contra, Shri Satyen Vaidya, learned Senior Counsel, appearing for the respondents, supported the judgment passed by the learned Single Judge. He forcefully contended that petition filed by the petitioner was liable to be rejected solely on the ground of delay and latches because admittedly cause of action, if any, accrued to the petitioner in the year 1997, when 100 promotions were made for the post of A.Es.(E), whereas, petition was filed in the year 2002 i.e. after six years and no explanation worth the name has been rendered in the petition justifying therein the delay caused in filing the same. He forcefully contended that promotions of the other persons were made strictly in accordance with the decision dated 20.12.1997 and thereafter office order dated 31.12.1997 was issued.

16. Mr.Vaidya strenuously argued that the promotion of the petitioner from J.E.(E) to A.E.(E) was made on 18.03.2002 which was accepted by him without any demur and as such, at this stage, he cannot be allowed to challenge the decision of the respondents-Board wherein vide order dated 31.12.1997, 56 J.Es.(E) were promoted, who, as per petitioner, were junior to him.

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

18. Admittedly, petitioner was appointed on temporary basis as J.E.(E) on 27.1.1996 vide office order (Annexure PA). The R&P Rules for promotion to the post of A.E.(E) from various categories of J.E.(E) were amended on 14.2.1986, wherein the promotion criteria under 6% quota is as follows:

> ***"From amongst those persons who pass Section A&B of the examination of Institution of Engineers (India) during service period and have minimum one year service in the grade."***

19. Perusal of office order No.302 dated 31.12.1997 (Annexure PD) suggests that conscious decision was taken to relax the Recruitment & Promotion Regulations for promotion to the post of A.E.(E) and petitioner claimed promotion on the basis of aforesaid order of relaxation.

20. Careful perusal of office order dated 31.12.1997 suggests that conscious decision was taken by the respondents-Board for promoting 50 AMIE/Graduate J.Es.(E) and 27 AMIE/Graduate J.Es.(Civil/Mechanical), who were working as A.Es.(E) on adhoc or acting basis by providing one time relaxation to the R&P Regulations. Similar decision was taken to promote 56 J.Es.(E) and 22 J.Es(C/M), who had obtained AMIE Degree after aforesaid adhoc or acting A.Es, who had become senior to them by virtue of the decision of Hon'ble the Supreme Court, by providing one time relaxation in the R&P Regulations against vacancies meant for the direct recruitment category.

21. As has been observed above, petitioner, who was appointed as a J.E.(E), at initial stage, on daily wages on 8.1.1990 with the respondent-Board on temporary basis and as on 31.12.1997 he was not working as A.E.(E) on adhoc/acting basis and as such his case could not be considered in light of one time relaxation, which was strictly applied in the case of 50 AMIE/Graduate J.Es.(E) and 27 AMIE/Graduate J.Es.(E), who were working as A.E. on adhoc or acting basis at that relevant time. Since on 31.12.1997 petitioner was not working as A.E. on adhoc/acting basis, his case also could not be considered in the second category for 56 J.Es.(E) and 27 J.Es.(E), who had admittedly obtained AMIE degree qualification after the first category of adhoc/acting A.E. who had become senior to them as a result of judgment passed by the Hon'ble Apex Court. Further perusal of order dated 31.12.1997 suggests that there was no specific bar for promotion from the post of J.E.(E) to A.E.(E) as per R&P Rules and as such case, if any, of the petitioner was required to be considered for promotion in accordance with the R&P Rules and Regulations. Since petitioner did not fall in the category which was given relaxation in terms of office order dated 31.12.1997, his case was to be considered strictly in accordance with the R&P Rules. During arguments having been made by the learned counsel representing the petitioner, we had occasion to peruse office order dated 31.12.1997 as well as order dated 20.12.1997.

22. Careful reading of office order dated 31.12.1997 itself suggests that H.P. Electricity Board on the recommendations of Class-I DPC took a conscious decision to promote the A.E.(E) AMIE/diploma holders/non-diploma holders and the cadre working on adhoc/acting and out of turn basis and also J.E.(E) AMIE/diplomas holders/non-diploma holders/CHDM as A.Es. on regular basis, meaning thereby vide order dated 31.12.1997, individual working as A.E.(E) either on adhoc basis or acting basis were promoted as A.E.(E) on regular basis. Whereas, present petitioner admittedly on 31.12.1997 was not working as A.E. rather he was working as J.E.(E) at that relevant time. Hence, at this belated stage, petitioner could not be allowed to assail the promotions made vide order dated 31.12.1997 that too when on the given date he was not eligible to be promoted in terms of that letter. Moreover, there is no specific challenge, if any, to communication dated 31.12.1997, wherein decision was taken to promote the aforesaid persons on regular basis. Further perusal of decision taken on 20.12.1997 (reproduced in para-4 of the reply filed by respondents No.1 and 2) which is further reproduced herein below:-

> ***"It was brought in the notice of WTM that Board is appointing 106 AMIEs (Electrical) and 49 AMIEs (Civil/Mechanical) JEs as AEs against the quota of direct recruits AEs. It was also brought into the notice that 37 JEs (E) and 6 JEs (Civil/Mech.) Dips. who are already working on adhoc/acting AEs, also be regularized against the post of AEs. It was brought to the notice of WTM that in the case of bulk promotions to Class-I post, the general instructions for filling up selection post may not necessarily be applied. It was also brought to the notice of WTM that while promoting JEs AMIE of both Electrical/Civil/Mechanical the minimum criteria of 7 years for promotion from JEs to AEs as per R&P Rules has also to be enforced. The Board agreed that the principle of selection while holding the buik promotions of these AMIEs /Diploma holders JEs against the post of AEs be not enforced to avoid supersession. It was also decided that the minimum criteria of 7 years regular service as JEs as per R&P Rules be also followed."***

suggests that it was brought to the notice of concerned persons of the Board with regard to appointments of 106 AMIEs (Electrical) and 49 AMIEs (Civil/Mechanical) JEs as AEs against the quota of direct recruits A.Es, and all stakeholders including the petitioner were aware about the aforesaid decision taken by the respondents. It also suggests that it was categorically decided that the persons who are already working on adhoc/acting A.Es. would be regularized against the posts of A.Es. Since bulk promotions to the Class-I post were to be carried out, it was decided by the respondent-Board that general instructions for filling up selection post would not be necessarily applied. Decision with regard to prescribing minimum criteria of 7 years for promotion from J.Es. to A.Es as per R&P Rules was also proposed to be enforced vide aforesaid communication. Conscious decision was taken in the aforesaid meeting that while making bulk promotions to the post of A.Es. principle of selection would not be enforced to avoid supersession; therefore, criteria of 7 years regular service as J.Es, as per R&P Rules, was decided to be enforced. Admittedly, as has been discussed/observed above, on the relevant date petitioner had only rendered one year regular service as J.E. and he was much below in the cadre of J.E.(E) and as such, he was rightly not promoted in terms of aforesaid order dated 31.12.1997.

23. At the cost of repetition, it is pointed out at this stage that by way of petition under reference, petitioner never laid any challenge to either decision dated 20.12.1997, which further culminated into promotion of other persons vide order dated 31.12.1997, which clearly suggests that petitioner acquiesced and accepted the aforesaid decisions made by the respondent-Board and now, at this belated stage, he cannot be allowed to rake up the issue, which has attained finality qua the persons who were promoted in terms of order dated 31.12.1997. It is also noticed, at this stage, that the persons, who were promoted in terms of letter dated 31.12.1997, were not made party in the petition and any critical analysis of letter dated 31.12.1997 as well as decision taken on 20.12.1997 by this Court, at this stage, would amount to decide the rights of effected/necessary parties in their absence, which is not

permissible at this stage. As far as another plea with regard to the consideration of the case of the petitioner under 6% quota of J.E.(E) AMIE acquiring qualification of AMIE for the purpose of promotion to the post of A.E.(E) is concerned, the same could not be considered under the aforesaid quota of 6%, as per amendment carried out in R&P Rules dated 14.2.1986, whereby benefit of improvement of qualification by way of AMIE during service was given only to those J.Es. who acquired this qualification during service but not to those persons like petitioner who admittedly had passed out AMIE before joining the service. Amendment in the R&P Rules dated 14.2.1986 for the aforesaid benefit to the J.Es.(E), who acquired qualification of AMIE after joining service, was not challenged by the petitioner at all and, as such, he cannot be allowed to claim benefit of 6% quota, which was admittedly in terms of R&P Rules amended on 14.2.1986 and was to be given to the person who had acquired qualification of AMIE during service. Hence, promotion of the petitioner from J.E.(E) to A.E(E) could only be considered under 28% quota of qualified J.Es as per amendment carried out in the R&P Rules on 14.2.1986.

24. Even, at this stage, it is also noticed by this Court that condition of prescribing criteria of 7 years regular service for J.E., as per R&P Rules, as decided on 20.12.1997, was never challenged by the petitioner in any of the proceedings and, as such, the same was enforced by the Board while carrying out bulk promotions of the J.Es. who, at the relevant time, were working as acting/adhoc A.Es. Moreover, as was noticed above, that the petitioner was promoted vide office order dated 18.3.2002 (Annexure PM), from J.E.(E) to A.E.(E) and same was accepted by him without any demur and as such, at this stage, without there being a specific challenge to the decision dated 20.12.1997, office order dated 31.12.1997 and order dated 14.2.1986, whereby amendment was carried out in R&P Rules, no benefit could be given to the petitioner. It also appears from the judgment passed by the learned Single Judge that no seniority list with regard to J.Es. was ever placed before the Court, hence, findings of the learned Single Judge that in the absence of seniority of the petitioner as J.E.(E), it is not possible to determine whether the petitioner was legally denied promotion from J.E.(E) to A.E.(E), in view of the R&P Rules/Regulations and relaxation dated 31.12.1997, are based on correct appreciation of record and as such no interference is called for.

25. In view of aforesaid discussion, we do not find any illegality and infirmity in the impugned judgment passed by the learned Single Judge, as such the same is upheld and the appeal is dismissed alongwith pending application, if any.

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

Aman Chaudhary .....Petitioner.

Versus

State of Himachal Pradesh and another .....Respondents.

Cr. Revision No.320 of 2015.
Date of decision: 03.06.2016.

Juvenile Justice (Care and Protection of Children) Act, 2000- Section 7- Petitioner moved an application for forwarding the juvenile to the concerned board- the application was allowed by ld. sessions Judge but the order was set-aside with a direction to hold an inquiry – Ld. sessions Judge conducted an inquiry and held that the juvenile was more than 18 years of age- held, that juvenility has to be determined after recording the evidence- the court can rely upon the matriculation certificate and in absence of the same, upon the date of birth certificate from the school first attended or the certificate given by a corporation or a municipal authority or a panchayat - if no documents are available, medical board is to be constituted for determination of age- Ld. Sessions judge has relied upon school leaving certificate but it was not issued by the

school first attended by the juvenile - petition allowed and ld. Sessions Judge directed to decide the question afresh. (Para 4-12)

Cases referred:
Ashwani Kumar Saxena versus State of M.P., AIR 2013 SC 553
Jodhbir Singh versus State of Punjab AIR 2013 SC 1
Nagendra versus State of Uttar Pradesh 2015 (3) RCR (Criminal) 543: 2015(4) Cri CC 571,
Parag Bhati (Juvenile and others) versus State of Uttar Pradesh and another AIR 2016 SC 2418

For the Petitioner : Mr.Satyen Vaidya, Senior Advocate with Mr.Vivek Sharma, Advocate.
For the Respondents : Ms.Meenakshi Sharma, Additional Advocate General and Mr.J.S.Guleria, Assistant Advocate General, for respondent No.1.
Mr.N.S.Chandel and Mr.Dinesh Thakur, Advocates, for respondent No.2.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral).**

The solitary issue arising in this criminal revision petition filed under Section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000, (for short the 'Act') is regarding the juvenility of the petitioner.

2. Since the issue is pre-dominantly a legal one, facts in detail need not to be referred to. Suffice it to say, the petitioner moved an application under Section 7 of the Act for forwarding the juvenile/applicant to the concerned Board for trial in accordance with law. This application was initially allowed vide order dated 11.03.2013, by the learned Sessions Judge, Shimla, however, the said order was set aside by this Court in ***Criminal Revision No.120/2013***, titled as ***State of Himachal Pradesh versus Aman Chaudhary*** and ***Cr.MMO No.97 of 2013***, titled as ***Nishant Negi versus State of Himachal Pradesh and another***, decided on 07.08.2013 and the case was remanded back to the learned Sessions Judge for holding inquiry to reach a rightful conclusion with respect to the juvenility of the petitioner. Now the Sessions Judge vide order dated 07.08.2015 has determined the juvenility of the petitioner by concluding that he is more than 18 years of age. It is this order which has been assailed in the instant petition as being contrary to the provisions of law.

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

3. It cannot be disputed that juvenility has to be determined in accordance with Section 7A of the Act readwith Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short "2007 Rules").

4. The mode and manner in which the juvenility has to be determined was a subject-matter of decision by the Hon'ble Supreme Court in ***Ashwani Kumar Saxena*** *versus* ***State of M.P., AIR 2013 SC 553*** and it was held as under:-

> *25. We may in the light of the judgments referred to herein before and the principles laid down therein while examining the scope of Section 7 A of the Act, Rule 12 of the 2007 Rules and Section 49 of the Act examine the scope and ambit of inquiry expected of a court, the J.J. Board and the Committee while dealing with a claim of juvenility.*
>
> *26. We may, however, point out that none of the above mentioned judgments referred to earlier had examined the scope, meaning and content of Section 7A, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7A of the Act and Rule 12 of the 2007 Rules:*

"Section 7A - Procedure to be followed when claim of juvenility is raised before any court.

(1)Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary(but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

Rule 12.Procedure to be followed in determination of Age.?- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

(emphasis added)

27. Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

28. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word 'inquiry' has not been defined under the J.J. Act, but Section 2(y) of the J.J. Act says that all words and expressions used and not defined in the J.J. Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

29. Let us now examine the meaning of the words inquiry, enquiry, investigation and trial as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions.

"Inquiry" as defined in Section 2(g), Cr.P.C. reads as follows:

"Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

"Investigation" as defined in section 2(h), Cr.P.C. reads as follows:

"Investigation includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

The expressions "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in sections 2(g) and 2(h) of the Code of Criminal Procedure."

30. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating some offences committed. We find in very many cases that the Court /the J.J. Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) of the Code of Criminal Procedure, but an inquiry under the J.J. Act, following the procedure laid under Rule 12 and not following the procedure laid down under the Code.

31. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Indian Penal Code or under other Penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold inquiry.

32. Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under section 7A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in section 7A read with Rule 12.

33. We also remind all Courts/J.J. Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

34. "Age determination inquiry" contemplated under section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

35. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict

with law. It has been made clear in subsection (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J. Act also draws a presumption of the age of the Juvenility on its determination.

36. Age determination inquiry contemplated under the J.J. Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination."

5. It would be evident from the aforesaid exposition of law that age determination inquiry contemplated under Section 7 of the Act readwith Rule 12 of 2007 Rules, enables the Court to seek evidence and in that process, the Court can obtain matriculation certificate or equivalent certificate, if available. Only in the absence of matriculation or equivalent certificate, the Court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation certificate or equivalent certificate or date of birth certificate from the school first attended, the Court need obtain the birth certificate given by a Corporation or a Municipal Authority or a Panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the Court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his/her age on the lower side within the margin of one year.

6. Similar issue thereafter came up for consideration before the Hon'ble Supreme Court in ***Jodhbir Singh*** *versus* ***State of Punjab AIR 2013 SC 1*** wherein it was made clear that Rule 12 of the Rules should be the basis for determination of the age of the child victim as well as child in conflict in law. It was further held that in the scheme contemplated under Rule 12(b), it is not permissible to determine the age in any other manner.

7. Identical issue came up recently for consideration before the Hon'ble Supreme Court in ***Nagendra*** *versus* ***State of Uttar Pradesh 2015 (3) RCR (Criminal) 543: 2015(4) Cri CC 571***, wherein the juvenility had been determined on the basis of the school leaving certificate which did not fall in any of the provisions contemplated under Rule 12 of the 2007 Rules and after placing reliance on the judgment of ***Ashwani Kumar Saxena's case*** (supra), it was held as under:-

"3. Having given our thoughtful consideration to the submission advanced at the hands of the Learned Counsel for the appellant, we are satisfied, that a school leaving certificate is not a relevant consideration to determine the juvenility of an accused/convict Under Rule 12(3) thereof. The afore-mentioned statutory provision was not considered by this Court while deciding Ranjeet Goswami's case. The same cannot therefore be any precedential value in terms of the statutory provisions, referred to here in above. For the reasons recorded here in above, we find no merit in this appeal. The same is accordingly hereby dismissed."

8. Similar reiteration of law can be found in a very recent judgment of the Hon'ble Supreme Court in ***Parag Bhati (Juvenile and others)*** *versus* ***State of Uttar Pradesh and another AIR 2016 SC 2418.***

9. Adverting to the facts of the instant case, the impugned order passed by the learned Sessions Judge will now have to be tested on the basis of the principles laid down by the Hon'ble Supreme Court in the cases cited above. The relevant portion of the order passed by the learned Sessions Judge reads thus:-

> *"26. The most material witness to prove the age of the accused Aman Chaudhary is AW-9 Sh.Nand Kishore Singh, Principal Middle School Mukundpur G.P.Gosaigaon, who deposed that on the receipt of application Ext.AW-9/A, he supplied the date of birth certificate of accused Aman Chaudhary Ext.AW-9/B and as per this certificate, date of birth of the accused was 05.02.1993 and the accused had left the school on 11.01.2005. He brought the original record and according to him, the date of birth was entered in the register as per application Ext.AW-9/C moved by his father. He has further stated that the entry qua admission of accused in Admission Register of School at serial No.11 dated 16th January, 2002 is Ext.AW-9/D, which is true and correct as per the original record and the transfer certificate issued by the school is Ext.AW-9/E. Admittedly, in the certificate Ext.AW-9/E, the date of birth of accused Aman Chaudhary is recorded as 05.02.1993.*
>
> *27. Thus, from the evidence on record, as discussed above, it is proved that the date of birth of accused Aman Chaudhary is 05.02.1993. The offences alleged to have been committed by the accused admittedly dated 20.10.2011. It means that the applicant/accused Aman Chaudhary on that day was more than 18 years of age and as such he is not juvenile in conflict with law. Accordingly, the application fails and is hereby dismissed. It be tagged with main case file."*

10. It is not in dispute that Ex.AW-9/B is a school leaving certificate, but the same has not been issued by the school first attended by the petitioner nor is it a matriculation or equivalent certificate. Rather, the petitioner had taken admission in the school when he was 9 years old on 16th January, 2002 and had then left the school on 11.01.2005.

11. It is thus clear that the certificate which has been relied upon by the learned Sessions Judge to come to the conclusion that the petitioner was more than 18 years of age does not fall within the scheme and any one of the categories contemplated under Rule 12(b) and, therefore, it was not permissible for the learned Sessions Judge to have determined the age of the petitioner on the basis of this certificate.

12. In view of the aforesaid discussion, the petition is allowed. The order passed by the learned Sessions Judge (Forests), Shimla, is set aside and he is directed to determine the juvenility of the petitioner in accordance with Rule 12(3) (b) of the Rules and thereafter pass consequential orders in accordance with law. Pending application, if any, also stands disposed of. Interim order stands vacated.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Avnish Kant Tiwari & others ...Petitioners.

Versus

Hon'ble High Court of H.P. & others ...Respondents.

Civil Writ Petition No.2661 of 2015
Reserved on : 30.5.2016
Date of Decision : June 3, 2016

Constitution of India, 1950- Article 226- Petitioners challenged the amendment made in Himachal Pradesh High Court Officers and the Members of the Staff (Recruitment, Conditions of

Service, Conduct & Appeal) Rules, 2003 and decision of the grievance committee to revise the ratio for promotion of Section Officer from 5:1 to 7:1- held, that Rules were framed in exercise of the power conferred by Article 229 of the Constitution of India which is a legislative power- the Rules cannot be struck down because the Court thinks that they are unreasonable but they can be struck down only on the ground on which a legislative measure can be struck down - fixing limitation and restrictions to the criterion of promotion exclusively falls within the domain of the State and a scheme cannot be held to be arbitrary or mala-fide or unconstitutional because it does not satisfy every employee – Grievance committee had considered all the relevant material while enhancing the ratio from 5:1 to 7:1- opportunity of hearing was given to the affected persons - the committee had taken into consideration entire cadre strength and the promotional avenues of petitioners -quota is to be fixed so that each category gets equal promotion - the petitioners had failed to show as to how their chance of promotion will be affected - the record on the other hand shows that the chances will not be affected- petition dismissed. (Para 7-75)

Cases referred:

Shakuntala Sharma v. High Court of Himachal Pradesh, (1994) 2 SCC 411

Supreme Court Employees' Welfare Association v. Union of India and another, (1989) 4 SCC 187

R.L. Bansal and others v. Union of India and others, 1992 Supp (2) SCC 318

B.S. Vadera v. Union of India and others, AIR 1969 SC 118

Shri Sitaram Sugar Company Limited and another v. Union of India and others, (1990) 3 SCC 223

Union of India and another v. Cynamide India Ltd. and another, (1987) 2 SCC 720

E.P. Royappa v. State of Tamil Nadu and another, (1974) 4 SCC 3

Cellular Operators Association of India and others v. Telecom Regulatory Authority of India and others, AIR 2016 SC 2336

State of Tamil Nadu v. P. Krishnamoorthy, (2006) 4 SCC 517

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

Syed T.A. Naqshbandi v. State of J&K, (2003) 9 SCC 592

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

Ramchandra Shankar Deodhar and others v. The State of Maharashtra and others, (1974) 1 SCC 317

Mohammad Shujat Ali and others v. Union of India and others, (1975) 3 SCC 76

Dhole Govind Sahebrao and others v. Union of India and others, (2015) 6 SCC 727

Ajit Singh and others (II) v. State of Punjab and others, (1999) 7 SCC 209

P.U. Joshi and others v. Accountant General, Ahmedabad and others, (2003) 2 SCC 632

Joginder Nath and others v. Union of India and others, (1975) 3 SCC 459

Kerala Magistrate (Judicial) Assn. and others v. State of Kerala and others, (2001) 3 SCC 521

V.T. Khanzode and others v. Reserve Bank of India and another, (1982) 2 SCC 7

Dwaraka Prasad and others v. Union of India and others, (2003) 6 SCC 535

Govind Dattatray Kelkar and others v. Chief Controller of Imports and Exports and others, AIR 1967 SC 839

Tamil Nadu Rural Development Engineers Association v. Secretary to Government Rural Development Department and others, (2013) 15 SCC 380

V.B. Badami and others v. State of Mysore and others, (1976) 2 SCC 901

For the Petitioners	:	Mr. Raman Sethi, Advocate.
For the Respondents	:	Ms Jyotsna Rewal Dua, Senior Advocate with Ms Shalini Thakur, Advocate, for respondent No.1. Mr. Ramakant Sharma, Senior Advocate with Ms Devyani Sharma, Advocate, for respondent No.2 to 53.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

In this petition, filed under Article 226 of the Constitution of India, ten petitioners, who fall in the category of Translators/Revisors, have laid challenge to the amendment carried out, vide Notification dated 2.6.2014 (Annexure P-7), in Column No.4, Serial No.9, Schedule-B of the Himachal Pradesh High Court Officers and the Members of the Staff (Recruitment, Conditions of Service, Conduct & Appeal) Rules, 2003 (hereinafter referred to as '2003 Rules'). Challenge is also laid to the decision dated 30.3.2015 (Annexure P-12) of the Grievance Committee of this Court.

2. In short, without alleging any malafides, it is the petitioners' grievance that revised ratio, in fixing the quota, for promotion to the post of Section Officer, from 5:1 to 7:1, from the categories of Superintendent Grade-II and Revisor, while adversely affecting them, would confer undue benefit upon private respondents No.2 to 53.

3. The moot point for consideration is the scope of interference by a Writ Court, in striking down the rules framed by the Chief Justice of the High Court of Himachal Pradesh in exercise of his legislative power and the extent of power of judicial review of the decision taken by the Full Court of the High Court of Himachal Pradesh. Also, what is the nature of recommendation made by a Committee of Judges of the High Court?

4. First, we proceed to discuss the legislative history of the Rules, subject matter of challenge before this Court.

5. In exercise of his powers, under Article 229 of the Constitution of India, the Chief Justice of the High Court of Himachal Pradesh (hereinafter referred to as the Chief Justice) was pleased to notify the High Court of Himachal Pradesh (Recruitment, Conditions of Service and Conduct) Rules, 1975 (hereinafter referred to as '1975 Rules'). Rule-4 prescribed the 'Method of Recruitment', both for promotional and selection posts. For the post of Superintendent, Schedule-II prescribed the promotions to be in the following manner:

"5.	Superintendents	-do-	Rs.450-800	(a) By selection from amongst the graduate Court servants serving in a grade not less than Rs.225-500 with a minimum service of 5 years in the grade. (b) By recruitment from amongst the officials of the Courts subordinate to the High Court in a grade not less than Rs.160-400 with a minimum service of 5 years in the grade."

6. 1975 Rules came to be amended vide Notification dated 6.1.1976 (Page-442 of Volume-1) and in the aforesaid Schedule, the following words came to be inserted:

> "(b) By selection from amongst non-graduate but atleast matriculate Court servants serving in a grade not less than Rs.225-500 with a minimum service of 8 years in the grade.

(c) By direct recruitment from amongst the graduate Court servants and graduate officials of the Courts subordinate to the High Court serving in a grade not less than Rs.160-400 with a minimum service of 5 years in the grade.

(d) By direct recruitment of Law Graduates conversant with office working."

Noticeably, even non-graduates, who were matriculate with a minimum grade, having qualifying service of eight years, were made eligible for promotion to the post of a Superintendent.

7. It is a matter of record that Association of Non-Graduate Officers of the employees of this Court made representations, which came up for consideration before various Committees set up by the Chief Justice. Perhaps what was required to be examined was the sufficiency of representation of the feeder categories.

8. Based on the recommendations of the Committee and other contemporaneous material, including the representations made by various employees/ associations, vide Notification dated 25.11.1992, new Rules came to be notified. Subsequently, the High Court in its wisdom also thought of deleting the provision of pay-scale, which is not a permanent feature and is always subject to alteration. With the enactment of the Himachal Pradesh (Recruitment, Conditions of Service and Conduct) Rules, 1992 (hereinafter referred to '1992 Rules'), the 1975 Rules came to be repealed. In terms of these Rules, promotion to the post of Superintendent, as prescribed in Schedule-II, was to take place in the following manner:

"Superintendents	Gaz. Class-II	Rs.2200-4000 + Rs.200/- S.P.	By promotion from amongst graduate Deputy Superintendents/Revisors with minimum 3 years of service as such in the ratio of 4:1, failing which by promotion from amongst Sr. Assistants/ Translators with minimum 6 years service as such in the same ratio. Explanation:- After promoting 4 Deputy Superintendents/ Sr. Assistants as Superintendents from general category...., one Revisor/Translator shall be promoted as Superintendent from amongst Revisors'/ Translators' category."

9. Significantly, it was for the first time that the concept of a 'feeder category' and 'quota' came to be introduced. Also, the post was to be filled up by way of promotion and not selection.

10. The introduction of minimum qualifying service of three years, in these Rules, as reproduced supra, came to be assailed by one Mrs. Shakuntala Sharma and the apex Court in *Shakuntala Sharma v. High Court of Himachal Pradesh*, (1994) 2 SCC 411, quashed such action. What essentially weighed with the Apex Court was the introduction of minimum period of service.

11. Pursuant thereto, and in compliance of the directions issued by the apex court, for framing equitable rule of promotion to the post of Superintendent, vide Notification dated 28.9.1994, the following criteria for promotion to the post of Superintendent came to be introduced:

Sr.No.10	By promotion from amongst graduate Deputy Superintendents/Revisors in the ratio of 4:1, failing which by promotion from amongst Sr. Assistants/ Translators with minimum 6 years service, as such in the same ratio. Explanation:- After promoting 4 Deputy Superintendents/ Sr. Assistants as Superintendents from category...., one Revisor/Translator shall be promoted as Superintendent from amongst Revisors'/ Translators' category."

12. Noticeably, except for the period of length of qualifying service for graduate Deputy Superintendents/ Revisors, qualifying service continued to remain the same.

13. Even the 1992 Rules came to be repealed by virtue of the Himachal Pradesh (Recruitment, Conditions of Service and Conduct) Rules, 1997 (hereinafter referred to as '1997 Rules'). For promotion to the post of Superintendent, no change at all was made in these Rules, save and except that vide subsequent amendment dated 12.3.1998, the post of Superintendent was made as a Selection Post and the period of qualifying service, so prescribed for promotion from the category of Senior Assistants/Translators came to be changed from 6 to 5 years. Hence, with these amendments, Rules for promotion to the post of Superintendent came to be read as under:

"Superintendents	Gazetted Class-II	Rs.2200-4000 + Rs.200/- S.P.	By selection from amongst graduate Deputy Superintendents/Revisors with minimum 3 years of service as such in the ratio of 4:1, failing which by promotion from amongst Sr. Assistants/ Translators with minimum 5 years service as such in the same ratio. Explanation:- (1) In case a graduate Dy. Superintendent is not available for promotion, a graduate Senior Assistant shall be considered for promotion. (2) In case a graduate Revisor is not available for promotion, a graduate Translator shall be

			considered for promotion. (3) After promoting 4 Deputy Superintendents/ Sr. Assistants as Superintendents from general category...., one Revisor/Translator shall be promoted as Superintendent from amongst Revisors'/ Translators' category." Note:- The promotions made under the repealed rules will be taken into account for the purpose of above ratio."

14. Still further, in its wisdom, the Chief Justice repealed the 1997 Rules and w.e.f. 25.11.2003, 2003 Rules came to be notified. As per these Rules, Schedule-B, dealing with Class-1 Gazetted Officers, prescribed the post of Superintendent to be filled up as under:

9.	Superintendents. (including one leave reserve Reader)	13	By Selection from amongst Deputy Superintendents/ Revisors in the ratio of 4:1 on the basis of merit-*cum*-seniority. Note.-Roster of ratio maintained under the repealed Rules will continue. *Explanation.*- After promotion of four Dy. Supdts. One Revisor will be appointed. This cycle will repeat.	Graduation	Three years	Rs.7220-220-8100-275-10300-340-11660 + S.A. Rs.400/-

15. Noticeably, here three significant changes came to be incorporated – (i) Selection to the post of Superintendent was restricted only to the category of Deputy Superintendent/Revisor, in the ratio of 4:1, (ii) Senior Assistants and Translators were excluded

for promotion to this post, and (iii) Experience/length of qualifying service in the feeder cadre was introduced. Of course, selection was to be on the basis of merit-cum-seniority.

16. It is the common case of the parties that with effect from 3.6.2010, post of Superintendent came to be re-designated as Section Officer, and the Deputy Superintendent as Superintendent Grade-II. Hence, for the post of Section Officer, selection in the ratio of 4:1 was to be carried out from amongst the Superintendents Grade-II and Revisors.

17. It is a matter of record that when representations/counter representations, filed by both the feeder categories, came to be placed before the Chief Justice, a Committee of Judges of this court was constituted to examine the question of inadequate representation of Superintendents Grade-II. Pursuant thereto, on 17.5.2011, such Committee made the following recommendation:

> ""The Committee considered the representations received from various categories of the employees on the subject. After having gone through the record and position of Rules, the committee noticed that earlier the cadre strength of Senior Assistants and Translators was 32 and 8, respectively. Therefore, the ratio of 4:1 was logically fixed between these two cadres for promotion to the post of Section Officer. Now with the cadre strength of Senior Assistants having increased to 40 and such strength of Translators having remained the same, the committee is of the unanimous view that the existing ratio of 4:1 needs to be revised to 5:1 between the aforesaid categories. Necessary steps to make suitable amendment in the R&P Rules be taken."
>
> Let follow up action be taken."

18. Finding favour with such recommendation, the 2003 Rules came to be amended with effect from 14.6.2011 and the figure "4:1" was substituted with that of "5:1".

19. Aggrieved thereof, petitioners made representation(s), which came to be rejected by the Committee in its meeting held on 26.8.2011. The Committee felt that the recommendation, enhancing the ratio was made only after considering cases of all the affected officials. Noticeably, the Committee noticed stagnation in both the feeder categories, yet it took into account the cadre strength of Senior Assistants and Translators, while enhancing the ratio.

20. It is also a matter of record that still further these Rules came to be amended with effect from 2.6.2014 and the ratio of "5:1" substituted as "7:1". The relevant amendment, so carried out vide Notification dated 2.6.2014, reads as under:

> "The figure "5:1" in column No.4 "Mode of Appointment" of item No.9 of Schedule "B" of Class-I (Gazetted), annexed to "The Himachal Pradesh High Court Officers and the Members of Staff (Recruitment, Conditions of Service, Conduct & Appeal) Rules, 2003" shall be substituted by figure "7:1".
>
> Consequently, "Explanation" of the item No.9 under Column No.4 "Mode of Appointment" of Schedule "B" of Class-I (Gazetted) annexed to the Rules supra shall be read as under:-
>
> "After promotion of seven Superintendents Gr.II one Revisor will be appointed. This cycle will repeat." "

21. Petitioners, through proper channel, made representations and also approached the Court on judicial side. This Court vide judgment dated 5.12.2014, passed in CWP No.6501 of 2014, titled as *Panne Lal and others v. High Court of H.P. and others,* directed the High Court to have the matter examined, in the light of the representations submitted by the petitioners.

22. On the Administrative side, the matter came up for consideration before a Committee of Judges constituted by the Chief Justice and the petitioners' representations came to be considered and rejected on 30.3.2015.

23. It is also a matter of record that 2003 Rules now stand repealed with the notification of Himachal Pradesh High Court Officers and the Members of the Staff (Recruitment, Conditions of Service, Conduct & Appeal) Rules, 2015, notified on 3.12.2015. However, insofar as the relevant rule of promotion is concerned, there is no change and it remains the same.

24. With these facts, we are called upon to examine the correctness of the decisions taken by the Committees and the Full Court over a period of time, as also the legality of the legislative action in carrying out the amendment dated 2.6.2014, in the 2003 Rules.

25. Rules so framed in the year 2003 are framed by the Chief Justice, in exercise of his power, under Article 229 of the Constitution of India, which reads as under:

> "229. Officers and servants and the expenses of High Courts :- (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct :
>
> Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.
>
> (2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose :
>
> Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.
>
> (3) The administrative expenses of High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund."

26. Undisputedly, the State has not framed any other Rules, governing the service conditions of the employees of the High Court. Therefore, the question, which arises for consideration, is as to what is the nature of power, so exercised by the Chief Justice, in framing these Rules.

27. We notice that provisions of Articles 146(2) and 229 (2) of the Constitution of India are similar.

28. In *Supreme Court Employees' Welfare Association v. Union of India and another,* (1989) 4 SCC 187, the apex Court has held the powers exercised by the Chief Justice of India, under Article 146(2) of the Constitution of India, to be legislative in nature. The Court observed that:

> "97. The fact that the power exercised by the Chief Justice of India or the President under Art. 146 (2) is derived directly from the Constitution, and not from a statute, makes no difference to the power of judicial review by a competent court. Any action taken.(or. refusal to act) on the strength of' power derived directly by constitutional delegation is as much justiciable or reviewable upon the same grounds and to the same extent as in the case of any statutory instrument. The fundamental question in determining whether the exercise of power by an authority is subject to judicial review is not whether the source of

> his power is the Constitution or a statute, but whether the subject matter under challenge is susceptible to judicial review. Pure questions of facts or questions which cannot be decided without recourse to elaborate evidence or matters which are generally regarded as not justiciable such as, for example, those relating to the conduct of the external affairs or the defence of the nation - are not amenable to judicial review."
>
> "105. Any arbitrary exercise of power by a public authority, whether or not it is in the nature of subordinate legislation, is liable to be condemned as violative of Article 14. As stated in E. P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555 :
>
> "..... equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch ....." "
>
> "107. The true position thus appears to be that, just as in the case of an administrative action, so also in the case of subordinate legislation (whether made directly under the Constitution or a Statute), its validity is open to question if it is ultra vires the Constitution or the governing Act or repugnant to the general principles of the laws of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

29. We notice that the scope of proviso to Article 309, Part III of the Constitution of India is also similar.

30. A Five-Judge Bench of the apex Court in *B.S. Yadav and others v. State of Haryana and others,* 1980 (Supp) SCC 524, has held the power exercised by the Government, under Article 309 of the Constitution of India, to be legislative in nature.

31. While taking a similar view, a Two-Judge Bench of the apex Court in *R.L. Bansal and others v. Union of India and others,* 1992 Supp (2) SCC 318, has further held that the exercise of such power being legislative in character cannot be struck down merely because the Court thinks that they are unreasonable and that they can be struck down only on the ground on which a legislative measure can be struck down.

32. A Five-Judge Bench of the apex Court in *B.S. Vadera v. Union of India and others,* AIR 1969 SC 118, has held that:

> "24. It is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning unless hedged-in, by any limitations. The rules, which have to be 'subject to the provisions of the Constitution shall have effect, 'subject to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President or by such person as he may direct, are to have effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other imposed by the proviso to Article 309, regarding the ambit of the, operations of such rules. In other words the rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority."

33. In Shri *Sitaram Sugar Company Limited and another v. Union of India and others,* (1990) 3 SCC 223, the apex Court drew the distinction between the power exercised by the authority being legislative, administrative or quasi-judicial in nature. Court further observed that:

> "37. If a particular function is termed legislative rather than judicial, practical results may follow as far as the parties are concerned. When the function is

treated as legislative, a party affected by the order has no right to notice and hearing, unless, of course, the statute so requires. It being of general application engulfing a wide sweep of powers, applicable to all persons and situations of a broadly identifiable class, the legislative order may not be vulnerable to challenge merely by reason of its omission to take into account individual peculiarities and differences amongst those falling within the class."

34. A Two-Judge Bench in *Union of India and another v. Cynamide India Ltd. and another,* (1987) 2 SCC 720, has held the legislative action, plenary or subordinate, not to be subject to the Rules of natural justice unless, of course, law itself specifically provides for the same.

35. A Five-Judge Bench of the apex Court in *E.P. Royappa v. State of Tamil Nadu and another,* (1974) 4 SCC 3, has held that:-

"85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground it is really in substance and effect merely an aspect of the second ground based on violation of Arts. 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Art. 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Art 14 is the genus while Art. 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle ? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14 and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reasons for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice : in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16."

36. Most recently in *Cellular Operators Association of India and others v. Telecom Regulatory Authority of India and others,* AIR 2016 SC 2336, while reiterating the principles of law

laid down in its earlier decision in *State of Tamil Nadu v. P. Krishnamoorthy,* (2006) 4 SCC 517, has laid down the following parameters for judicial review of the subordinate legislation:

> "There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:
>
> (a) Lack of legislative competence to make the subordinate legislation.
> (b) Violation of fundamental rights guaranteed under the Constitution of India.
> (c) Violation of any provision of the Constitution of India.
> (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
> (e) Repugnancy to the laws of the land, that is, any enactment.
> (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).
>
> The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy.
>
> But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

37. Hence, the scope of judicial review of the legislative action by the Chief Justice of this Court is in a very limited compass. The legislative competence is not an issue. Hence, the petitioners would have to demonstrate as to how the exercise of such power is violative of Part-IV of the Constitution of India.

38. There is yet another legal issue which arises for consideration and that being as to what extent can a Court exercise its powers in reviewing the decision taken by the Judges of the High Court in its Full Court meeting.

39. A three-Judge Bench of the apex Court in *High Court of Judicature of Patna, Through Registrar General v. Shyam Deo Singh and others,* (2014) 4 SCC 773, while dealing with the question of finalization of the Annual Confidential Reports of the Judicial Officers, in the Full Court meetings, relying upon its earlier decision in *Syed T.A. Naqshbandi v. State of J&K,* (2003) 9 SCC 592, has held that:-

> "…….In the very nature of things it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court, to judicial review except in an extraordinary case when the Court is convinced that some monstrous thing which ought not to have taken place has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court."

40. While addressing similar question, the apex Court in *High Court of Judicature, Patna v. Shiveshwar Narayan and another,* (2011) 15 SCC 317, has observed that:-

> "13. Lord Hailsham in Chief Constable of the North Wales Police vs. Evans, 1982 3 AllER 141 (HL) made the following statement:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."
>
> 14. In State of U.P. and others vs. Maharaja Dharamander Prasad Singh and others, 1989 2 SCC 505 it was held by this Court that judicial review is directed, not against the decision, but is confined to the examination of the decision-making process.
>
> 15. Recently, Centre for PIL vs Union of India, 2011 4 SCC 1 a three Judge Bench of this Court stated that a difference between judicial review and merit review has to be kept in mind."
>
> "20. On a careful reading of the judgment of the High Court, we are of the view that the Division Bench failed to keep in mind the distinction between judicial review and merit review and, thereby committed a serious error in examining the merits of the decision of the Full Court."

41. Another legal issue which arises for consideration is the extent to which this Court can exercise its powers of judicial review in the case of amendments, variations, additions, subtractions carried out by an employer with regard to qualifications, eligibility criteria and other conditions of service including avenues of promotion in the relevant Rules from time to time as per administrative exigencies.

42. A five-Judge Bench of the apex Court in *Ramchandra Shankar Deodhar and others v. The State of Maharashtra and others,* (1974) 1 SCC 317, has reiterated its earlier principle that chances of promotion are not conditions of service. The principle stands reiterated also in another five-Judge Bench decision of the apex Court in *Mohammad Shujat Ali and others v. Union of India and others,* (1975) 3 SCC 76. (See also: *Dhole Govind Sahebrao and others v. Union of India and others,* (2015) 6 SCC 727).

43. A five-Judge Bench of apex Court in *Ajit Singh and others (II) v. State of Punjab and others,* (1999) 7 SCC 209, has further held right of an employee to be considered for promotion as a fundamental right, which would not mean that promotion itself is a fundamental right.

44. It is a settled proposition of law that fixing limitations and restrictions to the criteria of promotion exclusively falls within the domain of the State. The apex Court in *P.U. Joshi and others v. Accountant General, Ahmedabad and others,* (2003) 2 SCC 632, has further observed as under:

> "10. 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 is 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/substraction 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 the 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."

45. In *Joginder Nath and others v. Union of India and others,* (1975) 3 SCC 459, the apex Court observed that it would not be possible or practical to measure the respective merits for the purpose of seniority with mathematical precision by a barometer and some formula doing largest good to the largest number had to be evolved.

46. In *Kerala Magistrate (Judicial) Assn. and others v. State of Kerala and others,* (2001) 3 SCC 521, the apex Court reiterated the principles laid down in *V.T. Khanzode and others v. Reserve Bank of India and another,* (1982) 2 SCC 7, by observing that no scheme governing service matters can be foolproof and some section or the other of employees is bound to feel aggrieved on the score of its expectations being falsified or remaining to be fulfilled. Arbitrariness, irrationality, perversity and mala fides will of course render any scheme unconstitutional but the fact that the scheme does not satisfy the expectations of every employee is not evidence of these.

47. The question as to whether for determining the quota, the strength of the immediate feeder cadre alone is to be considered for promotion to the next higher post or not, is no longer *res-integra*. In *Dwaraka Prasad and others v. Union of India and others,* (2003) 6 SCC 535, held as under:

> "16. Fixation of quotas or different avenues and ladders for promotion in favour of various categories of posts in feeder cadres based upon the structure and pattern of the Department is a prerogative of the employer, mainly pertaining to policy making field. The relevant considerations in fixing a particular quota for a particular post are various such as the cadre strength in the feeder quota, suitability more or less of the holders in the feeder post, their nature of duties, experience and the channels of promotion available to the holders of posts in the feeder cadres. Most important of them all is the requirement of the promoting authority for manning the post on promotion with suitable candidates. Thus, fixation of quota for various categories of posts in the feeder cadres requires consideration of various relevant factors, a few amongst them have been mentioned for illustration. Mere cadre strength of a particular post in feeder cadre cannot be a sole criteria or basis to claim parity in the chances of promotion by various holders of posts in feeder categories.
>
> 17. Normally, where officers are to be drawn for promotion from different posts in the feeder cadre, quota for each post in the feeder cadre is maintained proportionately to the sanctioned strength in that post. This, however, cannot be an inviolable rule of strict application in every case, with an absolute equality of arithmetical exactitude but may vary from case to case depending upon the pattern, structure and hierarchies in the Departmental set up as well as exigencies and balancing needs of Administration. There are other relevant considerations, some of which have been mentioned above, which may require departure from the practice of fixation of quota for each post in the feeder cadre, solely proportionate to its strength." (Emphasis supplied)

48. Significantly, a five-Judge Bench of the apex Court, in *Govind Dattatray Kelkar and others v. Chief Controller of Imports and Exports and others,* AIR 1967 SC 839, has also observed that:

> "16. But, it is said that if the system of rotation was necessary, the Government should have applied the ratio of 50: 50 and not 75: 25. When the recruitment to certain posts is from different sources, what ratio would be adequate and equitable would depend upon the circumstances of each case and the requirements and needs of a particular post. Unless the ratio is so unreasonable as to amount to discrimination, it is not possible for this Court to strike it down or suggest a different ratio. Nothing has been placed before us to show that the ratio of 3: 1 is so flagrant and unreasonable as to compel us to interfere with the order of the Government."

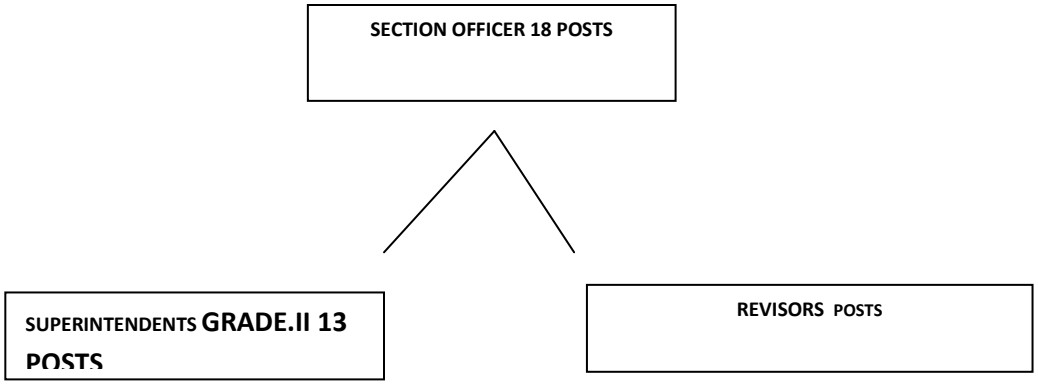
49. On this issue, a two-Judge Bench of the apex Court in *Tamil Nadu Rural Development Engineers Association v. Secretary to Government Rural Development Department and others,* (2013) 15 SCC 380, has observed that:

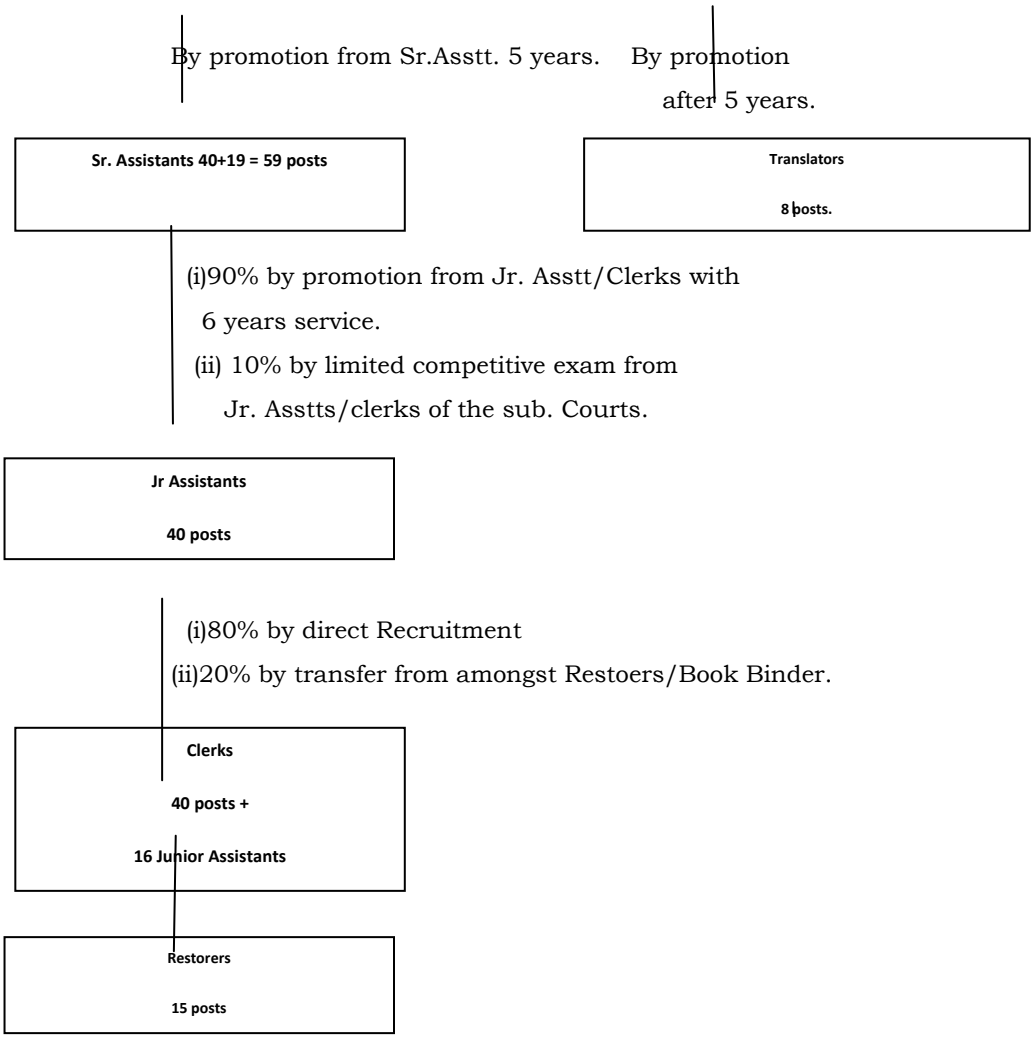
> "48. Even otherwise, the fixation of the quota/ratio is the prerogative of the executive. It is not disputed that the ratio of 6:2:1 has been fixed in the service rules in exercise of the powers of the Governor under the proviso to Article 309 of the Constitution of India. In the absence of the Appellants placing on the record material to establish that fixation of such a ratio is patently arbitrary, the action of the Government cannot be nullified. Fixation of rota/quota on the basis of qualification is well accepted in service jurisprudence. We, therefore, see no merit in the submissions of the Appellants that the ratio of 6:2:1 ought to be replaced with the ratio by 1:1."

50. In this legal backdrop, now we examine the merits of the present case.

51. We notice that while enhancing the ratio from 5:1 to 7:1, all relevant material came to be considered by the Committee constituted by the Chief Justice. In fact, petitioners' apprehension of non-consideration of their representations came to be met with the Grievance Committee, having examined the matter, even though not required in law, after affording opportunity of hearing to all concerned. Crucially, the Committee wanted to balance the equity between different feeder categories. The Committee not only took into account the hierarchy of the posts, leading to the appointment of a Section Officer, but also the entire cadre strength and the promotional avenues of various sections of employees in the High Court. This was in the line of *Dwaraka Prasad (supra)*.

52. To examine the numerical strength, we have culled out an empirical data. A Chart, depicting the number of posts and the promotional avenues, is as under:





Total cadre strength in Ist line = 13+59+40+56+15 = 183

53. Can it be said that while fixing the ratio, on the basis of the material objectively considered and assessed by the Committee, the present petitioners have been put to a disadvantageous or inequitable position. In our considered view, no. For demonstrating the same, comparative Chart, so prepared, by the High Court is on record. We also, in tabulated form, highlight the date on which some of the petitioners would be promoted, considering the respective ratios:

Sr.No.	**Name/ of the petitioner**	**Date of appointment as Translator**	**Date of promotion as Revisor**	**Anticipated date of promotion as Section Officer in the ratio of 5:1**	**Anticipated date of promotion as Section Officer in the ratio of 7:1**
1.	Sh. Avnish Kant	14.3.2005	19.3.2011	6.4.2016	1.10.2016

	Tiwari				
2.	Sh. Rajiv Kumar	20.3.2007	2.1.2013	1.11.2016	1.3.2018
3.	Sh. Sanjeev Kumar Sethi	8.7.2008	5.5.2015	1.3.2018	1.8.2019
4.	Sh. Yugal Kishore	2.9.2009	18.5.2016	1.2.2019	1.2.2021
5.	Sh. Ramesh Chand	20.8.2011	1.11.2016 (Anticipated)	1.5.2020	1.8.2022
6.	Ms Ramninder Kaur	20.8.2011	1.3.2018 (Anticipated)	1.6.2021	1.2.2024
7.	Sh. Yash Paul	20.8.2011	1.2.2019 (Anticipated)	1.8.2022	1.4.2026

54. Keeping in view the overall length of service of the petitioners in the Institution, it cannot be said that any promotional avenues of the petitioners stand marred.

55. Also, what weighed with the Committee, and the Chief Justice, was the nature of work and the duties, which the petitioners and the respondents are either required or called upon to discharge. The petitioners, by the very nature of their duties, are only required to either translate or revise such work. Neither are they called upon to discharge administrative work nor do they have any such experience.

56. Comparatively, Superintendent(s) Grade-II, who are equivalent to the Revisor(s), are being filled up from the Senior Assistants having more than six years of experience and all employees in that stream are called upon to discharge and perform various administrative work and duties.

57. Noticeably, there is no prescribed criteria of experience/length of service for appointment to the post of Translator. Also, the cadre of Translators is much smaller. They do not face stagnation, as compared to other categories, for their strength being large.

58. It is a settled principle of law that quota is fixed in order to equi-balance each category so that each one of them gets equal opportunity of promotion. It is also settled principle of law that in larger interest of administration, decision of the employer, who is best suited to fix the ratio and decide the percentage of posts in the promotional cadre should not be trifled with.

59. As a model employer and a mother institution, the High Court is duty bound to provide promotional avenues to all of its employees. This is more so to increase efficiency in public service. The impugned action, may only curtail, but not mar, the petitioners' right of promotion, which action is only in public interest and cannot be said to be grossly unreasonable or arbitrary, hence, violative of Article 14 or 16 of the Constitution of India. This we say so in view of the limited scope of judicial review of the legislative action. "Judicial Review" and not "Merit Review" as laid down in the *High Court of Judicature Patna (supra)* is what is required to be done.

60. With the change in the ratio, it cannot be said that for all times to come, right of the petitioners for promotion to the post in question stands obliterated or grossly affected. This

can clearly be inferred from the Chart reproduced (supra). With the vacancy being available, their cases would be considered in accordance with law. Action is in the line of view taken in *Ramachandra Shankar Deodhar (supra)* and *Mohammad Shujat Ali (Supra)*.

61. Noticeably, petitioners never laid any challenge to the amendment carried out in the year 2011, when the ratio came to be changed from 4:1 to 5:1.

62. In the instant case, doctrine of reasonable/ legitimate expectation of the petitioners to be always governed by the Rules, prevalent at the time of their induction in service, merits rejection, in view of the law laid down in *P.U. Joshi (supra)*.

63. Petitioners have laid much reliance on the following observations, made by the apex Court in *Shakuntala Sharma (supra)*:-

> "12. .....If Senior Assistants and Translators are to be provided with promotional avenue, more posts of Deputy Superintendents and Revisors which are above the posts of Senior Assistants and Translators respectively, should be created, and first the Senior Assistants and Translators have to be promoted to the said posts....."

64. Noticeably, such observation came to be made in the backdrop of the explanation to the main Rule, as it existed in the Rules, which now stands repealed. We are dealing with the Rules, whereby categories of Translators are no longer in the feeder cadre for the post, in question, i.e. Section Officer. Also, amendment to the Rules was not carried out for the purpose of providing opportunities of promotion to Superintendent Grade-II. Also, subsequent decisions of the apex Court have specifically dealt with the issue otherwise. Since much vehemence is laid on the said decision, we are of the considered view that, it would be only fallacious to contend that the decision of the Committee is contrary to the principle of law laid down by the apex Court, wherein the Court was dealing with the issue of promotion amongst the Revisors and Senior Assistants, and not the Revisors and Superintendents Grade-II. Also, in the said decision question of ratio/quota was never in issue, which came to be introduced only with the enactment of 2000 Rules, and the Rules under consideration by the apex Court came to be repealed.

65. We notice that the recommendation made by the Grievance Committee came to be accepted by the Chief Justice, who, in exercise of his powers under Article 229 of the Constitution of India, on 2.6.2014 got notified the amendment carried out in the Rules. The role of the committee is only recommendatory in nature. It is not that every recommendation made by the Committee is to be always accepted by the Chief Justice or for that matter the High Court. Constitution mandates the Chief Justice to deliberate on such recommendations and independently take action. In the instant case, we find that before taking such decision, the matter came to be placed before the Full Court and only after due deliberation and consultation by the Judges of this Court, the Chief Justice was pleased to carry out the necessary amendment in the rules, which was actually in the interest of the Institution and its employees.

66. The scope of judicial review, with regard to the decisions so taken by the Full Court and the Chief Justice in exercise of his legislative functions is limited in nature, which we have already discussed. [(*Supreme Court Employees' Welfare Association (supra); High Court of Judicature of Patna (supra);* and *Syed T.A. Naqshbandi (supra)*].

67. While fixing the ratio of promotion to the next post, it is not necessary for the employer to only consider the immediate strength of the feeder cadre. This alone can never be the criteria for fixing the quota. Personal interest of an employee has to make way for the larger good of the institution. Decision taken by the Committee, the Full Court and the Chief Justice, is not based on the myopic view, which the petitioners want the Court to take. It is not that the cadre strength of the immediate feeder category alone is required to be considered for fixing the ratio for promotion to the next higher post, when there is more than one feeder category. The mandate of law laid down by the apex Court in *Dwaraka Prasad (supra)* is unambiguously clear to such effect. Keeping in view the entire attending circumstances, in our considered view, the Chief

Justice, by taking a holistic view, decided to change the ratio from "5:1" to "7:1". Objectivity in taking such decision is demonstratively evident.

68. Yet another grievance made out by the petitioners that decision for carrying out amendment never came to be communicated, is legally untenable, in view of the law laid down in *Sitaram Sugar Company Limited (supra).*

69. We notice that challenge is not laid on the ground of malafides – legal or factual. It is also not the petitioners' established case that the legislative power is exercised only to accord undue favour to a particular individual. Hence, there cannot be any question of bias against the petitioners. The exercise of such power is neither ultra vires nor in bad faith.

70. It is also contended that the decision of the Committee is self-contradictory. For highlighting such fact our attention is invited to the minutes of the meeting dated 30.4.2014, wherein on one hand, the representation of the private respondents came to be rejected, yet the ratio came to be altered from 5:1 to 7:1. We do not find such fact to be true. Private respondents were seeking redetermination of the ratio on a much higher scale.

71. Petitioners have failed to even prima facie show, muchless establish or demonstrate that in fixing the quota/ ratio of 7:1, the action of the respondent is unreasonably perverse or an act of malafide, manipulation and is indefensively arbitrary.

72. In a passing reference, we may only observe that the petitioners always stand accommodated by the High Court. Their condition of qualifying test, in terms of the Recruitment and Promotion Rules, came to be repeatedly relaxed.

73. Our attention is invited to the minutes of the meeting of the Committee of Registrars dated 25.10.1990. This is to contend that the High Court itself had desired that for promotion to the post of Superintendent/ Reader, feeder categories be so provided and that all equally placed persons should get equal opportunity. Noticeably, even then the ratio between the two immediate feeder categories came to be determined as 4:1.

74. Reliance upon the decision rendered by a Division Bench of the High Court of Delhi, in CWP No.W.P.(C) 8026/2011, titled as *J.P. Gupta and others v. High Court of Delhi and others,* is also misconceived. In fact, it does not lay down the proposition that for the purposes of fixing quota, only the cadre strength of the immediate feeder category alone is to be taken into account. In fact, in the very same decision, the Court refused to interfere with the decision taken by the Full Court, which demonstrably was found not to shock the conscience of the Court. In any case, *Dwaraka Prasad (supra)* is the law on the issue.

75. Reliance on *V.B. Badami and others v. State of Mysore and others,* (1976) 2 SCC 901, is totally misconceived, it does not deal with any of the propositions urged before us. The issue before the Court was only with regard to *rota-quota*, inter se the two groups of the feeder category. Hence, for all the aforesaid reasons, we find no merit in the present petition, which is accordingly dismissed. All interim orders stand vacated. Pending application(s), if any, also stand disposed of.

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

Bago Devi and others …Appellants.

Versus

Sat Pal Saini and others …Respondents.

FAO No. 700 of 2008
Decided on: 03.06.2016

Motor Vehicles Act, 1988- Section 166- Injured had sustained injuries in the accident- he was admitted in hospital on 9th Dec., 2005 and was discharged on 16 Dec., 2005 - while assessing the compensation, some guess work has to be made- the injured had suffered pain and suffering for 8 days- he was attended by an attendant and must have spent some amount for medicines and special diet - hence, an amount of Rs. 35,000/- awarded in lump sum in addition to the amount already awarded by the Tribunal along with interest @ 7.5 % per annum. (Para 7-14)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellants: Mr. Jeet R. Poswal, Advocate.
For the respondents: Mr. Devender K. Sharma, 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)*

Subject matter of this appeal is judgment and award, dated 26th September, 2008, made by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (for short "the Tribunal") in M.A.C. No. 40 of 2006, titled as Bago Devi and others versus Sat Pal Saini and others, whereby compensation to the tune of ₹ 15,000/- with interest @ 9% per annum from the date of the filing of the claim petition till its realization came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The insurer, 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 appellants-claimants have questioned the impugned award only on the ground of adequacy of compensation.

4. Learned counsel for the appellants-claimants argued that injured-Prem Chand died after two years of the accident, thus, is a death case. Further stated that he has filed application for bringing on record the legal representatives of injured-Prem Chand before the Tribunal, which were brought on record and there names figure in the impugned award also.

5. I have gone through the record. It is not the case of the claimants that injured-Perm Chand has died because of the injuries sustained by him in the said accident.

6. It was the duty of the claimants to lay a motion for amendment of the claim petition and to file an amended claim petition for grant of compensation in lieu of the death of injured-Prem Chand. They have not led any evidence to prove that the death of injured-Prem Chand was related to the traffic accident, thus, the argument of the learned counsel for the appellants-claimants that injured-Prem Chand died due to the accident is not tenable.

7. However, it appears that the amount awarded is too meagre for the following reasons:

8. Admittedly, injured-Prem Chand sustained injuries in the accident, was admitted in hospital on 9th December, 2005 and came to be discharged on 16th December, 2005, as is also evident from the discharge slip (Mark-A). The copy of the MLC (Mark-B) contains the details of the injuries sustained by injured-Prem Chand.

9. It is beaten law of the land that while assessing compensation in injury cases, guess work is to be made.

10. My this view is fortified by the judgments rendered by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

11. This Court has also laid down the same principle in a series of cases.

12. Injured-Prem Chand remained admitted in the hospital for eight days, has suffered pain and sufferings, was attended upon by an attendant and must have spent some amount for medicines and special diet, have not been taken into consideration by the Tribunal.

13. In the given circumstances, I deem it proper to award ₹ 35,000/- in lump-sum in addition to the amount already awarded by the Tribunal in favour of the appellants-claimants.

14. The insurer is directed to deposit ₹ 35,000/- before the Registry within six weeks. In default, it shall carry interest @ 7.5% per annum from the date of the claim petition till its finalization.

15. On deposition, the awarded amount be released in favour of the claimants strictly as per the terms and conditions in the impugned award through payees' account cheque or by depositing the same in their respective bank accounts.

16. Viewed thus, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

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

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

Jania son of Shri Thebu ....Appellant/Plaintiff

Versus

Dharmi son of Budhu & others .....Respondents/Defendants

RSA No. 90 of 2003
Judgment reserved on 10th May 2016
Date of Judgment 3rd June, 2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendants from interfering in the suit land- it was pleaded that plaintiff is owner in possession of the suit land- civil suit was filed by S, which was decreed but right of the plaintiff was not affected by the civil suit- defendants threatened to interfere in possession of the plaintiff without any right- defendants pleaded that suit was filed by wife of the plaintiff, which was dismissed by the civil Judge- plaintiff was one of the defendants- suit is barred by res-judicata- suit was decreed by the trial Court- appeal was preferred, which was allowed- held, in second appeal that plaintiff had mentioned the value of the suit land in plaint as Rs.130/- -any exchange of immovable land valuing more than Rs. 100/- requires registration- no registered deed was produced to prove exchange – mutation will not confer any right upon the person- predecessor-in-interest of the plaintiff was not proved to be in possession- no relief was sought against the present plaintiff in the previous suit- therefore, principal of res-judicata will not be applicable - appeal partly allowed. (Para-11 to 16)

Cases referred:
Satyawan and others vs. Raghubir, AIR 2002 (P&H) 290
Ram Saran and others vs. Domini Kher and others, AIR 1961 SC 1747
Naval Shankar Ishwar Lal Dave and another vs. State of Gujarat, AIR 1994 SC 1496

For the Appellant: Mr. Dushyant Dadwal Advocate.
For the Respondents: Mr.G.D.Verma Sr. Advocate with Mr.B.C.Verma Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present regular second appeal is filed under Section 100 of Code of Civil Procedure 1908 against judgment and decree passed by learned District Judge Shimla (H.P.) in Civil Appeal No. 29-S/13 of 2000 title Dharmi and others vs. Jania.

Brief facts of the case

2. Plaintiff filed suit for permanent prohibitory injunction restraining defendants from interfering in suit land comprised in Khata No. 173 min, Khatauni No. 431 Khasra No. 325 min old new Khasra No. 1467 situated in mauja Karalash Tehsil Rohru District Shimla H.P. It is pleaded that suit land was previously owned and possessed by Shanti Kumar and Mohan Dutt sons of Bihari Lal. It is pleaded that vide mutation No. 6403 suit land was purchased by Gita Ram. It is pleaded that suit land was exchanged with plaintiff by Gita Ram vide mutation No. 113 dated 15.10.1994 and plaintiff became exclusive owner in possession of suit land. It is pleaded that Shyam Piari filed civil suit No. 34-1 of 1990/59-1of1992 title Shyam Piari vs. Gita Ram in the Court of learned Civil Judge Rohru and same was decided on 28.4.1994. It is pleaded that right of plaintiff is not effected by former civil suit. It is pleaded that defendants Nos. 1 to 7 interfered in possession of plaintiff and threatened the plaintiff to dispossess from suit land. It is pleaded that defendants Nos. 1 to 7 have no right title or interest in suit land and prayer for decree the suit as mentioned in relief clause sought.

3. Per contra written statement filed on behalf of defendants pleaded therein that plaintiff is estopped from filing the present suit by his act conduct and acquiesance. It is pleaded that former suit was filed by wife of plaintiff Shyam Piari on the basis of exchange and in alternative on the basis of right of adverse possession and same was dismissed by learned Civil Judge Rohru on 28.4.1994 in which plaintiff was one of co-defendants. It is pleaded that present suit is hit by principles of resjudicata. It is pleaded that plaintiff has no locus standi to file the present suit and plaintiff is not in possession of suit land. It is pleaded that defendants have raised the apple orchard over suit land. It is pleaded that suit land is in settled possession of defendants for the last more than 40 years. It is pleaded that Gita Ram did not become exclusive owner of suit land at any point of time. It is pleaded that suit land was not exchanged at any point of time as pleaded in plaint. It is pleaded that mutation No. 113 dated 15.10.1994 of exchange is illegal. It is pleaded that plaintiff has no cause of action to file the present suit and prayer for dismissal of suit sought.

4. Plaintiff also filed replication and re-asserted allegations mentioned in plaint. As per the pleadings of parties learned Trial Court framed following issues on 22.6.1996:-

1. Whether plaintiff is owner in possession over the suit land as alleged? OPP
2. Whether defendants interfere with possession of the plaintiff as alleged? OPP
3. Whether plaintiff is estoped to file the present suit as alleged?……OPD
4. Whether suit is hit by principle of resjudicata as alleged? …..OPD
5. Whether suit is hit under Section 10 CPC as alleged?…..OPD

6. Relief.

5. Learned Trial Court decided issues Nos. 1 and 2 in affirmative and decided issues Nos. 3 to 6 in negative. Learned Trial Court decreed the suit filed by plaintiff and restrained the defendants permanently by way of prohibitory injunction from interfering in suit land.

6. Feeling aggrieved against judgment and decree passed by learned Trial Court Shri Dharmi and other defendants filed Civil appeal No. 29-S/13 of 2000 title Dharmi and others vs. Jania before learned District Judge Shimla and learned District Judge Shimla on 11.11.2002 accepted the appeal and set aside the impugned judgment and decree passed by learned Trial Court. Learned first Appellate Court dismissed the suit of plaintiff with costs throughout.

7. Feeling aggrieved against the judgment and decree passed by learned first Appellate Court Shri Jania appellant filed present RSA which was admitted on following substantial questions of law on 2.5.2005:-

1. Whether learned first Appellate Court erred in relying upon the entry during the settlement without specifying the status of the possession of the respondents in view of the settled position of law?

2. Whether findings of the learned first Appellate Court are vitiated by non-consideration of the evidence on record which if considered would have led to opposite result?

3. Whether learned first Appellate Court erred in holding that the suit of the plaintiff was barred by principle of resjudicata?

8. Court heard learned Advocate appearing on behalf of parties and also perused the entire record carefully.

9. Findings upon point No.1 of substantial question of law with reasons:-

9.1 PW1 Jania has stated that area of suit land is 12 bighas 4 biswas. He has stated that old Khasra number of suit land was 325. He has stated that he is in possession of suit land and he has planted orchard of apples since 26-27 years. He has stated that copy of Khasra Girdawari w.e.f. 5.8.1989 to 29.4.1993 is Ext.PW1/A, copy of jamabandi is Ext.PW1/B and copies of mutation No. 113 is Ext.PW1/C. He has denied suggestion that defendants have planted orchard in suit land. He has admitted that former civil suit filed by Shyam Piari was dismissed. He has admitted that Shyam Piari is his wife. He has denied suggestion that he is illegally interfering in land owned by defendants.

9.2 PW2 Keshru has stated that parties are known to him. He has stated that land was given in exchange to plaintiff by Gita Ram. He has stated that area was 12 bighas some biswas. He has stated that possession of suit land was given in exchange to plaintiff in his presence about 29-30 years ago. He has stated that plaintiff is in continuous possession of exchanged land. He has stated that no one has right to interfere in land of plaintiff given to plaintiff in exchange by Gita Ram. He has admitted that Jania is his relative. He has stated that defendants are also his relatives.

9.3 DW1 Dharmi has stated that plaintiff is known to him and he has also seen the suit land. He has stated that suit land is in his settled possession for the last 45 years and he has planted apple trees. He has stated that former civil suit was also filed by Shyam Piari wife of appellant and same was dismissed. He has tendered in evidence decree sheet Mark X. He has stated that plaintiff has filed the present suit without any cause of action. He has stated that area of suit land is 14 bighas 11 biswas. He has denied suggestion that defendants are interferring in possession of land which is in possession of plaintiff. He has stated that plaintiff is interfering in land of defendants.

9.4 DW2 Narayan Dass has stated that parties are known to him and he has also seen the suit property. He has stated that suit land is in possession of Dharmi since 30 years and he has planted orchard trees. He has stated that plaintiff did not remain in possession of suit

property at any point of time. He has denied suggestion that he has deposed falsely in Court because he has litigation with plaintiff.

9.5 DW3 Gudru has stated that parties are known to him and he has seen the suit land. He has stated that apple trees planted over suit land. He has stated that age of apple trees is 15-19 years and Dharmi is in possession of suit land since 45 years and further stated that Jania did not remain in possession of suit land. He has stated that he does not know that defendants are interfering in land which is in possession of plaintiff measuring 12 bighas 4 biswas.

9.6 DW4 Ponu Ram has stated that parties are known to him and he has seen the suit land. He has stated that apple trees are planted over suit land. He has stated that age of apple trees is 15-19 years and further stated that Dharmi is in settled possession of suit property. He has stated that Jania did not remain in possession of suit property.

10. Following documentaries evidence filed by the parties. (1) Ext.PW1/A is copy of Khasra Girdawari w.e.f. 5.8.1989 to 29.4.1993. (2) Ext.PW1/B is copy of Missal Hakiyat. (3) Ext.PW1/C is copy of mutation No.113 dated 15.10.1994. (4) Ext.PA is copy of Missal Hakiyat (5) Ext.PB is copy of jamabandi for the year 1973-74. (6) Ext.PC is copy of jamabandi for the year 1968-69. (7) Ext.PD is copy of Khasra Girdawari w.e.f. 3.10.1973 to 19.4.1974. (8) Ext.PE is copy of Khasra Girdawari w.e.f. 4.5.1983 to 30.10.1983. (9) Ext.PF is copy of khasra Girdawari w.e.f. 4.5.1983 to 31.10.1983. (10) Ext.DW1/A is copy of decree sheet passed in civil suit No. 34-1 of 1990/59-1 of 1992 title Shyam Piari vs. Gita Ram and others. (11) Ext.D1 is copy of judgment passed by learned Civil Judge Court No. 2 Rohru District Shimla on 28.4.1994 in civil suit No. 34-1of1990/59-1of1992 title Shyam Piari vs. Gita Ram and others.

11. Submission of learned Advocate appearing on behalf of appellant that appellant Jania has acquired title in suit property on the basis of exchange of suit land with Gita Ram vide mutation No. 113 dated 15.10.1994 attested at Rohru District Shimla is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that during settlement process old Khasra No. 325 was bifurcated into four new Khasra Nos. i.e. 1469, 1469/1, 1471 and 1467. Appellant has himself mentioned the value of suit land in plaint as Rs.130/- (Rupees one hundred thirty). As per Section 17 of Indian Registration Act 1908 any exchange of immovable land valuing more than Rs.100/- (Rupees hundred) requires compulsory registration. Value of suit land which was exchanged between Jania and Gita Ram was more than Rs.100/- (Rupees hundred). Appellant did not place on record any registered document relating to exchange of land between Jania and Gita Ram. It is held that title of suit property did not vest in favour of Jania in the absence of registered document of exchange. ***See AIR 2002 (P&H) 290 title Satyawan and others vs. Raghubir. See AIR 1961 SC 1747 title Ram Saran and others vs. Domini Kher and others.***

12. Submission of learned Advocate appearing on behalf of appellant that on the basis of mutation No. 113 dated 15.12.1994 title of suit land is vested in favour of Jania is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that mutation does not confer or extinguish any title in suit property. ***See AIR 1994 SC 1496 title Naval Shankar Ishwar Lal Dave and another vs. State of Gujarat.***

13. Submission of learned Advocate appearing on behalf of appellant that as per revenue record status of respondents in possession column is not recorded and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused entire revenue record placed on record. In Khasra No. 1469, 1469/1 measuring 0-66-19 possession of Smt. Shyam Piari wife of Jania has been recorded in possession column without any status and in Khasra No. 1471 measuring 0-06-79 possession of Kadaru recorded without any status and in Khasra No.1467 measuring 0-17-15 possession of Dharmu recorded without any status. In ownership column name of Gita Ram recorded. Revenue record is prepared by public servant in discharge of official duty and same is relevant fact under Section 35 of Indian Evidence Act 1872. Possession of appellant did not figure in revenue record prepared by public official relating to suit land under H.P. Land Revenue Act. Court has also perused mutation No. 113 dated 15.10.1994 carefully and revenue official has specfically mentioned in mutation that Dharmu son of Budhu is recorded in possession of suit land qua Khasra No. 1467 measuring 0-17-15 without any status. Revenue official while attesting the mutation has specifically mentioned in mutation No. 113 that possession of Dharmu son of Budhu is recorded in cultivation column and not in ownership column and revenue official has also specifically mentioned in mutation No. 113 that possession of Dharmu would automatically become under Jania because in exchange of land only ownership right in immovable property is transferred. Even DW1 Dharmu, DW2 Narayan, DW3 Gudru and DW4 Ponu Ram have specifically stated that Dharmu is in settled possession of suit property. Testimonies of DWs 1 to 4 are trustworthy reliable and inspire confidence of Court relating to possession. Oral testimonies of DWs 1 to 4 are corroborated by revenue entries placed on record cited supra. It is well settled law that a person in settled possession of immovable property can be dispossessed only by way of due process of law. Appellant/plaintiff did not seek any relief of possession in present civil suit. In view of above stated facts and case law cited supra point No.1 of substantial question of law is decided against appellant.

Findings upon point No. 2 of substantial question of law with reasons

14. Submission of learned Advocate appearing on behalf of appellant that mutation No. 113 dated 15.10.1994 can be looked for collateral purpose i.e. possession as mentioned under Section 49 of Registration Act 1908 is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that unregistered document can be looked for collateral purpose i.e. for the purpose of possession. In pressent case even revenue official while attesting mutation No. 113 dated 15.10.1994 did not held that Jania is in settled possession of suit land. Revenue official while attesting mutation No. 113 on 15.10.1994 held that in exchange only ownership right is seen. In present case settled possession of appellant over the suit land is not proved. Name of appellant did not figure in possession column in any of revenue record placed on record prepared by revenue authority under H.P. Land Revenue Act. Testimony of PW1 and PW2 that appellant is in settled possession of suit land cannot be relied because testimonies of PW1 and Ext.PW2 are not corroborated with revenue documentaries evidence placed on record. On the contrary testimonies of DWs 1 to 4 are corroborated with documentaries revenue evidence placed on record qua possessuion upon suit property. Point No. 2 of substantial question of law is decided against the appellant.

Findings upon point No. 3 of substantial question of law with reasons

15. Submission of learned Advocate appearing on behalf of appellant that findings of learned District Judge Shimla (H.P.) that suit of the plaintiff was barred by principles

of resjudicata is contrary to law and contrary to proved facts is accepted for the reasons hereinafter mentioned. Learned District Judge Shimla (H.P.) has specifically mentioned in judgment that Shyam Piari wife of appellant filed civil suit No. 34/1 of 1990/59-1 of 1992 title Shyam Piari vs. Gita Ram and others relating to suit property Ext.DW1/A placed on record and Jania was impleaded as co-defendant No.2 and present civil suit filed by appelant is barred under constructive resjudicata as mentioned under Section 11 Explanation IV of Code of Civil Procedure 1908. Court has carefully perused judgment and decree relating to civil suit No. 34/1 of 1990/59-1 of 1992 placed on record. In former civil suit No. 34/1 of 1990/59-1 of 1992 no relief was sought against Jania by Shyam Piari and Jania, Kadaru, Pannu and Dharmu were impleaded as proforma co-defendants. It is well settled law that when no relief is claimed against proforma defendants by plaintiff then proforma defendants are not under legal obligation to contest the suit on all grounds. In civil suit No. 34/1of1990/59-1of1992 relief was only sought against Gita Ram by Shyam Piari and no relief was sought against Jania, Kadaru, Pannu and Dharmu and they were impleaded as proforma defendants Nos. 2 to 5. Even parties in civil suit No. 34-1of1990/59-1of1992 and parties in civil suit No. 78/1 of 1995/54-1 of 1998 are different and even nature of suit land and cause of action in civil suit No. 34-1 of 1990/59-1 of 1992 and civil suit No. 78/1 of 1995/54-1 of 1998 are different. Hence it is held that in view of above stated facts concept of constructive resjudicata as mentioned under Section 11 Explanation IV of CPC will not apply in present case. It is held that learned first Appellate Court has erred in holding that suit of plaintiff was barred by principles of constructive resjudicata. Point No. 3 of substantial question of law is decided in favour of appellant.

Relief

16. In view of above findings judgment and decree passed by learned District Judge Shimla H.P. affirmed except relating to findings of resjudicata under Section 11 Explanation IV of CPC. Learned Registrar Judicial will prepare decree sheet as required under Section 100 of Code of Civil Procedure 1908 forthwith. Parties are left to bear their own costs. Files of learned Trial Court and learned first Appellate Court along with certified copy of judgment and decree sheet be sent back forthwith. RSA is disposed of. Miscellaneous pending application(s) if any also stands disposed of.

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

Sh. Karnail Singh and another .....Appellants.

Versus

Sh. Rattan Lal Gujjar and others .....Respondents

FAO (MVA) No. 388 of 2010
Date of decision: 3rd May, 2016.

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that the deceased was earning Rs. 10,000/- per month- even taking the income of the deceased as a labourer, he would have been earning Rs. 4,500 per month- one half of the amount was to be deducted towards personal expenses – loss of dependency is Rs. 2,250/- the deceased was aged 23 years and multiplier of 16 is applicable- the claimants are entitled to Rs. 2250x12x16= Rs. 4,32,000/- the claimants are also entitled to Rs. 10,000/- each for loss of love and affection, loss of estate and funeral expenses - the claimants are entitled to Rs. 4,62,000/- along with interest @ 7.5% per annum from the date of award till realization. (Para 10-11)

Cases referred:

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

For the appellants: Mr. Rajan Kahol, Advocate.
For the respondents: Nemo for respondents No. 1 and 2.
Mr. S.D. Gill, Advocate, for respondent No.3.

The following judgment of the Court was delivered*:*

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

This appeal is directed against the judgment and award dated 19.6.2010, made by the Motor Accident Claims Tribunal, (1), Kangra at Dharamshala, H.P. in MACP No. 45-N/II-2007, titled *Sh. Karnail Singh and another versus Rattan Lal and others*, for short "the Tribunal", whereby compensation to the tune of Rs.50,000/- under "no fault liability" was granted in favour of the claimants alongwith interest @ 9% per annum, with Rs.2000/- as costs, hereinafter referred to as "the impugned award", for short.

2. Claimants have questioned the impugned award on the grounds that the tribunal has fallen in an error in recording the findings on issues No. 1 and 2.

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

4. The only question to be determined in this appeal is- whether the findings recorded on issues No. 1 and 2 are legally correct or otherwise?

5. I am of the considered view that the findings recorded on issues No. 1 and 2 are legally incorrect, for the following reasons.

6. Claimants have invoked the jurisdiction of the Tribunal for the grant of compensation as per the break-ups given in the claim petition on the ground that deceased Sukhwinder who was deployed as co-driver with Baru Singh Rajput on Tanker No. GQA-5331, met with an accident, suffered injuries and succumbed to the injuries. FIR No. 48/01 dated 6.4.2001 under Sections 279, 337 and 304-A IPC and Section 177 of the Motor Vehicles Act, for short "the Act" was lodged at Police Station Prantiz (Gujarat) against the driver.

7. The claimants have led evidence and stated that the driver has driven the offending vehicle rashly and negligently and also proved the FIR Ext. PW1/A which has remained un-rebutted.

8. The driver, owner and insurer have not led any evidence. The evidence led by the claimants have remained un-rebutted. The averments contained in the claim petition were evasively denied by the respondents. The Tribunal has fallen in error in recording the findings on issue No.1. Thus, it is held that the driver had driven the offending vehicle. i.e Tanker NO. GQA-5331 and caused the accident. Accordingly, issue No. 1 decided in favour of the claimants and against the respondents.

9. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 7. The onus to prove all these issues was on the respondents, have failed to discharge the onus. Accordingly, the Tribunal has decided all these issues in favour of the claimants and against the respondents. Respondents have not questioned the said findings, accordingly, the findings returned by the Tribunal on these issues are upheld.

10. **Issue No.2.** The deceased was 23 years of age at the time of accident and claimants has pleaded in the claim petition that he was earning Rs.10,000/- per month. Taking his income as a labourer, he would have been earning Rs.4500/- per month. One half was to be deducted, 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***. The multiplier of "16" is applicable in view of the judgments referred to supra.

11. Thus, it is held that the claimants have lost the source of dependency to the tune of Rs.2250x12x16= Rs. 4,32,000/-. The claimants are also entitled to compensation under the three heads as under:

(i)	Loss of love and affection:		Rs.10,000/-
(ii)	Loss of estate	:	Rs.10,000/-
(iii)	Funeral expenses	:	Rs.10,000/-
			Total Rs.30,000/-

Thus , in all the claimants are entitled to Rs. 4,62,000 alongwith interest at the rate of 7.5% per annum, from the date of impugned award, keeping in view the facts of the case.

12. The factum of insurance is admitted. Thus, the insurer is saddled with the liability 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 account, in equal shares.

13. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

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

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

FAO No.475 of 2010 with FAO No.31 of 2011.
Decided on : 03.06.2016

1. FAO No.475 of 2010

Lalit Kumar .....Appellant

Versus

Sanjiv Kumar and others ..... Respondents

2. FAO No.31 of 2011

Anju Kaundal and others .....Appellants

Versus

Lalit Kumar and others ..... Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was a business man - he was running an agency of Bajaj Allianz Insurance Company - he was also having agricultural income- Tribunal had rightly treated the annual income of the deceased as Rs. 96,000/- per annum- four persons were dependent upon deceased - Tribunal had wrongly deducted 1/3rd amount towards personal expenses whereas 1/4th amount was to be deducted - loss of dependency will be Rs. 72,000/-- the deceased was 43 years of age and multiplier of 14 is applicable - the claimants are entitled for a compensation of Rs. 72,000/- x 14= 10,08,000/- claimants are also entitled to Rs. 10,000/- each (Rs. 40,000/- in total) under the heads 'loss of estate', 'loss of consortium', 'loss of love and affection' and 'funeral expenses' - total compensation of Rs. 10,08,000/- + Rs. 40,000/- = Rs. 10,48,000/- awarded. (Para 23-28)

Motor Vehicles Act, 1988- Section 149- Tribunal held that the license of the driver of the vehicle was not renewed within the prescribed time and the driver did not have a valid driving license at the time of accident - the insured was saddled with liability-held, in appeal, it was for the insurer to plead and prove that the driver did not have a valid driving license at the time of accident- the insurer had not examined any witness to prove this fact- the driver had applied for the renewal of driving license on 7-5-2007 -license had expired on 16-04-2007- the driver is

supposed to apply for the renewal of license within a period of one month from the date of expiry- the license was renewed on 30-05-2007 after verification - it was the duty of the licensing authority to renew the license within time and reject the application in case of some defect– the driver cannot be held liable for the delay caused by the authority- the Tribunal had wrongly saddled the insured with liability by holding that driver did not have a valid driving license at the time of accident - appeal allowed. (Para- 9 to 22)

Cases referred:

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

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

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

FAO No.475 of 2010

For the appellant: Mr.Ashwani Pathak, Senior Advocate, with Mr.Sandeep K. Sharma, Advocate.

For the respondents: Mr.Tara Singh Chauhan, Advocate, for respondent No.1.
Mr.J.S. Bagga, Advocate, for respondent No.2.
Mr.Rajiv Rai, Advocate, for respondents No.3 to 6.

FAO No.31 of 2011

For the appellants: Mr.Rajiv Rai, Advocate.

For the respondents: Mr.Satyen Vaidya, Senior Advocate, with Mr.Varun Chauhan, Advocate, for respondent No.1.
Mr.Tara Singh Chauhan, Advocate, for respondent No.2.
Mr.J.S. Bagga, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Both these appeals are taken up together for final disposal as the same arise out of common award, dated 6th August, 2010, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P., (for short, the Tribunal), in Claim Petition No.66 of 2007, titled Anju Koundal and others vs. Lalit Kumar and others, whereby compensation to the tune of Rs.9,16,000/-, with interest at the rate of 7.5% per annum, from the date of filing of the claim petition till the amount is deposit, came to be awarded in favour of the claimants, being widow and sons, and proforma respondent No.4, being mother of the deceased, and the insurer was saddled with the liability, with right of recovery from the owner and the driver, (for short, the impugned award).

2. Since both the appeals arise out of the common award, therefore, the same are taken up together and are being disposed of by this common judgment.

Brief facts:

3. Claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short, the Act) for grant of compensation to the tune of Rs.25.00 lacs, as per the break-ups given in the claim petition, on account of death of Nand Lal Koundal in vehicular accident, which was, allegedly, caused by the driver, namely, Sanjeev Kumar, while driving truck bearing No.HP-24-4853, on 29th May, 2007, at about 12.00 A.M. near village Lakhanpur on NH-21 in Bilaspur District. It was alleged that the deceased, who was traveling on the scooter, was hit by the offending truck, being driven by its driver, as a result of which he sustained injuries and lateron succumbed to the same. In regard to the accident, FIR bearing No.159 of 2007, dated 29th May, 2007, under Sections 279 and 304-A of the Indian Penal Code

was registered at Police Station, Sadar, District Bilaspur, H.P. The claimants, being the widow and the sons of the deceased filed the claim petition and the mother of the deceased was impleaded as proforma respondent No.4 in the claim petition.

4. Respondents resisted the claim petition by filing replies. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether late Shri Nand Lal Koundal had died on account of injuries sustained by him on 29.5.2007 at about 12 A.M. near Lakhanpur, District Bilaspur due to rash and negligent driving of truck No.HP-24-4853 being driven by respondent No.2, 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 driver of the offending truck was not possessed of a valid and effective driving licence at the relevant time? OPR-3*
>
> *4. Whether the offending ruck was being plied without valid documents in contravention of the provisions of Motor Vehicles Act? OPR-3*
>
> *5. Whether the accident took place due to the contributory negligence of the deceased and also that of respondent No.2? OPR-3*
>
> *6. Whether this petition is bad for non-joinder of necessary parties? OPR-3*
>
> *7. Relief."*

5. Claimants to prove their case have examined PW-1 Dr.S.K. Patial, PW-2 HHC Nand Lal, PW-3 Rajesh Jamwal, PW-4 Anju Kaundal (claimant No.1) and PW-5 Shami Kumar. On the other hand, the driver of the offending truck stepped into the witness box as RW-1 and the owner examined one Vinod Kumar as RW-2. The insurer has not examined any witness.

6. The Tribunal, on scanning the evidence led by the parties, held that the driver of the offending vehicle, namely, Sanjeev Kumar, had driven the offending vehicle rashly and negligently on the fateful day and had caused the accident. Since the licence of the driver of the offending truck was not renewed within the prescribed time, therefore, it was held that the driver was not having a valid and effective driving licence and accordingly, the insured came to be saddled with the liability.

7. Feeling aggrieved, the owner has questioned the impugned award on the ground that the Tribunal has wrongly saddled him with the liability, while the claimants have questioned the same on the ground that the compensation awarded by the Tribunal is on the lower side.

8. Thus, in FAO No.475 of 2010, filed by the owner, the question needs to be determined is - Whether the Tribunal has rightly directed the insured to satisfy the award?

9. Before answering the above question, I may place on record that the findings returned by the Tribunal on issue No.1 qua rash and negligent driving of the driver are not in dispute. However, I have gone through the impugned award and the record of the case. The claimants have proved that the accident was the outcome of rash and negligent driving of the driver Sanjeev Kumar in which the deceased lost his life. Therefore, the findings returned by the Tribunal on issue No.1 are upheld.

10. Before issue No.2 is taken up for adjudication, I deem it proper to determine issues No.3, 4, 5 and 6, at the first instance. It was for the insurer to plead and prove that the driver of the offending truck was not having a valid and effective driving licence and thus, was in breach. The insurer has not examined any witness to prove the said factum, therefore, has failed to discharge the onus. The Tribunal has decided issue No.3 in favour of the insurer and against the insured and the driver, which is not legally correct.

11. It is beaten law of the land that in order to prove breach on the part of the insured, the insurer has to plead and prove that the owner/insured committed willful breach. The Apex Court in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has taken the similar view. It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings: but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

12. The Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** has again reiterated the same position. It is apt to reproduce paragraph 10 of the said decision hereunder:

> *"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 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. In the instant case, the insurer has not examined any witness in order to come to the conclusion that the insured had committed any willful breach.

14. The driver of the offending truck had applied for renewal of the driving licence on 7th May, 2007, which had expired on 16th April, 2007.

15. Section 15 of the Act deals with the renewal of driving licences, which mandates that a driver is supposed to apply for the renewal of the licence within one month of its expiry. It is apt to reproduce Sub Section (1) of Section 15 of the Act hereunder:

> ***"15. Renewal of driving licences. –*** *(1) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the date of its expiry;*
>
> *Provided that in any case where the application for the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal:*
>
> *Provided further that where the application is for the renewal of a licence to drive a transport vehicle or where in any other case the applicant has attained the age of forty years, the same shall be accompanied by a medical certificate in the same form and in the same manner as is referred to in sub-section (3) of section 8, and the provisions of sub-section (4) of section 8 shall, so far as may be, apply in relation to every such case as they apply in relation to a learner's licence."*

16. It is not the mandate of Section 15 of the Act that in case the application is incomplete, that cannot be termed as application within time.

17. RW-2 Vinod Kumar, Clerk from the office of Registering and Licencing Authority, Bilaspur, stated that the driver had applied for renewal of his licence on 7th May, 2007, which was sent for verification to the Registering and Licencing Authority, Sunder Nagar and after the receipt of the verification, the licence was renewed on 30th May, 2007.

18. The Tribunal has recorded in paragraph 28 that RW-2 Vinod Kumar had stated that on receiving the application of the driver Sanjiv Kumar for renewal of his licence, the same was sent for verification to Sunder Nagar, for which reason the licence was not renewed. However, in paragraph 29 of the impugned award, the Tribunal has concluded that due to the non-deposit of fees by the driver Sanjiv Kumar, the licence was not renewed. It is apt to reproduce paragraphs 28 and 29 of the impugned award hereunder:

> *"28. The respondents No.1 and 2 have also examined Vinod Kumar (RW-2) Clerk, Registering and Licencing Authority, Bilaspur, who has stated that Sanjiv Kumar, driver has applied for renewal of his licence on 7.5.2007 alongwith his driving licence which licence was sent for verification to R&LA, Sunder Nagar as it was earlier renewed from there and after receipt of renewal certificate, the driving licence was renewed w.e.f. 30.5.2007 and he has proved the copy of renewal application Ext.RW-2/A and the renewal certificate Ext.RW-2/B issued by the R&LA, Sunder Nagar. The learned counsel for respondents No.1 and 2 has submitted that since the respondent No.2 has applied for renewal of his licence within 30 days i.e. on 7.5.2007 from the date of expiry of his licence which expired on 16.4.2007, the licence shall be deemed to have been renewed from the date of expiry in view of the provision of Section 15 of the Motor Vehicles Act and as such, the respondent No.2 was holding a valid and effective driving licence on the date of accident.*
>
> *29. No doubt, on the basis of statement of respondent No.2 (RW-1) and Vinod Kumar (RW-2 as well as on perusal of Ext.RW-2/A which is the copy of application for renewal of*

the licence moved by respondent No.2 to R&LA Bilsapur, it is clear that such application has been received by R&LA, Bilaspur on 7.5.2007, but it is also clear on perusal of the said application that though the respondent No.2 has enclosed medical certificate and copies of his photos with such application, but no fees has been deposited by respondent No.2 at the time of moving of such application. It is in the cross-examination of RW-2 that the respondent No.2 has deposited the fees on 30.5.2007 and as such licence was renewed w.e.f. 30.5.2007 by the R&LA. The respondent No.3 has also placed on record Ext.R-4 copy of counter cash book of R&LA, Bilaspur, on perusal of which it is established that respondent No.2 has deposited the fees for renewal of licence on 30.5.2007 after the expiry of 30 days from the expiry of his earlier licence and as such penalty of Rs.50/- was also imposed upon the respondent No.2 by R&LA, Bilaspur. Such evidence on record therefore, shows that the respondent No.2 has not applied properly for renewal of his licence within a period of 30 days after the expiry of his licence and as such the licence was renewed by the R&LA not from the date of expiry of the licence, but from the date of renewal i.e. 30.5.2007. It is to be noted that as per Section 15 of the Motor Vehicles Act, the licence remains effective for a period of 30 days after its expiry and in case where renewal of a licence is applied more than 30 days after the date of its expiry, the driving licence shall be renewed from the date of its renewal."

19. While reaching at the above conclusion, the Tribunal has lost sight of the fact that it is the duty of the Authority concerned to renew the licence within time. In the instant case, the driver applied for renewal on 7th May, 2007, i.e. well within time prescribed under the Act, but the licence was not renewed for the reason that it was sent for verification, as stated by RW-2 Vinod Kumar. In case the application for renewal was not complete and was not accompanied with the requisite fee, it was the duty of the Authority concerned to reject the application and inform the applicant accordingly, which has not been done in the instant case. Thus, the delay in renewing the licence is not on the part of the driver, but is attributable to the Authority concerned.

20. Section 146 of the Act mandates that the owner of a vehicle is under statutory obligation to get the vehicle insured, the aim and object of which is to protect third party interest.

21. Having glance of the above discussion, it is held that the Tribunal has wrongly saddled the owner with the liability. Accordingly, the appeal filed by the owner is allowed and the insurer is saddled with the liability.

22. Now coming to FAO No.31 of 2011, which has been filed by the claimants for enhancement, wherein the question to be determined is - Whether the amount awarded by the Tribunal is inadequate?

23. The claimants pleaded in the claim petition that the deceased was a business man and was running Agency of Bajaj Allianz Insurance Company. In addition, the deceased was also having agricultural income. The Tribunal, after referring to the oral as well as documentary evidence led by the claimants in this regard, has rightly held that the deceased was earning Rs.96,000/- per annum. The number of dependants, including the mother of the deceased, was four. The Tribunal fell into error in deducting 1/3rd from the income of the deceased towards his personal expenses, rather, keeping in view the dictum of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 1/4th was to be deducted towards his personal expenses. Accordingly, after deducing 1/4th amount from the annual income of the deceased, the claimants can be said to have lost source of dependency to the tune of Rs.72,000/-.

24. Admittedly, the deceased was 43 years of age at the time. In view of the mandate of 2nd Schedule attached to the Act and the dictum of the Apex Court in Sarla Verma's case Supra, the Tribunal has rightly applied the multiplier of 14.

25. In view of the above discussion, the claimants are held entitled to Rs.72,000/- x 14 = Rs.10,08,000/- under the head loss of source of dependency.

26. In addition to above, the claimants are also held entitled to Rs.10,000/- each (Rs.40,000/- in total), under the heads 'loss of estate', 'loss of consortium', 'loss of love and affection' and 'funeral expenses'.

27. Accordingly, the appeal filed by the claimants is allowed and they are held entitled to compensation to the tune of Rs.10,08,000/- + Rs.40,000/- = Rs.10,48,000/-.

28. The impugned award is modified, as indicated above. The insurer is directed to deposit the entire amount, alongwith interest as awarded by the Tribunal, in the Registry of this Court within a period of eight weeks from today and on deposit, the Registry is directed to release the same in favour of the claimants through their respective bank accounts forthwith, strictly in terms of the conditions contained in the impugned award. The statutory amount deposited by the insured is awarded as cost in favour of the claimants. Both the appeals stand disposed of accordingly.

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

M/s Bakshi Ram Rattan Chand .....Appellant

Versus

Vijay Kumar and others ..... Respondents

FAO No. 292 of 2010.
Decided on : 03.06.2016

Motor Vehicles Act, 1988- Section 166- **Limitation Act, 1963-** Section 5- **Code of Civil Procedure, 1908-** Order 22 Rule 3- Sole proprietor of the claimant firm died during the pendency of the claim petition- application for substituting his son as legal representative was filed along with an application for condonation of delay- applications were dismissed by the Tribunal- claim petition was also dismissed as having abated – held, in appeal that limitation was prescribed earlier for filing claim petition- however, provision relating to limitation was deleted w.e.f. 14.11.1994- claim petition can be filed at any time- provisions of order 22 are not applicable to the proceedings under the Act- Tribunal had erred in dismissing the application- appeal allowed and Tribunal directed to proceed with the claim petition, after bringing on record the Legal representatives of deceased. (Para-6 to 14)

Case referred:
Dhannalal vs. D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155

For the appellant: Mr.Vikrant Thakur, Advocate.
For the respondents: Nemo for respondents No.1 and 2.
Mr.V.S. Chauhan, Advocate, for respondent No.3.
Mr.Deepak Bhasin, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is the order, dated 30th March, 2010, passed by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, H.P., (for short, the Tribunal), in

Claim Petition No.33 of 2005/04, titled N/s Bakshi Ram Rattan Chand vs. Vijay Kumar and others, whereby the claim petition was dismissed as abated, (for short, the impugned order).

2. Facts of the case, necessary for the disposal of the instant appeal, in brief, are that the claimant-firm, i.e. M/s Bakshi Ram Rattan Chand had filed a claim petition under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), through Duni Chand, who was the son and was Special Power of Attorney of the sole proprietor of the claimant-firm, namely, Bakshi Ram, for grant of compensation, as per the break-ups given in the claim petition, on the ground of damage having been caused to the building, shop, house and articles which were kept in the shop at the time of accident.

3. During the pendency of the Claim Petition, the sole proprietor of the claimant-firm, namely, Bakshi Ram had died, constraining the sons of said Bakshi Ram, namely, Prakash Chand and Duni Chand, to move an application before the Tribunal under Order 22 Rule 3 of the Code of Civil Procedure, (for short, CPC), for substituting them as legal representatives of deceased Bakshi Ram, alongwith application under Section 5 of the Limitation Act for condoning the delay in filing the said application.

4. The Tribunal after examining the pleadings of the parties, dismissed both the applications and consequently, the claim petition was also dismissed as abated.

5. Feeling aggrieved, the claimant-firm has questioned the impugned order by the medium of the instant appeal.

6. From the above narration of facts, the moot question emerges for consideration of this Court is – Whether the provisions of Limitation Act are applicable to the Claim Petitions filed under Section 166 of the Act? The answer is in the negative for the following reasons.

7. The Act has gone through a sea change and rigrours of Limitation Act have been taken away. Prior to coming into force of the amendment of the Act, limitation was prescribed for filing the claim petitions by the victims of a vehicular accident. However, after noticing that the prescribing of limitation was operating harsh and in many cases was likely to cause injustice, the Act was amended and Sub Section (3) of Section 166 of the Act came to be deleted, which amendment came into force w.e.f. 14th November, 1994. The consequence of the above said amendment was that the Claim Petition, in a vehicular accident, could be filed by the victim at any time.

8. The Apex Court in **Dhannalal vs. D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155,** while examining the effect of omitting Sub-section(3) of Section 166 of the Act, has held that there is no limitation prescribed for filing claims before the Tribunal in respect of any accident. It was also held that where a claim petition was filed, while sub section (3) of Section 166 of the Act was operative, the same could not be dismissed on the ground that at the time of its filing it was barred by limitation under Sub-Section (3) of Section 166 of the Act:

> *"6. Before the scope of sub-section (3) of Section 166 of the Act is examined, it may be pointed out that the aforesaid sub-section (3) of Section 166 of the Act has been omitted by Section 53 of the Motor Vehicles (Amendment) Act, 1994, which came in force w.e.f. 14-11-1994. The effect of the Amendment Act is that w.e.f. 14-11-1994, there is no limitation for filing claims before the Tribunal in respect of any accident. It can be said that Parliament realised the grave injustice and injury which was being caused to the heirs and legal representatives of the victims who died in accidents by rejecting their claim petitions only on ground of limitation. It is a matter of common knowledge that majority of the claimants for such compensation are ignorant about the period during which such claims should be preferred. After the death due to the accident, of the bread earner of the family, in many cases such claimants are virtually on the streets. Even in cases where the victims escape death some of such victims are hospitalised for months if not for years. In the present case itself the applicant claims that he met with the accident on 4-12-1990, and he was being treated as an indoor patient till 27-9-1991. According to us, in its wisdom the Parliament,*

rightly thought that prescribing a period of limitation and restricting the power of Tribunal to entertain any claim petition beyond the period of twelve months from the date of the accident was harsh, inequitable and in many cases was likely to cause injustice to the claimants. The present case is a glaring example where the appellant has been deprived by the order of the High Court from claiming the compensation because of delay of only four days in preferring the claim petition.

7. In this background, now it has to be examined as to what is the effect of omission of sub-section (3) of Section 166 of the Act. From the Amending Act it does not appear that the said sub-section (3) has been deleted retrospectively. But at the same time, there is nothing in the Amending Act to show that benefit of deletion of sub-section (3) of Section 166, is not be extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub-section (3) from Section 166 of the Act can be tested by an illustration. Suppose an accident had taken place two years before 14-11-1994, when sub-section (3) was omitted from Section 166. For one reason or the other no claim petition had been filed by the victim or the heirs of the victim till 14-11-1994. Can a claim petition be not filed after 14-11-1994, in respect of such accident ? Whether a claim petition filed after 14-11-1994, can be rejected by the Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub-section (3) of Section 166, was in force having expired the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub-section (3) of Section 166 w.e.f. 14-11-1994 ? According to us, the answer should be in negative. When sub-section (3) of Section 166 has been omitted, then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The claim petitions cannot be thrown out on the ground that such claim petitions were barred by time when sub-section (3) of Section 166 was in force. It need not be impressed that Parliament from time to time has introduced amendments in the old Act as well as in the new Act in order to protect the interest of the victims of the accidents and their heirs if the victims die. One such amendment has been introduced in the Act by the aforesaid Amendment Act 54 of 1994, by substituting sub-section (6) of Section 158, which provides :

> "As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner of such report, forward the some to such Claims Tribunal and Insurer".
>
> In view of sub-section (6) of Section 158 of the Act the officer incharge of the police station is enjoined to forward a copy of information / report regarding the accident to the Tribunal having jurisdiction. A copy thereof has also to be forwarded to the concerned insurer. It also requires that where a copy is made available to the owner of the vehicle, he shall within thirty days or receipt of such copy forward the same to the Claims Tribunal and insurer. In this background, the deletion of sub-section (3) from Section 166 should be given full effect so that the object of deletion of said section by the Parliament is not defeated. If a victim of the accident or heirs of the deceased victim can prefer claim for compensation although not being preferred earlier because of the expiry of the period of limitation prescribed, how the victim or the heirs of the deceased shall be in a worse position if the question of condonation of delay in filing the claim petition is pending either before the Tribunal, High Court or the Supreme Court. The present appeal is one such case. The appellant has been pursuing from Tribunal to this Court. His right to get compensation in connection with the accident in question is being resisted by the respondents on the ground of delay in filing the

same. If he had not filed any petition for claim till 14-11-1994, in respect of the accident which took place on 4-12-1990, in view of the Amending Act he became entitled to file such claim petition, the period of limitation having been deleted, the claim petition which has been filed and is being pursued up to this Court cannot be thrown out on the ground of limitation."

9. Another question which arises for consideration is – Whether the provisions of Order 22 of the CPC are applicable to the proceedings under the Act. The answer is in the negative for the reasons enumerated hereinbelow.

10. In view of the mandate of Sections 169 and 176 of the Act, the State of Himachal Pradesh has framed the Himachal Pradesh Motor Vehicles Rules, 1999, (hereinafter referred to as the Rules). Rule 232 of the Rules ibid provides as under:

"232. The Code of Civil Procedure to apply in certain cases:-

The following provisions of the First Schedule to the Code of Civil Procedure, 1908 shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30 ; Order IX ; Order XIII ; Rule 3 to 10 ; Order XVI, Rules 2 to 21 ; Order XVII ; Order XXI and Order XXIII, Rules 1 to 3.

Section 169 and 176 (b)."

11. Thus, it is clear from the above quoted Rule that the provisions of Order 22 of the CPC have not been made applicable to the proceedings under the Act. Therefore, the question of abatement does not arise, as has been held by the Tribunal.

12. The Tribunal has also lost sight of the fact that sub section (6) to Section 158 and sub section (4) to Section 166 have been added, which are reproduced below:

"158(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."

"166(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."

13. Under Sub Section (4) of Section 166 of the Act, a Claims Tribunal is under obligation to treat any report of accident forwarded to it under Section 158 (6) as an application for compensation. The purpose of inserting the aforementioned sub sections in the Act is to ensure that the claimants in a vehicular accident do not suffer unnecessarily and get compensation as early as possible. Therefore, the Tribunal was not right in its approach, while dismissing the claim petition as having abated, when the provisions of Order 22 of the CPC were not applicable, as has been held above.

14. In view of the above discussion, the appeal is allowed, the impugned order is set aside and the Tribunal is directed to conclude the claim petition, after bringing on record the Legal representatives of deceased Bakshi Ram, within three months, from 20th June, 2016, on which date the parties shall cause appearance before the Tribunal. Needless to say that the Tribunal shall determine the claim petition after giving adequate opportunity to all the parties and uninfluenced from the observations made hereinabove. The Registry is directed to send the record of the case, alongwith a copy of this judgment, to the Tribunal forthwith so that the same reaches the Tribunal well before the date fixed.

15. The appeal stands disposed of accordingly.

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

National Insurance Company Ltd. .....Appellant
Versus
Smt. Rama @ Babita & others .....Respondents

FAO No.457 of 2007
Date of decision: 03.06.2016

Motor Vehicles Act, 1988- Section 166- Claimants were the victims of motor vehicle accident which was caused by the driver while driving Mahindra Max- Compensation of Rs. 5,86,000/- along with interest @ 7.5 % was awarded by the Tribunal- held, that the insurer had not led any evidence to prove the breach of terms and conditions of the policy and it was rightly held liable to pay the compensation- appeal dismissed. (Para 6-9)

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Nishant Kumar, Advocate.
For the respondents: Mr.Lakshay Thakur, Advocate, for respondents No. 1 to 3.
Nemo for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is on the Board of this Court for the last about 9 years, is a terrible commentary on the judicial process.

2. The claimants invoked the jurisdiction of Motor Accident Claims Tribunal (II), Mandi, H.P., Camp at Karsog, (for short, "the Tribunal") by the medium of Claim Petition No.104 of 2003, titled Smt. Rama alias Babita & others vs. Sh. Ramesh Kumar & others on the ground that they became victims of vehicular accident, which was caused by the driver, namely, Rakesh Kumar, while driving Mahindra Max, bearing registration No.HR-62-0606, on 10.8.2003, at about 5.30 A.M., near Datyar on Chandigarh-Shimla road, in which Parma Nand sustained injuries and succumbed to the injuries, for grant of compensation on the grounds taken in the memo of claim petition.

3. The respondents, in the claim petition, resisted the same on the grounds in the respective memo of objections.

4. Following issues came to be framed:

"1. Whether Shri Parma Nand died due to rash and negligent driving of vehicle No.HR-62-0606 on 10-8-2003 at about 5.30 A.M. at place near Datyar on National Highway-22 Chandigarh Shimla, being driven by respondent No.2 (Rakesh Kumar) 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 respondent No.2 was not having a valid and effective driving licence at the time of accident? OPR-3.

4. Whether the offending vehicle was being driven in contravention of the terms and conditions of the Insurance Policy? OPR-3.

5. Releif."

5. Parties have led evidence.

6. The Tribunal, after scanning the evidence, oral as well as documentary, vide judgment and award dated 8th November, 2006, awarded compensation to the tune of Rs.5,86,000/- alongwith interest at the rate of 7½ % per annum and saddled the insurer with liability (for short, the "impugned award").

7. The insurer has not led any evidence, thus, has failed to discharge the onus to prove issues No.3 and 4, which came to be decided against the insurer, in terms of paras 25 and 26 of the impugned award.

8. I have gone through the findings recorded by the Tribunal, are well reasoned, need no interference.

9. Having said so, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

10. The 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 payees' account cheque or by depositing the same in their respective bank accounts.

11. 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 Company Ltd. .....Appellant

Versus

Smt. Babita Kumari & others ..... Respondents

FAO No.537 of 2007
Date of decision: 03.06.2016

Motor Vehicles Act, 1988- Section 149- Sitting capacity of the tractor was 2+1 which means that risk of two labourers and one driver was covered- driver has a valid driving license- insurer had failed to prove the breach of terms and conditions of the insurance policy- the insurer was rightly held liable to pay compensation by the Tribunal- appeal dismissed. (Para- 3 to 9)

For the appellant: Ms. Shilpa Sood, Advocate.
For the respondents: Mr.Sanjay Dutt Vasudeva, Advocate, for respondents No.1, 3 and 4.
Nemo for respondents No.2 & 5 to 9.
Mr.Naveen K. Bhardwaj, Advocate, for respondent No.10.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award and judgment, dated 31st August, 2007, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala, H.P., (for short, "the Tribunal") in MACP No.45-K/2002, titled Smt. Babita Kumari & others vs. Karam Chand & others, whereby a sum of Rs.4,57,000/-alongwith interest at the rate of 7½% 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, owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. The only dispute is whether the insurer came to be rightly saddled with liability? The dispute revolves around issues No.2 to 4.

4. The Insurance Policy is on the file as Ext.RX, which is not in dispute. Perusal of the same does disclose that the seating capacity of the offending vehicle i.e. Tractor, bearing registration No.HP-40-658, was '3', i.e., '2+1'. Meaning thereby the risk of two labourers and one driver was covered.

5. It was for the insurer to plead and prove that the owner-insured has committed breach of the terms and conditions of the insurance policy and the mandate of Section 149 of the Motor Vehicles Act, 1988 (for short, "the M.V. Act"), has not led any evidence.

6. However, the Tribunal has made discussion in paras 10 to 14 of the impugned award and held that the driver was having a valid and effective driving licence, the owner-insured has not committed any willful breach, thus, the insurer is to be saddled with liability.

7. The Tribunal, while determining issue No.4, has rightly recorded finding in para 17 of the impugned award that the offending vehicle was insured with the insurer.

8. Viewed thus, the Tribunal has rightly made the impugned award, needs no interference.

9. Having said so, the impugned award is upheld and the appeal is dismissed.

10. The 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 payees' account cheque or by depositing the same in their respective bank accounts.

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

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

P.B.Anadam then Managing Director of Jakhau
Salt Company Private Limited. ...Petitioner.

Vs.

State of HP and others. ...Non-petitioners.

Cr.MMO No. 264 of 2014.
Order reserved on: 29.4.2016.
Date of Order: June 3, 2016.

Prevention of Food Adulteration Act, 1954- Section 16 (1) (a) (i)- Food Inspector took sample of iodized salt against the payment of Rs. 21- the salt was found to be adulterated- notice of the accusation was put against the proprietor - an application for impleading the manufacturer was filed which was allowed and petitioner was impleaded- held, that the plea of the petitioner that company had made nomination is not sufficient as the nomination was made by a different company- the company was summoned but necessary steps were not taken to ensure its presence- the question whether the offence was committed with the consent or connivance of director, manager or Secretary or any other officer of the company cannot be decided at this stage- petition dismissed and the trial court directed to ensure the presence of the company and to dispose of the complaint in accordance with law. (Para-6 to 10)

Cases referred:

State (Delhi Admn.) Vs. I.K.Nangia and another, AIR 1979 SC 1977
Delhi Cloth & General Mills Co. Ltd. Vs. State of M.P and others, AIR 1996 SC 283

For petitioner: Mr. Sanjay Kumar Sharma, Advocate.
For Non-petitioner-1: Mr. R.K.Sharma, Deputy Advocate General.
For non-petitioners 2 to 4. 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 of order dated 3.3.2014 passed by learned Judicial Magistrate Ist Class Arki District Solan HP in Prevention of Food Adulteration Act case No.42/2003 of 2007 whereby petitioner is summoned as co-accused.

BRIEF FACTS OF THE CASE:

2. Food Inspector Solan/Shimla HP complainant filed complaint against accused persons namely Sunil Gupta and Krishan Chand Gupta under Section 16(1)(a)(i) read with Section 7(i) of Prevention of Food Adulteration Act 1954. It is alleged in the complaint that complainant is duly appointed as Food Inspector for Arki Sub Division District Solan and District Shimla HP. It is further alleged in the complaint that on 29.3.2007 at about 1 PM Sh Sunil Gupta was conducting business in the shop in the capacity of salesman on behalf of co-accused Krishan Chand proprietor and 150x1Kg packets of iodized salt were kept for sale to general public for human consumption. It is further alleged in the complaint that Food Inspector disclosed his identity and issued notice in form VI to accused person and declared his intention to take sample of iodized salt against payment of Rs.21/- for analysis purpose. It is further alleged in the complaint that after completing all formalities sample was sent for opinion of public analyst. It is further alleged that as per report of public analyst Kandaghat iodized contents of the sample was 9.54 parts per million against minimum prescribed standard of 15 parts per million and sample of iodized salt was declared adulterated by public analyst Kandaghat HP.

3. Learned Trial Court issued notice of accusation to accused Sunil Gupta and Krishan Chand and Sunil Gupta and Krishan Chand filed application under Section 20-A of Prevention of Food Adulteration Act 1954 alleging that packets of salt purchased from M/s Anju Enterprises Subathu through Dinesh Kumar proprietor vide invoice bill No. AE-6964. It is further alleged that M/s Anju Enterprises Subathu be impleaded as co-accused in present case. Learned Trial Court on the basis of invoice bill impleaded M/s Anju Enterprises Subathu through Dinesh Kumar proprietor as co accused in present case. Thereafter co-accused Dinesh Kumar filed application under Section 20-A of Prevention of Food Adulteration Act 1954 to implead Jhakhau Salt Company Private Limited Green Park Plot No.113-14 Sector 8 Tagore Road Gandhi Dham Gujarat through Rajesh Shrivastva. Thereafter Rajesh Shrivastva was impleaded as co-accused in present case. Thereafter Rajesh Shrivastva filed Cr.MMO No. 4031 of 2013 title Rajesh Srivastava Vs. State of HP and others before Hon'ble High Court of HP. Hon'ble High Court of HP on dated 31.10.2013 quashed impleadment order of Rajesh Srivastava and directed learned trial Court to decide impleadment matter in view of law laid down by Hon'ble Apex Court in R.Banerjee and others Vs. H.D.Dubey and others AIR 1992 SC 1168. Thereafter learned Trial Court discharged co-accused Rajesh Srivastava in present case and impleaded P.B.Anadam present petitioner as co-accused in present case on dated 3.3.2014. Feeling aggrieved against impleadment order as co-accused Sh P.B.Anadam petitioner filed present petition under Section 482 Cr.PC.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of State. Court also perused entire record carefully.

5. Following points arise for determination in present petition:

1. Whether petition filed by petitioner is liable to be accepted as mentioned in memorandum of ground of petition?.

2. Final order.

Findings on point No.1 with reasons:

6. Submission of learned Advocate appearing on behalf of petitioner that at the time of offence the petitioner was director of the company but company has authorized Sh Anil Shrimali as quality/production incharge of the company placed on record and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner P.B. Anadam did not file any application under Section 20A of Prevention of Food Adulteration Act 1954 for impleadment of Sh Anil Shrimali as co-accused in present case before learned Trial Court. No cogent reason has been assigned by petitioner P.N.Anadam for not filing application under Section 20A of Prevention of Food Adulteration Act 1954 before learned Trial Court. Court is of the opinion that it is expedient in the ends of justice to direct petitioner to file application before learned Trial Court under Section 20A of Prevention of Food Adulteration Act 1954. Court has also carefully perused copy of nomination of persons by company under Prevention of Food Adulteration Act 1954 placed on record nominating Sh Anil Shrimali as production incharge and quality controller. Sh Anil Shrimali was appointed as production incharge and quality controller of M/s Wellbrines Chemicals Ltd on dated 4.3.2003. As per complaint filed by food inspector 150x1kg packets of iodized salt were manufactured by Allwyn Brinechem Private Limited Navaqav Bhachau Kutch Gujarat. Petitioner P.N.Anadam did not place on record any document in order to prove that Sh Anil Shrimali was appointed as quality controller by manufacturer company namely Allwyn Brinechem Private Limited. Company Allwyn Brinechem Private Limited and company M/s Wellbrines Chemicals Ltd are two separate companies. There is no evidence on record in order to prove that company Allwyn Brinechem Private Limited is taken over by M/s Wellbrines Chemicals Private Limited and same is complicated issue of fact which cannot be decided in present petition filed under Section 482 Cr.PC.

7. Submission of learned Advocate appearing on behalf of petitioner that although learned Trial Court on dated 31.1.2013 impleaded Allwyan Brinechem Private Limited company as co-accused and issued summon but did not take necessary steps to procure the presence of Allwyn Brinechem Private Limited as co-accused in present case is accepted for the reasons hereinafter mentioned. It is proved on record that learned Trial Court vide order dated 31.1.2013 impleaded Allwyn Brinechem Pvt. Ltd manufacturing company as co-accused in the case and issued summon to manufacturing company namely Allwyn Brinechem Private Limited but thereafter learned Trial Court did not use any coercive step for the presence of Allwyn Brinechem Private Limited. It is held that learned Trial Court was under legal obligation to use coercive step for the service of Allwyn Brinechem Private Limited in present case.

8. Submission of learned Advocate appearing on behalf of petitioner that as per Prevention of Food Adulteration Act 1954 person nominated by company is only liable and director, manager, secretary or other officer of the company are not liable is rejected being devoid of any force for the reasons hereinafter mentioned. As per section 17(4) of Prevention of Food Adulteration Act 1954 director, manager, secretary or other officer of the company are also liable if it is proved by prosecution that offence was committed with the consent or connivance of director, manager, secretary or other officer of company or if it is proved that offence is attributable to negligence on the part of director, manager, secretary or other officer of the company. See AIR 1979 SC 1977 title State (Delhi Admn.) Vs. I.K.Nangia and another. It was held in case reported in AIR 1996 SC 283 title Delhi Cloth & General Mills Co. Ltd. Vs. State of M.P and others that joint trial of manufacturer, distributor or dealer for same offence is permissible under Section 20A of Prevention of Food Adulteration Act 1954.

9. Fact whether offence was committed with consent or connivance of director, manager or secretary or any other officer of company cannot be decided in proceedings under Section 482 Cr.PC and same fact will be decided by learned Trial Court after giving due opportunity to both parties to prove its case. It is well settled law that complicated question of fact cannot be decided in proceedings filed under Section 482 Cr.PC. It is well settled law that complicated question of fact is always decided by learned Trial Court after giving due opportunity

to both parties to lead evidence in support of their case. In view of above stated facts and case law cited supra point No.1 is decided accordingly.

Point No.2 Final order.

10. In view of finding on point No.1 petition is partly allowed. Prayer No.1 declined in the ends of justice. Prayer No.2 allowed in the ends of justice. Learned Trial Court is directed to issue summon/warrant to manufacturer M/s Allwyn Brinechem Pvt. Ltd in accordance with law and thereafter dispose of the present case in accordance with law expeditiously within three months because present complaint is pending since 2007 and requires expeditious disposal. Parties are directed to appear before learned Trial Court on 29th June 2016. File of learned Trial Court along with certified copy of order be sent back forthwith. Petition filed under Section 482 Cr.PC is disposed of. All pending application(s) if any also disposed of.

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

Pawan Sharma ...Petitioner.

Versus

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

CWP No. 3160 of 2015
Date of decision: 3rd June, 2016.

Constitution of India, 1950- Article 226- Petitioner filed an application for correcting dimensions of his land – the correction was ordered- there was some error in the order on which the petitioner filed a review petition- respondent no. 3 sought permission of respondent no. 2 which was declined on the ground that file could not be reopened after the lapse of one year and 6 months- held, that when the error was committed by the respondent no. 3, the delay could be no ground for not correcting the same - procedure is handmaid of justice and should not be used to defeat the justice - order passed by respondent no. 2 set-aside and respondent no. 3 directed to carry out correction in accordance with law. (Para- 7 to 23)

Cases referred:

Sangram Singh vs. Election Tribunal, Kotah AIR 1955, S.C. 425
Balwant Singh Bhagwan Singh and another vs. Firm Raj Singh Baldev Kishen AIR 1969 Punjab and Haryana 197
State of Gujarat vs. Ramprakash P. Puri, 1970 (2) SCR 875
Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774
Shreenath and Another vs. Rajesh and others AIR 1998 SC 1827).
(R.N. Jadi & Brothers vs. Subhash Chandra, 2007) 9 Scale 202
Sambhaji and others vs. Gangabai and others (2008) 17 SCC 117,
Rajendra Prasad Gupta vs. Prakash Chandra Mishra and others, 2011 (1) Scale 469
Mahadev Govind Gharge and others vs. The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, 2011 (6) Scale 1

For the Petitioner : Mr. Ajay Sharma, Advocate.
For the Respondents : Ms. Meenakshi Sharma, Additional Advocate General, with Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral*)

This writ petition has been filed with the following substantive prayer:

"(i) That an appropriate writ, order or directions may kindly be issued and the impugned order dated 3.9.2014, Annexure P-5, passed by respondent No.2 may kindly be quashed and set-aside thereby issuing command to respondent No.2 to grant approval as is sought by respondent No.3 vide his orders dated 31.7.2014 with further directions to respondent No.3 to decide the question of review as is sought by the petitioner vide petition pending before him within time as deemed by this Hon'ble Court, in the interest of law and justice."

2. The undisputed facts are that the petitioner filed an application for correction of 'Meterkhan' of the land as per details given in the application. The respondent No.3 vide order dated 11.2.2013 ordered the said correction. However, there were certain errors in the said order, constraining the petitioner to file a review petition before respondent No.3.

3. The application was processed and the respondent No.3 was convinced that there was error on his part, but since he was not competent to carry out the corrections and was required to seek permission from respondent No.2 before carrying out the correction, he accordingly sought the requisite permission, which admittedly has been declined by respondent No. 2 on the ground that the case could not be re-opened/reviewed after lapse of a period of almost 1 year and 6 months.

4. The respondents have though filed their reply, but as observed earlier, the factual position has not been disputed.

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

5. The zimini orders annexed as Annexure P-4 with the writ petition reveal that the review was sought by respondent No.3 from respondent No.2 on the ground that the mistake in fact had been committed in his office as is evident from N-4 which reads thus:

".....Discussed on 31.7.2014. Review orders be sought from Worthy Divisional Commissioner in this matter, since the mistake has been made on the part of our office."

6. The respondent No.3 had unequivocally admitted and acknowledged the mistake to be on the part of its office, therefore, the fact that the application was moved after a period of one year and six months, was really of no consequence.

7. The proposition that Rules of Procedure are handmaid of justice and cannot take away the residuary power in Judges to act ex debito justitiae, where otherwise it would be wholly inequitable, is by now well founded.

8. It must be remembered that the Courts are respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so and further taking into consideration the fact that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done.

9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or

any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

10. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

11. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

12. It is useful to quote the oft-quoted passage of Lord Penzance in 1879 (4) AC 504:

> *"Procedure is but the machinery of the law after all the channel and means whereby law is administered and justice reached. It strongly departs from its office when in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern when it ought to subserve."*

13. In the matter of ***Sangram Singh*** vs. ***Election Tribunal, Kotah reported in AIR 1955, S.C. 425***, the Hon'ble Apex Court has observed as under:

> *"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends, not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provide always that justice is done to both sides) less the very means designed for the furtherance of justice be used to frustrate it."*
>
> *"Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course there must be expectations and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso our laws of procedure should be construed, wherever that is reasonably possible in the light of that principle."*

14. In ***Balwant Singh Bhagwan Singh and another*** vs**. *Firm Raj Singh Baldev Kishen*** reported in ***AIR 1969 Punjab and Haryana 197*** it was held that:

> *"Promptitude and despatch in the dispensation of justice is a desirable thing but not at the cost of justice. All rules of procedure are nothing but handmaids of justice. They cannot be construed in a manner, which would hamper justice. As a general rule, evidence should never be shut out. The fullest opportunity should always be given to the parties to give evidence if the justice of the case requires it. It is immaterial if the original omission to give evidence or to deposit process fee arises from negligence or carelessness."*

15. In the matter of ***State of Gujarat*** vs**. *Ramprakash P. Puri,*** reported in ***1970 (2) SCR 875,*** the Hon'ble Apex Court has held that:

> *"Procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause."*

16. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. - Justice is the goal of jurisprudence – processual, as much as substantive. (***See Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774).***

17. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See ***Shreenath and Another vs. Rajesh and others AIR 1998 SC 1827***).

18. The Hon'ble Supreme Court in ***(2007) 9 Scale 202 (R.N. Jadi & Brothers vs. Subhash Chandra***), considered the procedural law vis-à-vis substantive law and observed as under:

> *"9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."*

19. Procedure is only handmaid of Justice:- All the rules of procedure are the handmaids of justice. Any interpretation which eludes substantive justice is not to be followed. Observing that procedure law is not to be a tyrant, but a servant, in ***Sambhaji and others*** vs. ***Gangabai and others (2008) 17 SCC 117,*** the Hon'ble Supreme Court held as under:

> *"6.(14) Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."*

20. In ***2011 (1) Scale 469 Rajendra Prasad Gupta*** vs. ***Prakash Chandra Mishra and others,*** the issue before the Hon'ble Supreme Court was as to whether an application will be maintainable before the trial Court to withdraw the application filed earlier for withdrawal of the suit. The trial Court dismissed the application as not maintainable. The High Court held that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without there being any order on the withdrawal application and as such another application at a later point of time to withdraw the suit was not maintainable. When the matter was taken up in appeal, the Hon'ble Supreme Court disagreed with the views expressed by the High Court. While allowing the appeal, the Hon'ble Supreme Court observed thus:

> *"5. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted."*

21. The Hon'ble Supreme Court in ***2011 (6) Scale 1 Mahadev Govind Gharge and others*** vs. ***The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka***, reiterated the legal position regarding procedural law and observed:

> *"28. Thus, it is an undisputed principle of law that the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold....."*

22. Bearing in mind the aforesaid exposition of law, the respondent No.2 was required to adopt a liberal, pragmatic justice oriented and non-pedantic approach in the matter, more particularly, when respondent No.3 himself had acknowledged the mistake committed on the part of its office.

23. In view of the discussion, the impugned order dated 3.9.2014 (Annexure P-5) passed by respondent No.2 is not sustainable and is accordingly set-aside. Deemed approval is granted to respondent No.3 and he is further directed to carry out necessary corrections as expeditiously as possible and in no event later than **31st December, 2016.** However, before proceeding with the matter, he shall issue notice of appearance to the concerned parties and only after hearing them would he proceed further in the matter.

With the aforesaid observations, the petition stands disposed of, so also the pending application(s), if any, leaving the parties to bear their costs.

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

FAOs No. 547 & 603 of 2008
Decided on: 03.06.2016

FAO No. 547 of 2008

Prem Singh ...Appellant.

Versus

Bimla Devi and others ...Respondents.

FAO No. 603 of 2008

Ram Pal and another ...Appellants.

Versus

Bimla Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Tribunal granted the right of recovery to the insurer- held, in appeal that it was for the insurer to plead and prove that the driver did not have a valid driving license at the time of the accident – the insurer had not led any evidence to prove this fact – the insurer had not even asked the legal representative to place on record the driving license or to examine any official from the registration and licensing authority- the insurance policy was duly proved and thus the insurer is liable to indemnify the insured- Tribunal had fallen in error in exonerating the insurer from the liability- appeal allowed and insurer saddled with liability. (Para 12-15)

FAO No. 547 of 2008:

For the appellant: Mr. Manoj Bagga, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondent No. 1.
Mr. Tara Singh Chauhan, Advocate, for respondents No. 2 and 4.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

FAO No. 603 of 2008:

For the appellants: Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondent No. 1.
Mr. Manoj Bagga, Advocate, for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

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

Both these appeals are outcome of judgment and award, dated 13th February, 2004, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (for short "the

Tribunal") in MAC Petition No. 29 of 1999, titled as Smt. Bimla Devi versus Surinder Kumar and others, whereby compensation to the tune of ₹ 2,45,400/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and the insurer was directed to satisfy the award with a right of recovery (for short "the impugned award").

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

3. The appellants in both the appeals, i.e. the driver and the owners-insured of the offending vehicle, have questioned the impugned award on the ground that the Tribunal has fallen in an error in granting right of recovery to the insurer.

4. Thus, the only question to be determined in both these appeals is – whether the Tribunal has rightly recorded the findings viz-a-viz issues No. 3 to 5? The answer is in the negative for the following reasons:

5. The claimant invoked the jurisdiction of the Tribunal for grant of compensation, as per the break-ups given in the claim petition on the ground that she became the victim of the motor vehicular accident, which was caused by the driver, namely Surinder Kumar, while driving tractor trolley, bearing registration No. PB-16-0466, rashly and negligently, on 10th September, 1998, at about 2.30 P.M. at Village Raisari, Tehsil and District Una, in which Tilak Raj sustained injuries and succumbed to the injuries.

6. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of the objections.

7. Following issues came to be framed by the Tribunal on 17th March, 2003:

> *"1. Whether the death of Tilak Raj took place due to rash and negligent driving of tractor No. PB-16-466 by respondent Surinder Kumar? OPP*
>
> *2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and against whom? OPP*
>
> *3. Whether this Court has no jurisdiction to try the petition, as alleged? OPR*
>
> *4. Whether the driver of the tractor was not holding a valid and effective driving licence at the relevant time, if so, its effect? OPR-3*
>
> *5. Whether the respondent Insurance Company is not liable to indemnify the owner/insurer as alleged? OPR-3*
>
> *6. Relief."*

8. Parties have led evidence.

Issues No. 1 and 2:

9. The Tribunal after scanning the evidence, oral as well as documentary, has rightly held that the accident has taken place due to the rash and negligent driving of offending vehicle by its driver. Even otherwise, the findings returned by the Tribunal on issues No. 1 and 2 have not been questioned, thus, the same are accordingly upheld.

Issue No. 3:

10. Admittedly, the accident has taken place due to the use of the motor vehicle at Village Raisari, Tehsil and District Una and the claimant is also the resident of the said area. Thus, the Tribunal has the jurisdiction to try the claim petition. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issues No. 4 and 5:

11. Both these issues are to be determined together being interlinked and interdependent.

12. 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 relevant point of time. The insurer has not led any evidence to prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the offending vehicle at the time of the accident. The insurer has not even made an effort to ask the legal representatives of the deceased-driver to place on record the driving licence or to examine any official from the office of the Registering and Licensing Authority, thus, has failed to prove the same.

13. The factum of insurance is not in dispute. Even otherwise, the insurance policy, Ext. RX, is on the file, which does disclose that the offending vehicle was insured at the relevant point of time.

14. In the given circumstances, it cannot be said that the owner-insured has committed willful breach of the terms and conditions of the insurance policy.

15. Viewed thus, the Tribunal has fallen in an error in discharging the insurer. Accordingly, the findings returned by the Tribunal on issues No. 4 and 5 are set aside and the insurer is saddled with liability.

16. At this stage, learned counsel for the insurer stated at the Bar that the awarded amount has already been deposited before the Tribunal. Mr. Jagdish Thakur, learned counsel for the claimant, also stated at the Bar that his client has already received the awarded amount. Their statements are taken on record.

17. Having said so, the impugned award is modified, as indicated hereinabove and the appeals are allowed.

18. 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.

Ram Dhan and another .....Appellants.

Versus

Mehar Chand and another ....Respondents

FAO (MVA) No. 328 of 2010
Date of decision: 3rd June, 2016.

Motor Vehicles Act, 1988- Section 149- Tribunal had granted the right of recovery to insurer-insured had not placed on record certain documents for which he filed an application - the route permit was also not placed on record - hence, the case remanded to the Tribunal to decide the issue no. 4 afresh after affording an opportunity to the owner as well as insurer to lead evidence in support of their contentions. (Para 4-7)

For the appellants: Ms. Anu Tuli Azta, Advocate.
For the respondents: Mr.Naveen K. Bhardwaj, 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)*

This appeal is directed against the judgment and award dated 19.5.2010, made by the Motor Accident Claims Tribunal, Kullu, H.P. in Claim Petition No. 35 of 2008, titled *Mehar Chand versus Shri Ram Dhan and others*, for short "the Tribunal", whereby compensation

to the tune of Rs.2,31,000/- alongwith interest @ 7% per annum came to be granted in favour of the claimant, and insurer was directed to satisfy the award with right of recovery from the insured/appellant herein, hereinafter referred to as "the impugned award", for short.

2. Insurer, claimant and driver have not questioned the impugned award on any ground. Thus, the same has attained the finality so far as it relates to them.

3. Only the owner Ram Dhan has questioned the impugned award on the ground that the Tribunal has fallen in an error in granting the right of recovery. Thus, the only question to be determined in this appeal is whether the right of recovery has been rightly granted?

4. Unfortunately, the appellant/insured has not placed on record certain documents which he is intending to place on record now by the medium of CMP No.681 of 2010. It is moot question whether that can be taken on record at this stage.

5. The route permit is also not on record. It is also a question whether plying of the vehicle in breach of route permit can be said to be a breach. However, I deem it proper to set aside the impugned award so far as it relates to granting the right of recovery and findings on issue No.4.

6. It is apt to record herein that the amount awarded is adequate.

7. The Tribunal is directed to decide issue No.4 afresh, after affording opportunity to the owner as well as the insurer to lead evidence in support of their contentions.

8. At this stage, Mr. B.M. Chauhan, Advocate, stated at the Bar that the amount stands already deposited before the Tribunal. The amount be released in favour of the claimant, if not already, released, which shall be subject to the findings returned on issue No. 4 by the Tribunal.

9. Parties are directed to cause appearance before the Tribunal on **27th June, 2016.**

10. Let the entire exercise be done by the Tribunal, within two months w.e.f. 27.6.2016.

11. The appeal is accordingly, disposed of. 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.

Sarvan Kumar .....Appellant
Versus
Asha Kumari and others ..... Respondents

FAO No.417 of 2010.
Reserved on: 27.05.2016.
Pronounced on : 03.06.2016

Motor Vehicles Act, 1988- Section 149- Tribunal held that accident had taken place due to rash and negligent driving of drivers of both the offending vehicles- driver of the offending bus was having a valid and effective driving license and the driver of offending van was not having valid and effective driving license- insurer of the offending bus and owner and driver of the offending van were saddled with liability in the ratio of 50:50- held, that it was specifically pleaded in the claim petition that accident had occurred as a result of contributory negligence on the part of the drivers of the offending vehicles - it was duly proved from the pleadings of the parties and

statements of witnesses that accident was the outcome of contributory negligence - insurer of the bus was rightly held liable to pay compensation of 50% - owner of the van had specifically pleaded that the driver of the van had a valid license- copy of the license was also placed on record- once the copy of the license was placed on record, it was for the insurer to prove that the driver did not have a valid and effective driving license at the time of the accident - however, no evidence was led by the insurer to this effect - even the police had not booked the driver for violation of the provisions of M.V. Act which shows that the driver had a valid driving license at the time of accident- Insurance policy was duly proved and thus, the insurer was liable to indemnify the insured - risk of four passengers was covered hence, insurer held liable to pay the compensation to the claimants and to indemnify the insured-appeal allowed. (Para 10-21)

For the appellant:	Mr.Prince Chauhan, Advocate, vice Mr.Rahul Mahajan, Advocate.
For the respondents:	Ms.Anjali Soni Verma, Advocate, for respondents No.1 to 4. Nemo for respondents No.5 and 6. Mr.Ajay Chandel, Advocate, for respondents No.7 and 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is the award, dated 8th July, 2010, passed by the Motor Accident Claims Tribunal(II), Kangra at Dharamshala, H.P., (for short, the Tribunal), in Claim Petition No.12-P/2006, titled Asha Kumari and others vs. Sanik Bus Service and others, whereby the claim petition was allowed and compensation to the tune of Rs.6,60,800/-, with interest at the rate of 7% from the date of filing of the petition till realization, came to be awarded in favour of the claimants and original respondents No.3 i.e. insurer of the bus and original respondents No.4 & 5 i.e. the owner and the driver of Maruti Van, came to be saddled with the liability in the ratio of 50 : 50, (for short, the impugned award).

2. The claimants, the driver of the Maruti Van, the driver of the bus, the owner/insured of the bus and the insurers of both the offending vehicles, have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved and dissatisfied, the appellant i.e. the owner of the Maruti Van has questioned the impugned award on the ground that the Tribunal has wrongly saddled him with 50% liability, rather the insurer had to be saddled.

4. Thus, the only question needs to be determined in this appeal is – Whether the Tribunal has rightly saddled the owner of the Maruti Van/appellant with the liability?

5. In order to answer the said question, a brief reference may be made to the facts of the case.

6. Claimants, being the wife, daughters and son of deceased Ashok Kumar, filed the Claim Petition under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act) before the Tribunal for grant of compensation to the tune of Rs.15.00 lacs, as per the break-ups given in the claim petition. It was averred in the claim petition that on 19th August, 2005, the deceased Ashok Kumar was on his way to his village Darang in Maruti Van bearing No.HP-39-1748, being driven by its driver, namely, Trilok Chand, and at about 5.40 P.M., when the said Van reached near Nalti, had a head on collision with bus bearing No.HP-37-3149, being driven by its driver, namely, Sansar Chand, as a result of which Ashok Kumar sustained multiple injuries and consequently died. It was specifically averred in the claim petition that both the offending vehicles were being driven rashly and negligently due to which the accident had occurred. An FIR bearing No.220/05 was registered at Police Station, Palampur. On such averments, the claimants filed the claim petition.

7. The respondents resisted the claim petition by filing replies.

8. On the pleadings of the parties, the following issues came to be settled:

"1. Whether the death of the deceased was caused by the respondents No.2 and 5 by striking the offending vehicles HP-39-1748 and HP-39-3149 against each other on 19.8.05 near Nalti Bridge Fared? OPP

2. If issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled to being legal heirs of the deceased and from whom? OPP.

3. Whether the petition is not maintainable in the present form, as alleged? OPR-1,2,4 and 5.

4. Whether the petition is bad for mis-joinder of necessary parties? OPR-4 and 5.

5. Whether the accident had been committed by respondent No.2 by striking the bus against the Maruti Van HP-39-1748 being driven by respondents No.5? If so, its effect? OPR-4 and 5.

6. Whether the respondent No.2 was not holding valid and effective driving licence to drive the vehicle as alleged and the respondents 1 and 2 had thus violated the terms and conditions of the insurance policy, as alleged? If so, its effect? OPR-3.

7. Whether the petition is collusive in between the petitioners and the respondents 1, 2, 4 and 5 as alleged? OPR-3.

8. Whether the respondents 1 and 2 were plying the offending vehicle NO.HP-37-3149 without fitness of registration certificate, route permit and violated the terms and conditions of the insurance policy, as alleged? OPR-3

9. Whether the respondent No.5 was not having valid and effective driving licence to drive the offending vehicle HP-39-1748 as alleged? If so, its effect? OPR-6

10. Whether the petition is collusive in between the petitioners and respondents 1, 2, 4 and 5, as alleged? If so, its effect? OPR-6

11. Whether the offending vehicle HP-39-1748 was not insured with respt. No.6 and, therefore, the petition is not maintainable against it? If so, its effect? OPR-6

12. Whether the offending vehicle HP-39-1748 was being plied without valid and proper documents and the deceased was traveling in this vehicle as a gratuitous passenger? If so, its effect? OPR-6.

13. Relief."

9. In order to prove their case, the claimants examined PW-1 Dr.Veena Sharma, PW-2 LHC Avnesh Kumar, PW-3 Asha Kumari (Claimant No.1), PW-4 Suresh Kumar and PW-5 Jitender Kumar. On the other hand, respondents in the claim petition also examined as many as five witnesses, namely, RW-1 Sansar Chand (driver of the offending bus), RW-2 Hukam Singh, RW-3 Garib Singh (owner of the offending bus), RW-4 Suresh Kumar and RW-5 Sarvan Kumar (owner of the offending Van).

10. The Tribunal, after examining the pleadings of the parties and the evidence, held that the accident had occurred due to the rash and negligent driving of the drivers of both the offending vehicles (bus and Van). It was held by the Tribunal that the driver of the offending bus was having a valid and effective driving licence and that the driver of the offending Van, namely, Trilok Chand, was not having a valid and effective driving licence, at the time of accident, and since the accident was the outcome of contributory negligence, therefore, the insurer of the offending bus and the owner and the driver of the offending Van were saddled by the Tribunal with the liability in the ratio of 50 : 50.

11. Learned counsel for the appellant/insured argued that the Tribunal has fallen into an error in holding that the driver of the offending Van was not having a valid and effective driving licence at the time of accident. The insured had specifically pleaded in the reply filed to the claim petition that the driver of the offending Van was having a valid and effective driving licence and also placed on record, alongwith the reply, a copy of the driving licence. Thus, it was

submitted that it was for the insurer to plead and prove, by leading evidence, that the driver was not having a valid and effective driving licence. It was further submitted that in the absence of any evidence led by the insurer to that effect, it can safely be concluded that the insurer has not discharged the onus cast upon it and therefore, the impugned award suffers from material illegality and is required to be set aside to that effect.

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

13. The claimants in the claim petition have specifically pleaded that the accident had occurred as a result of contributory negligence on the part of the drivers of the offending vehicles. After referring to the pleadings of the parties and also to the statements of the witnesses, the Tribunal has rightly concluded in paragraph 13 of the impugned award that the accident was the outcome of contributory negligence and insurer of the offending bus rightly came to be saddled with the liability to the extent of 50%.

14. The driver and the owner of the offending Van filed joint reply to the claim petition, in which, in paragraph 15, they have specifically pleaded that the offending Van was duly insured. They also attached alongwith the reply copies of the registration certificate, driving licence and insurance policy. It is apt to reproduce paragraph 15 of the reply hereunder:

> *"Para 15 of the petition, it is submitted that van No.HP-39-1748 was insured with the Oriental Insurance Co. Ltd., vide police No.263201/2005/5165 w.e.f. 17-3-2005 to 16-3-2006. The copy of R.C., D.L. and insurance policy are annexed herewith."*

15. Once the owner/appellant had specifically pleaded in the reply and also placed on record a copy of the Driving Licence of the driver of the offending Van, namely, Trilok Chand, it was for the insurer i.e. Oriental Insurance Company Ltd. 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.

16. The learned counsel for the insurer was not able to point out from the record that the insurer had taken steps to prove that the driver of the offending Van was not having a valid and effective driving licence at the time of accident.

17. Apart from it, the insurer was also required to plead and prove that the insured/owner had committed willful breach, in which also it has failed.

18. A perusal of the record shows that in regard to the accident, FIR Ext.PW-2/A was registered in Police Station, Palampur against the drivers of both the offending vehicles. However, there is no murmur in the FIR that the driver of the offending Van was not having a valid and effective driving licence. Had it been so, the driver of the offending Van would have been booked for commission of offence punishable under the Motor Vehicles Act, 1988.

19. For the reasons enumerated hereinabove, it can safely be concluded that the insurer has failed to plead and prove that the driver of the offending Van was not having a valid and effective driving licence and that the owner/appellant had committed any willful breach. Accordingly, the findings returned by the Tribunal on issue No.9 are set aside.

20. As far as issue No.11 is concerned, the factum of insurance is admitted. Still, this issue was decided in favour of the insurer by holding that the insurer was not liable to compensate the owner. The insurance policy of the offending Van has been placed on record as Ext.RX, which does disclose that the seating capacity of the said Van has been mentioned as four persons, meaning thereby that the risk of four persons was covered. It was never the case of the insurer that the number of passengers traveling in the offending Van was exceeding the permitted limit and, therefore, the deceased can be termed as a gratuitous passenger. The claimants, in the claim petition, have specifically pleaded that the deceased was traveling in the offending Van at the time of accident. Thus, by no stretch of imagination, the deceased can be treated as

gratuitous passenger. Moreover, the onus to prove the said factum was also upon the insurer, which it has failed to discharge.

21. Having glance of the above discussion, the impugned award is liable to be set aside so far as it pertains to saddling the owner/appellant with the liability. Accordingly, the appeal is allowed and the insurer of the offending Van i.e. Oriental Insurance Company Ltd. is saddled with the liability to the extent of 50%.

22. The insurer is directed to deposit the amount, alongwith interest as awarded by the Tribunal, within a period of eight weeks from today and on deposit, the Registry is directed to release the entire amount in favour of the claimants forthwith through their bank account(s), strictly in terms of the impugned award. The statutory amount deposited by the insured/appellant is awarded as costs in favour of the claimants.

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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
Ajay Kumar. ......Respondent.

Cr. Appeal No. 94 of 2011
Reserved on: 20.05.2016
Decided on: 03.06.2016

N.D.P.S. Act, 1985- Section 21- **Indian Penal Code, 1860-** Section 419- Accused started running on seeing the police party- he was apprehended and searched- 100 strips containing 10 capsules each, total 800 capsules of Spasmocip plus were recovered- accused revealed his name as V on inquiry - subsequently, his name was found to be A- accused was tried and acquitted by the trial Court- held, in appeal that PW-2, an independent witness, had not supported the prosecution version- there are contradictions regarding the time which make the prosecution version doubtful- statements of prosecution witnesses are contradicting each other- ASI of Crime Branch with whom samples were deposited was not examined to complete link evidence- statements of official witnesses are not consistent to each other- specimen seal was not produced before the Court- independent witnesses were not associated despite availability – trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 16)

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. D.S. Nainta & Mr. Virender Verma, Addl. AGs.
For the respondent: Mr. Avinash Jaryal, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The appeal is maintained by the appellant-State against the judgment of acquittal passed by learned Special Judge, Fast Track Court, Chamba, H.P., in Sessions Trial No. 22 of 2010, dated 30.10.2010, whereby the Court below has acquitted the respondent-accused (hereinafter referred as 'the accused'), for the offences under Sections 21 of the Narcotic Drugs

and Psychotropic Substances Act, 1985, (hereinafter referred to as 'NDPS') and Section 419 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

2. Briefly stating, as per the prosecution case, on 19.03.2010, HC Virender Singh alongwith HHC Kewal Krishan, Constable Mohammad Aslam, Constable Ram Parkash and Constable Rajesh Kumar was present at Ballupul near Hero Honda Agency in connection with patrolling. At about 4:30 p.m., the accused having *Pithu* of black colour on his back was seen coming towards Ballupul. On noticing the police party, the accused got perplexed and turned back and started running. On suspicion, he was overpowered by HC Virender Singh with the assistance of other police officials. Meanwhile, Pawan Kumar, son of Karam Chand, also arrived on the spot. In the presence of this witness as also other police officials, HC Virender Singh made inquiry and the accused disclosed his name as Vijay Kumar, son of Chaman Singh, resident of village Mugla, Tehsil and District Chamba. HC Virender Singh was suspicious that the accused was having narcotics, so the accused was apprised of his legal right to be searched before the Magistrate or Gazetted Officer. The accused gave his consent for search by the police present on the spot, as per memo Ex. PW-1/B. Thereafter, HC Virender Singh and other police officials and witness Pawan Kumar gave their search to the accused vide memo Ex. PW-1/A and then the search of the bag of the accused was carried out and the bag was found containing 100 strips containing 10 capsules each, total 800 capsules of ***Spasmocip plus,*** kept in a polythene envelope alongwith one carton box.

3. HC Virender Singh put the said capsules in the carton box and then bag was put in the polythene envelope, which was put in the bag and then the bag was parceled in piece of cloth and sealed with four seals of seal 'A' and taken into possession vide memo Ex. PW-1/C. Specimen of seal 'A', Ex. PW-1/F, was taken separately and the seal 'A' after use was handed over to witness Pawan Kumar. NCB forms were filled in and *rukka,* Ex. PW-10/A, was prepared and sent to Police Station Sadar, Chamba, through Constable Ram Parkash, on the basis of which FIR, Ex. PW-8/A, was registered at Police Station Sadar, Chamba. Photographs of the spot, Ex. P6 to P8 were taken with the official camera. Site plan, Ex. PW-10/B, was prepared and statements of witnesses were recorded. The accused was arrested and was communicated about the grounds of arrest vide memo, Ex. PW-1/D, and his personal search was carried out vide memo Ex. PW-1/E. The accused desired to give information of his arrest to his brother Sanjay Kumar. Sanjay Kumar disclosed the name of the accused as Ajay Kumar. Ration card, Ex. PW-10/E, was obtained and it was revealed that the name of the accused was Ajay Kumar and he had wrongly disclosed his name as Vijay Kumar, so Section 419 of IPC was added in the FIR. The accused was brought to Police Station Chamba. The case property was produced before ASI/SHO Mukesh Kumar for the purpose of resealing, who resealed the parcel with seal 'S' and specimen of seal is taken, which is Ex. PW-9/B, and facsimile was taken on NCB form and reseal memo, Ex. PW-9/C, to this effect was prepared and the case property was thereafter deposited with MHC, who made an entry in the *malkhana* register, the abstract whereof is Ex. PW-7/A. The case property was sent to FSL vide RC, Ex. PW-7/B and report of FSL, Ex. PX, was obtained. Special report of this case, Ex. PW-5/A, was prepared and sent to S.P. Chamba.

4. The prosecution in order to prove its case examined 11 witnesses.

5. The Learned Additional Advocate General has argued that persecution has proved the guilt of the accused beyond doubt and the learned Court below on the basis of minor contradictions, which generally occur due to observation power of the witnesses, has acquitted the accused. On the other hand, the learned counsel appearing on behalf of the accused has argued that the prosecution has miserably failed to prove the guilt of the accused beyond the shadow of doubt and so the judgment of the Court below needs no interference.

6. PW-1, Constable Mohammad Aslam, one of the members of the raiding party has corroborated the prosecution story and has stated that on 19.03.2010 at about 4:30 p.m., accused appeared at Ballupul when they were present near Hero Honda Agency and on seeing the police party, he turned back and tried to flee, as such, he was overpowered and in the meantime,

Pawan Kumar (PW-2) also appeared there. According to him, accused disclosed his name as Vijay and after completing codal formalities, the bag being carried by the accused was searched which was found containing a polythene bag having 100 strips, each containing eight capsules aggregating to 800 capsules of **spasmocip plus.** It has also been stated by him that one empty carton box was also recovered. Thereafter, all the capsules were put in the carton box which, in turn, was put in the bag which was parceled and sealed and taken into possession vide memo Ex. PW-1/C, which was signed by him, accused and witness Pawan Kumar. He also stated that NCB forms were also filled in on the spot, specimen of seal was taken and the seal after its use was handed over to Pawan Kumar. He also stated that *rukka* mark 'A' was prepared and sent to P.S. Chamba for registration of the case through constable Ram Parkash. Its copy was also sent to SP Chamba through the same constable and thereafter the accused was arrested and his personal search was conducted. In the cross-examination, he stated that they started from their office at 2:30 p.m. and via Sultanpur they reached at Parel at 3:30 p.m. and then they reached at Ballu bridge near Hero Honda agency at 4:15 p.m., which is at a distance of two kilo meters from Parel. It is quite strange that in order to cover a distance of less than 2 kilometers, time of 45 minutes was consumed. No explanation has come forward from him or other officials as to whey so much time was taken. His version is as that of other official witnesses, which is silent that they searched any vehicle, house etc. during said period. If so, it is apparent that he as also the other police officials have concealed some vital details from the Court regarding time and place. It is also claimed that adjacent to Hero Honda Agency, there are many shops and Maruti workshop besides a bus stoppage for the passengers towards Tissa and other adjoining areas, but it utterly surprising that no witness from the said shops, except Pawan, was associated at the time of nabbing the accused or searching the bag of the accused or to witness the recovery of the capsules. According to him, accused had tried to flee towards Ballu bridge and had covered a distance of 10-15 meters. It also cast a doubt about the veracity of this witness. Significantly, he stated that no witnesses were present when the accused was nabbed but 5 to 7 persons were sitting nearby. However, entire case file is silent about said 5-7 persons. His version is not consistent with regard to the time and place. He was under the influence of Investigating Officer. He has suppressed the vital details regarding his arrival at spot. Be it noted that independent witness Pawan Kumar has not supported the case of the prosecution. If so, the possibility of his deposing at the behest of Investigating Officer cannot be ruled out. In these circumstances, it is unsafe to believe him.

7. As per prosecution case, the accused appeared at Balu bridge having a bag on his shoulder and capsules were recovered therefrom which were parceled and sealed with seal 'A' and the seal 'A' after use was handed over to witness Pawan Kumar, but Pawan Kumar while appearing at PW-2 has categorically denied that the accused had appeared in his presence and capsules were recovered from him which were parceled and sealed or the seal after use was handed over to him. He was declared hostile but without any assistance. Though, PW-1 stated that proceedings were completed at the spot but this witness (PW-2) stated in the cross-examination that he signed all the papers opposite to his service station and proceedings were also completed there. The seal has not been produced by him. He has not been confronted with any receipt vide which seal was entrusted to him. Hence, his version also does not inspire confidence. PW-3, Constable Ram, Parkash who had also accompanied the Investigating Officer has supported the case but he too has not been able to show as to what was done by them in between 3:30 p.m. to 4:20 p.m. and why 50 minutes were consumed to reach Balu from Parel covering a short distance of two kilometers. This casts doubt about their presence at the spot. As per him, accused had been seen at a distance of 10-15 yards from the place where they were present and had run to a distance of 5-7 yards but PW-1 has put forth said distance as 20-22 meters and distance covered by accused was projected to be 10-15 meters by PW-1 whereas the Investigating Officer, PW-10, projected that accused had been seen at a distance of 15-20 feet. Once all of them were together, there was no occasion for any inconsistency in their statements and presence of inconsistency in the statements shows that accused had not been nabbed in the manner projected and entire case becomes doubtful. He is also under the influence of

Investigating Officer and possibility of deposing at his instance cannot be ruled out. Hence, his version totally belies the version of the prosecution.

8. PW-2, Shri Pawan Kumar, has categorically denied that the accused had been apprehended in his presence and capsules were recovered from him, which were parceled and sealed and seal after use was handed over to him. PW-2 was declared hostile and cross-examined at length, but nothing has come out which could be considered in favour of the prosecution. PW-2 in his cross-examination has stated that he signed the papers opposite to his Service Station, but PW-1, Constable Mohammad Aslam, has stated that the proceedings were completed on the spot. This way, the statement of PW-1 also becomes doubtful. The accused is stated to have run before he was apprehended. This is not mere observation defect, but makes the prosecution witnesses unreliable regarding apprehension of the accused on the spot, as the distance given is 5 to 7 yards to 10 to 15 meters, the inconsistency in the statement of the witnesses shows that accused had not been nabbed as projected by the prosecution.

9. Constable Mohammad Aslam (PW-1) stated that the distance from Parel to Balu is 2 kms. PW-10, HC Virender Singh, stated that the case file was handed over to him at 8:25 p.m. at Balu and as per PW-9, SI Mukesh Kumar, the case property was produced before him at 8:45 p.m. The distance from Parel to Balu is less than 2 kms and to cover the said distance, about 45 minutes were taken and astonishingly, while coming to Police Station, PW-10, HC Virender Singh, and other police officials covered the distance of more than 5 kms and that too in just 20 minutes. The above fact casts a serious doubt on the veracity of the prosecution story.

10. PW-8, Kuldeep Singh, stated that at 6:15 p.m. *rukka* was brought by witness Ram Parkash at Police Station, Chamba, and it took about 30 minutes for recording FIR and thereafter he handed over the file to Constable Ram Parkash. If PW-10 reached the Police Station only in 20 minutes then certainly same time could have been taken by Constable Ram Parkash to reach at Balu Bridge from the Police Station. Meaning thereby, file should have been delivered to the Investigating Officer at 7:05 p.m. but the file was delivered at 8:25 p.m. So, to this effect, the version of prosecution witnesses do not offer any credible justification.

11. As per PW-10, HC Virender Singh, Hero Honda agency is adjoined by many shops on both the sides and there are two lanes of shops at Balu. He has stated that accused was spotted by him from a distance of 15-20 feet, which is in contrast to the versions of his subordinates. He has further submitted that many people had assembled there, but surprisingly, he did not associate anyone from the vicinity and no explanation qua non-association of independent witnesses has been given. PW-10 has stated that firstly arrest memo was prepared and accused was arrested at 8:20 p.m. thereafter *jamatalashi* memo was prepared and accused disclosed his name as Vijay. However, the perusal of said memo, Ex. PW-1/D&D, does not depict that accused initially disclosed his name wrongly or his name was Vijay Kumar, despite his claim that the accused agreed to convey the information qua his arrest to his brother Ajay and it is only after inquiry from his brother Ajay that he came to know that the accused has wrongly disclosed his name. Had there been any truth, this witness could have divulged more imperative aspects qua memos, Ex. PW-1/D and E, and would have written the name of accused as Ajay instead of Vijay. Therefore, the possibility of preparation of these memos other than the spot of occurrence cannot be ruled out or the accused was not nabbed on the spot or he was falsely implicated. PW-10, HC Virender Singh, has neither cited the brother of the accused, Ajay, as a witness nor any person from whom identity of the accused was ascertained as also the person who supplied the ration card of the accused. In the above enumerated circumstances, it becomes highly doubtful that accused impersonated as Vijay or wrongly mentioned his name. Therefore, possibility of accused being implicated falsely on mistaken identity cannot be ruled out.

12. In these circumstances, PW-2, Pawan Kumar, the only independent witness assumes importance, who has stated unequivocally that the person at the place was not accused and since the prosecution has failed to subject the accused to test identification and non-citing of the witnesses present on the spot, there is no reason to disbelieve PW-2. PW-2 did not support

the prosecution to the extent that the seal was handed over to him and PW-11, Joginder, also did not utter a word that seal was given to him nor PW-9, Mukesh Kumar, stated that the seal was given to PW-11, Joginder, and the seals have not seen the light of the day. Therefore, the prosecution has also failed to prove that the case property, sealed with seals 'A' and 'S' alongwith specimen of seals 'A' and S', was sent to Forensic Science Laboratory. As per the prosecution, vide RC No. 49/10, HHC Ramjeewan, took the case property to Forensic Science Laboratory. Nothing has come on record that the specimen of seal 'A' and 'S' were also taken by him to Forensic Science Laboratory. In RC No. 49/10, Ex. PW-7/B, there is no reference that seal 'A' and 'S' were also entrusted to HHC Ramjeewan for being deposited at Forensic Science Laboratory with the case property. HHC Ramjeewan, stated that he has deposited the case property with ASI of Crime Branch at Forensic Science Laboratory, Junga, however, the said ASI has neither been cited as a witness nor examined to complete the chain of evidence. Undoubtedly, as per the report of Forensic Science Laboratory, Junga, Ex. PX, apparently the seals were intact and also tallied with the specimen of seals, but there is nothing on record that seals 'A' and 'S' were deposited at Forensic Science Laboratory. Thus, it cannot be safe to assume that the seals on the case property, which was examined by the Examiner at Forensic Science Laboratory, were intact and not tampered with.

13. The statements of police officials are not consistent to each other and are full of infirmities and contradictions, specimen of seals have not seen the light of the day and independent witness has not supported the case of the prosecution. The identity of the accused has not been proved. The witnesses, though present in plenty on the spot of occurrence, were not associated by the prosecution.

14. 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/misappropriation of evidence on record, reversal thereof by High Court was not justified.

15. 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.

16. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused persons conclusively and beyond a shadow of doubt, as reasonable suspicion has occurred in the prosecution story.

17. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made above, we find no merit in this appeal and the same is accordingly dismissed. All the pending application(s), if any, stand(s) disposed of accordingly.

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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

Piar Chand. .....Respondent.

Cr. Appeal No. 561 of 2010
Decided on: 03.06.2016

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was alone in her house- accused entered inside the house and raped her- he also threatened to kill the prosecutrix- accused was

tried and acquitted by the trial Court- held, in appeal that Medical Officer had not given any opinion regarding the assault on the person of the prosecutrix- FIR was lodged after the lapse of two years – PW-3 and PW-4 had not supported the prosecution version- the view taken by the trial Court cannot be said to be perverse and was reasonable – appeal dismissed. (Para-19 to 24)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401

For the appellant: Mr. D.S. Nainta & Mr. Virender Verma, Additional Advocate Generals.
For the respondent: Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral)*

The present appeal arises from the judgment of acquittal, dated 12.08.2010, passed by learned Sessions Judge, Hamirpur, H.P., in Sessions Trial No. 8 of 2010. The State of Himachal Pradesh has maintained the present appeal for setting-aside judgment of acquittal and punishing the accused for the offences committed under Section 376 and 506 of Indian Penal Code.

2. As per the prosecution, the prosecutrix (name withheld) made a statement, Ex. PW-8/A, before the Police that she was married with Shri Satish Kumar, resident of Village Bharoli, Tehsil Jawalamukhi, District Kangra, H.P, on 04.04.2017, in the office of Sub Divisional Magistrate, Hamirpur, H.P. Subsequently, prosecutrix and her husband started residing in the house of her husband's *'mausa'* at Sujanpur. They stayed there with effect from 04.04.2007 to 15.04.2007. On 10.04.2007, the prosecutrix was alone in the house, as her *mausi,* Smt. Pawana Devi, her daughter-in-law and her *dever* had gone to the local bus-stand to see off the daughter of the accused. At about 12 noon, the accused entered into the room of the prosecutrix, bolted the door from inside and committed rape on the prosecutrix. He also took obscene photographs with the mobile phone. The prosecutrix raised alarm, but she was threatened to be killed. On return of other family members from the bus-stand, the prosecutrix narrated the incident to Sapna Devi, daughter-in-law of her *mausi,* but she did not take any action. On 11.04.20007, when the husband of the prosecutrix came to the house, he was informed by the prosecutrix about the incident and he took the prosecutrix to the house of his maternal uncle, but her husband consumed poison there and was saved with difficulty. Thereafter, they dislodged to village Raili, P.O. Raili Jajri and since then they resided there.

3. Consequent upon the statement of the prosecutrix, an FIR, Ex. PW-11/A, was reduced into writing. Inspector, Kamal Devi (PW-10) investigated the case and on 03.06.2009, moved application, Ex. PW-1/A, for medical examination of the prosecutrix and the same was conducted by PW-1, Dr. Archna Soni. Report to this extent is Ex. PW-1/B.

4. The accused was arrested and police moved an application, Ex. PW-2/A, for medical examination of the accused. He was medically examined by PW-2, Dr. Parveen Kumar, and MLC to this effect is Ex. PW-2/B. Thereafter, the Investigating Officer, ASI Sukh Lal (PW-11), visited the spot and prepared site plan, Ex. PW-11/C. Photographs, Ex. PW-5/A to Ex. PW-5/D, were also taken. Application, Ex. PW-12/A, was moved by the police and statement of the prosecutrix under Section 164 Cr.P.C., Ex. PW-8/B, was recorded. On completion of investigation the *challan* was presented in the Court.

5. In order prove its case, prosecution examined twelve witnesses and accused also examined one witness in defence.

6. We have heard learned Additional Advocate General for the appellant/State, learned Defence Counsel for the respondent/accused and have also gone through the record carefully.

7. PW-1, Dr. Archna Soni, stated that application, Ex. PW-1/A, dated 03.06.2009, was moved by the police, and she conducted medical examination of the prosecutrix and issued MLC, Ex. PW-1/B. Relevant portion of her medical examination is extracted below:

> **"Labia minoro and labia majora well developed. Pubic hair present and matted. She was menstruating at the time of examination and fresh bleeding was present. Hymen was torn. No fresh injury on the part examined.**
>
> **E/V per vagina:**
>
> **Vagina roomy. Hymen admits two fingers easily. Cervix down, uterus normal in size, firm and fornixes were clear.**
>
> **Opinion:**
>
> **In her opinion, the prosecutrix was habitual. However, for decision of assault at that time, opinion of Gynecologist sought and there was no evidence of old injuries on the body."**

PW-1, Dr. Archna Soni, did not give any opinion qua assault on the person of the prosecutrix, as the prosecutrix was married for about three years and was habitual of sexual intercourse. PW-2, Dr. Praveen Kumar, medically examined the accused on an application moved by the police, Ex. PW-2/A, and issued MLC, Ex. PW-2/B. PW-2 found the accused capable of performing sexual intercourse.

8. PW-3, Smt. Veena Kumari, has stated that the prosecutrix and her husband stayed in a rented accommodation in her neighbourhood and the prosecutrix did not say anything to this witness. On her cross-examination she did not say that the prosecutrix told her that the accused committed rape on her when she was alone in the house. This witness was confronted with her earlier statement, Ex. PW-3/A, but she stated that she did not make such statement to the police. In her cross-examination by the defence counsel, she has admitted that Satish Kumar (husband of the prosecutrix) was unemployed when he stayed in her neighbourhood for about three years and it is also admitted that the mother of Satish Kumar is God sister of brother of PW-3.

9. Smt. Raj Kumari (PW-4) stated that PW-3, Veena Kumari, is her *nanad* and she used to visit her house. As per the version of PW-4 the prosecutrix did not tell anything to her about the incident. On her cross-examination, she stated that mother of Satish Kumar (husband of the prosecutrix) is God sister of her husband and both prosecutrix and her husband stayed in a rented accommodation at Harmandir. PW-4, Raj Kumari, was confronted with her statement given to the police, Ex. PW-4/A, but she has denied that the prosecutrix had informed PW-3, Veena Kumari, about the alleged rape by the accused.

10. PW-5, Hoshiar Singh, has taken the photographs, Ex. PW-5/A to Ex. PW-5/D. PW-7, Constable Pawan Kumar, got medical examination conducted from PW-2, Dr. Praveen Kumar. Both these witnesses are formal in nature, hence needs no further discussion.

11. PW-6, Smt. Shakuntla Devi, mother-in-law of the prosecutrix, stated that the prosecutrix told that she had been sexually assaulted by the accused. However, she did not believe the same. On her cross-examination, she stated that both prosecutrix and her husband stayed in the house of the accused for about a month and the prosecutrix informed her about the incident when she was alone. However, she thought that the prosecutrix was telling a lie. PW-6 has further stated that she did not know that the accused and his wife had given `30,000/- (rupees thirty thousand) as loan to the prosecutrix and her husband, Satish Kumar, for settling their home or business after marriage.

12. Prosecutrix was examined as PW-8 and she has stated that she had married Satish Kumar on her own. On 28.09.2006, she and Satish Kumar entered into marriage at Amritsar in a temple, but they had no documents of their marriage, therefore, they shifted to the house of the accused. Thereafter, they went to the maternal uncle of her husband at Cochin. Prosecutrix has further stated that after the court marriage, they stayed in the house of the accused w.e.f. 04.04.2007 to 15.04.2007. On 10.04.2007, her *dever,* Sapna (daughter-in-law of the accused) and wife of the accused had gone to bus-stand to see off the daughter of the accused and she was left alone with the accused, as the accused did not go to the bus-stand. On 10.04.2007, husband of the prosecutrix had gone out of the house for some work. Prosecutrix has stated that while she was in the bed room, accused entered the room, bolted the door from inside, pulled her and raped her. The accused had also taken obscene photographs of the prosecutrix with the mobile. He had increased the volume of the television when the prosecutrix was crying and she was also threatened to be killed by the accused, if she divulge the incident to any one. As per the version of the prosecutrix, she divulged the incident to the wife of the accused, but she did not believe her and when the prosecutrix informed about the incident to the daughter-in-law of the accused, she told that she could not help her, as the accused also used to suppress her. The prosecutrix has stated that she narrated the incident to her husband when he came on 14.04.2007, thereafter, on 15.04.2007, both of them left the house of the accused and went to the house of Prabhat Singh (maternal uncle of her husband) at village Dadlu. On the evening of 15.04.2007 the husband of the prosecutrix consumed poison, but somehow survived. Thereafter her husband telephoned Smt. Ambika Sood, President of the Mahila Commission, when he came out of depression and they were called to Bilaspur where the statement of the prosecutrix was recorded. Her statement, Ex. PW-8/A, was recorded by the Lady Inspector, when they were called by the Superintendent of Police, Hamirpur, and the prosecutrix was medically examined vide MLC, Ex. PW-1/B. Prosecutrix has stated that now she is living separately from her husband, as her husband was responsible for belatedly lodging the report. Prosecutrix, in her cross-examination, has stated that after September, 2006, she had been meeting her parents, her elder sister and brother and she has also told about the incident to her mother, however, in her statement made to the police, Ex. PW8/A, it is not so recorded. Prosecutrix has stated that her husband was her teacher and they entered into love marriage.

13. The prosecutrix has denied that Arti Devi, daughter of the accused, who was doing B.Ed. from Dharamshala, was at Dharamshala w.e.f. 04.04.2007 to 12.04.2007. It is also denied that on 10.04.2007 all the members of the family of the accused were there and prosecutrix and her husband stayed in the house of the accused from 11.04.2007 to 15.04.2007. As per the version of the prosecutrix, she informed her husband about the incident on 11.04.2007 and this fact is disclosed to the police in her statement, Ex. PW-8/A, however, it is not so recorded in her statement, Ex. PW-8/A. She has also divulged the entire incident from 11.04.2007 to 14.04.2007 to the police, but the police did not record it. She has also narrated to the police that the accused came into her room, pulled her towards him and increased the volume of the television. She has also stated that she had informed the wife of the accused about the incident. She has denied that they had taken loan of `30,000/- from the accused to start some business. She has also denied that when the accused started demanding money, a false report against him was made to the police.

14. PW-9, Satish Kumar (husband of the prosecutrix) has deposed that he married the prosecutrix on 04.04.2007. He has deposed that the accused is his real *mausa* and the accused and his wife advised him to get the marriage registered and he had gone to Gram Panchayat on the advice of the accused and his wife to get the marriage registered. He has stated that on 09.04.2007, the accused asked him to take the prosecutrix from his house, otherwise she would be thrown out. As per this witness, at that time he was at Bara from where he went to the house of the accused to take the prosecutrix, but the wife of the accused advised not to take the prosecutrix from the house. So, he again went to Bara. He has stated that on 14.04.2007, the prosecutrix called him immediately to the house where she was staying and on 15.04.2007, he and prosecutrix left the house of the accused and went to village Bara in the house of his

maternal uncle. As per this witness, the prosecutrix on 15.04.2007 informed him that the accused has committed rape on 14.04.2007 and thereafter he told this fact to the family members and they advised him not to publicise the matter any more. As per this witness, the prosecutrix used to cry during night. He has further stated that on 15.04.2007, he consumed poison to commit suicide, but then he was saved. He deposed that his wife (prosecutrix) was very disturbed and agitated and started breaking things/articles and so they shifted to village Harmandir, where he started working as Carpenter with his uncle at Naudan. After 2-3 months he went to Deothsidh alongwith the prosecutrix to run a computer centre. Thereafter, the prosecutrix continued to remain ill and his friend advised him to contact Mahila Commission and he alongwith his wife went to Shimla. As the Chairman was not available, he procured the telephone number of the Chairman and, later on, contacted the Chairperson at Bilaspur and on the advise of the Chairperson, Mahila Commission, they went to the office of Superintendent of Police, Hamirpur. After recording the statements of prosecutrix and her husband, the police medically examined the prosecutrix and thereafter, he alongwith his wife went to the house of his wife's maternal uncle. In cross-examination, he has admitted that on 09.04.2007, the accused, his wife, son and daughter were present in the house of the accused. He has stated that on 12/13.04.2007, he returned to the house of the accused, but the accused sent him with his son towards Tauni Devi in search of work. The accused and his wife did not allow him to speak to his wife. On 14.04.2007 the accused made him to sleep in a separate room and upto 14.04.2007, he could not talk to his wife. He could not tell the name of the Doctor to whom he has taken his wife for treatment. He could not tell the name of the friend, who gave him the telephone number of Mahila Commissioner. He admitted that the Advocate was engaged by the accused at the time of his marriage with the prosecutrix. He admitted that his wife told Prabhat Singh that nothing had happened, as Prabhat Singh started making indecent inquires. He has denied the suggestion that the accused and his wife had given them a loan of `30,000/- and on demanding the money back, a false case is registered.

15. PW-10, Inspector Kamla Ghai, deposed that she recorded the statement of prosecutrix under Section 154 Cr.P.C., Ex. PW-8/A, and the same was sent to Police Station, Sujanpur, for registration of FIR. She got conducted the medical examination of the prosecutrix vide application, Ex. PW-1/A, made to the Medical Officer, Zonal Hospital, Hamirpur, and thereafter she handed over the file to SHO, Sujanpur. She admitted that from 11.04.2007 to 15.07.2007 prosecutrix and her husband remained in the house of the accused. She stated that she had not asked the prosecutrix why she has reported the case to the police after two years.

16. PW-11, ASI Sukh Lal, registered FIR, Ex. PW-11/A, after receipt of *rukka,* Ex. PW-11/B. He also prepared the spot map, Ex. PW-11/C, at the instance of the prosecutrix, arrested the accused and got him examined after making application, Ex. PW-2/A, to the Medical Officer, CHC, Sujanpur. MLC to this effect is Ex. PW-2/B. He has taken the photographs, Ex. PW-5/A to Ex. PW-5/D. He has recorded the statements of Veena Kumari and Raj Kumari, Ex. PW-3/A and Ex. PW-4/A, respectively. In his cross-examination he admitted that the marriage of the prosecutrix was arranged by the accused and his wife and they had borne out the expenses for that. It is admitted that it was a love marriage, he cannot say that the prosecutrix was a student of her husband. He admitted that the prosecutrix and her husband lived in the house of the accused between 11.04.2007 to 15.04.2007. He conducted inquiry with respect to the consumption of poison by the husband of the prosecutrix. He admitted that the husband of the prosecutrix had not stated before him that he had consumed poison. He stated that house of the accused is single storeyed house, having two rooms and accessories, and there are houses of other people adjacent to the house of the accused and there is a thoroughfare, passing by the side of the house.

17. PW-12, SI Ramesh Chand, was SHO, Sujanpur. He sent the prosecutrix for recording statement before the Magistrate alongwith ASI Shamsher, who moved the application, Ex. PW-12/A, and the statement of the prosecutrix was recorded by JMIC, Court No. 1, Hamirpur.

18. The defence examined one witness, DW-1 Yugraj Singh, Assistant Professor, Government College of Teacher Education, Dharamshala, Kangra, H.P. He has produced the attendance record of the daughter of the accused pertaining to the year 2006-2007 about her presence in the hostel of the College.

19. As per the version of the prosecutrix, on 10.04.2007 the incident took place when she alongwith her husband was residing at the house of the accused (*mausa* of husband of the prosecutrix). Prosecutrix has stated that she was left alone alongwith accused in the house and all other family members went to local bus-stand in Village Toru (Bari) to see off the daughter of the accused, who was to go to Dharamshala to attend her B.Ed. Classes. Conversely, defence has produced a letter, Ex. DW-1/B, from Government College of Teacher Education, Dharamshala, District Kangra, H.P., which depicts that the daughter of the accused was residing in the hostel of the said College w.e.f. 08.04.2007 to 12.04.2007. Therefore, the letter, Ex. DW-1/B, shows that daughter of the accused, Arti Devi, had not come to her village during this period and there was no question of the family members of the accused leaving for local bus-stand to see her off.

20. The prosecutrix in the beginning of 2009 moved an application to the Chairperson of Mahila Commission and it is on that application the Investigating Agency was set into motion on the application of the prosecutrix. The application was stated to be moved before the Chairperson of Mahila Commission and thereafter that was produced before the Police. However, that application is not on the file, therefore, the contents of the application are not known and could not be unearthed. Similarly, Complaint No. 542, referred in para 35, the same is not on the record.

21. FIR, Ex. PW-11/A, was registered after substantial period of two years. Although, it is settled legal proposition that delay in lodging the FIR in rape case cannot be fatal, if the statement of the prosecutrix is otherwise convincing and there is no component of falsehood in the same. The main witness, Meena Kumari, who was the star witness, has not been examined by the prosecution and this also creates a dent in the prosecution story.

22. The statement of PW-1, Dr. Archna Soni, shows that there was no old or old healed injury on the body of the prosecutrix and it could not be commented whether sexual assault occurred at the time of the alleged incident or not. At the same point of time, PW-3, Veena Kumari, has not supported the case of the prosecution and she was declared hostile. PW-4, Raj Kumari also did not support the case of the prosecution and she was also declared hostile. Though, these witnesses were cross-examined at length by the prosecution, but nothing favorable has been extracted by the prosecution.

23. 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/misappropriation of evidence on record, reversal thereof by High Court was not justified.

24. 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.

25. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused persons conclusively and beyond a shadow of doubt, as reasonable suspicion has occurred in the prosecution story.

26. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made above, we find no merit in this appeal and the same is accordingly dismissed. All the pending application(s), if any, stand(s) disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J

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

Criminal Appeal No.351 of 2010
Reserved on : 23.5.2016
Date of Decision : June 3, 2016

Indian Penal Code, 1860- Section 376- Accused raped the prosecutrix aged 5 years- he was tried and acquitted by the Trial court- held, in appeal prosecutrix was examined by Medical Officer who found no sign of injury, inflammation, redness, bruises or laceration on the body of the prosecutrix - however, this by itself is not sufficient to doubt the prosecution version- the prosecutrix supported the prosecution version – her testimony was not impeached in cross-examination – however, trial court discarded her testimony on the ground that no blood was found on her person/clothes and there was a discrepancy regarding the place of incident - mother of the prosecutrix has explained that she had washed the clothes of the prosexutrix and therefore the absence of blood was accounted - incorrect description of place of incident by Investigating Officer will not make the testimony of prosecutrix doubtful- her testimony was corroborated by other independent witnesses- Trial Court had wrongly acquitted the accused- the accused convicted of the commission of offence punishable under Section 376 of IPC. (Para 4-42)

Cases referred:
Datta v. State of Maharashtra, (2013) 14 SCC 588
Prithi Chand v. State of H.P., (1989) 1 SCC 432
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Perminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592,
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
Narender Kumar v. State (NCT of Delh), (2012) 7 SCC 171
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327
Rameshwar vs. The State of Rajasthan (AIR 1952 SC 54
Gentela Vijayavardhan Rao & Anr. vs. State of A.P. (1996) 6 SCC 241
Golla Yelugu Govindu vs. State of Andhra Pradesh (2008) 16 SCC 769
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)
State of Rajasthan vs. Om Parkash (2002) 5 SCC 745,
State of Himachal Pradesh vs. Suresh Kumar (2009)16 SCC 697
Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 230102014, In Re, (2014) 4 SCC 786
Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Munna v. State of Madhya Pradesh, (2014) 10 SCC 254

For the Appellant : Mr. V.S. Chauhan, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General.
Mr. Anoop Chitkara, as Amicus Curiae.

For the Respondent : Mr. B.R. Sharma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 12.1.2010, passed by the Additional Sessions Judge, Fast Track Court, Shimla, Himachal Pradesh, in Sessions Trial No.23-S/7 of 2009, titled as *State of Himachal Pradesh v. Ram* Singh, challenging the acquittal of respondent Ram Singh (hereinafter referred to as the accused), who stands charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code.

2. Through the testimonies of Jai Dev Sharma (PW-1), Smt. Meena Kumari (PW-2) (mother of the prosecutrix) and prosecutrix (PW-3), prosecution wants the Court to believe that on 28.6.2009, accused Ram Singh sexually assaulted the prosecutrix, aged 5 years. Same day, on the basis of report lodged by Smt. Meena Kumari, FIR No.108 dated 28.6.2009 (Ex.PD), for commission of offence, punishable under the provisions of Section 376 of the Indian Penal Code, came to be registered at Police Station Shimla West, District Shimla, Himachal Pradesh. Investigation conducted by SI Mathura Dass (PW-9) revealed that prosecutrix was residing with her parents in village Patiyud, Post Office, Anandpur, Tehsil and District Shimla, Himachal Pradesh. Accused was sharing accommodation with Jai Dev Sharma (PW-1), brother in law of Smt. Meena Kumari. Prosecutrix used to frequently visit the house of Jai Dev Sharma, who, on 27.6.2009, had gone to his village Niun, Post Office Jai Nagar, Tehsil Nalagarh, District Solan, Himachal Pradesh. In the morning of 28.6.2009, prosecutrix went to the house of Jai Dev Sharma and finding her to be alone, accused sexually assaulted her. Prosecutrix narrated the incident to her mother, who, after contacting Jai Dev Sharma, lodged the report. Prosecutrix was got medially examined from Dr. (Mrs.) Asha Negi (PW-4), who issued MLC (Ex.PF). She found no evidence suggesting penetration. During investigation, police took into possession clothes of the prosecutrix, accused and the *Chattai* & *Baithak.* With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as nine witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he admitted the following facts to be correct:

Q.No.2. It is in evidence against you that you and Sh. Jai Dev Sharma work in the HRTC and are colleagues. What you have to state about it?

Ans: It is correct.

Q.No.3. It is in evidence against you that Sh. Jai Dev (PW-1) is residing in village Patiyud in the house of Sh. Prem Lal Sharma. You accused were living with Sh. Jai Dev in his house/quarter. What you have to state about it?

Ans: It is correct.

Q.No.4. It is in evidence against you that the complainant Smt. Meena Kumari is sister in law of Sh. Jai Dev. She, her husband and their children are residing in a house near to your quarter/house in village Patiyud. What you have to state about it?

Ans: It is correct.

Q.No.5. It is in evidence against you that the children of Smt. Meena Kumari including the prosecutrix used to visit your house/quarter off and on. What you have to state about it?

Ans: It is correct.

Q.No.6. It is in evidence against you that on 28.06.2009, in the morning, Sh. Jai Dev was away to his native village Niun. You accused were alone in the house/quarter. What you have to state about it?

Ans: It is correct.

However, while refuting the incident, he took the following defence:

> "I am innocent. The case is false. Actually, Smt. Meena Kumari and Sh. Jai Dev wanted that I should tie the nuptial knot with the younger sister of Smt. Meena Kumari. I did not agree to the said marriage proposal. Smt. Meena Kumari used to blackmail me for this purpose. She and Sh. Jai Dev even demanded Rs.25,000/- from me. When I refused to pay the money and contact the marriage, Smt. Meena Kumari etc. threatened me and roped me in this false case."

5. Age of prosecutrix (PW-3) is not in dispute. Her age was found to be between 4 and 5 years. However, from the testimony of her mother, as also the birth certificate, so tendered in evidence as Ex.PX, it is apparent that as on the date of the incident, prosecutrix was of 5 years and 3 months.

6. It is a matter of record that Dr. Asha Negi examined the prosecutrix on 28.6.2009 at 9.10 pm. The alleged incident took place in the morning at 8.30. In between, prosecutrix had had a bath and her clothes, stained with discharge of human blood, which smelt badly, were washed. The doctor found no evidence, suggestive of the fact that penetration had taken place.

7. No sign of injury, inflammation, redness, bruises or laceration were found on the private parts or anywhere on the body of the prosecutrix. Significantly, the doctor does not state that no rape had been committed. It does not rule out such possibility. Other scientific evidence is also not suggestive of the sexual assault.

8. But the question, which requires consideration, is as to whether in the absence of any such proof or opinion of the expert, is it open for the court to solely rely upon the substantive ocular version, for bringing home the guilt of the accused or not? The answer is no longer res integra. Fully inspiring testimony of the prosecutrix is sufficient enough.

9. Even in the absence of categorical opinion about rape, opinion of the doctor about such act not being totally ruled out is relevant. Mere absence of spermatozoa would not cast doubt on correctness of the prosecution case. (See: *Datta v. State of Maharashtra,* (2013) 14 SCC 588; and *Prithi Chand v. State of H.P.,* (1989) 1 SCC 432).

10. The Apex Court had the occasion to deal with the case where there was a conflict between the medical evidence and ocular evidence of the prosecution. There the Court held as under:

> "23. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of *Dayal Singh v State of Uttaranchal*, (2012) 8 SCC 263 (SCC p.283, paras 35036)
>
> > "35. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are

destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab*, (2003) 12 SCC 155, the Court, while dealing with discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)

> '8. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.'

36. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive."

(Emphasis supplied)

11. The Apex Court in *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, has held that:

"……

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:

> "... [Even 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." "

(Emphasis supplied)

12. Either non-rupture of hymen or absence of signs of injury on the body of the prosecutrix, in itself, cannot be a ground to disbelieve the otherwise inspiring testimony of the prosecutrix. In *Perminder alias Ladka Pola v. State of Delhi,* (2014) 2 SCC 592, the Hon'ble Supreme Court of India has observed that:

> ".....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 genital or leaving any seminal stains."

13. 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. (See: *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).

14. 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.

15. 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).

16. In the instant case, the doctor does not conclusively or clearly rule out the possibility of rape. There is no other opinion of the expert, totally ruling out the possibility of rape. No evidence is there suggestive of such fact. Absence of injury marks is also not fatal.

17. 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.

18. Out of the three prosecution witnesses, we find the prosecutrix to be a minor. It is now well settled that the testimony of a child witness can be referred to and relied upon for bringing home the guilt of the accused.

19. We may add that the Court itself had recorded its satisfaction and satisfied the test and principles laid down under Section 118 of the Evidence Act. Test laid down by the Apex Court in *Rameshwar vs. The State of Rajasthan* (AIR 1952 SC 54) stands fully satisfied in the instant case.

20. The Apex Court in *Gentela Vijayavardhan Rao & Anr. vs. State of A.P.* (1996) 6 SCC 241 has held as under:-

> "The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement on fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae."

21. In *Golla Yelugu Govindu* vs. *State of Andhra Pradesh* (2008) 16 SCC 769, the Apex Court, while reiterating its earlier view, held that 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. It further held that:

> "….It further held that the evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and

reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1)."

22. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997 (5) SCC 341) it was held as follows:

"5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

23. In *State of Rajasthan vs. Om Parkash* (2002) 5 SCC 745, the Apex Court held that:-

".....Cases involving sexual molestation and assault require a different approach-a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under penal laws....."

24. In the very same decision, the Court observed that child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse. These factors point towards a different approach required to be adopted.

25. In *State of Himachal Pradesh vs. Suresh Kumar* (2009)16 SCC 697, the Apex Court was dealing with a case where the prosecutrix was ravished by the accused on 15.3.2000 which incident was narrated by the prosecutrix to her sister later during the day. She also narrated the incident to her parents the following day and to the Doctors after the incident. Court accepted the statement of the sister, the parents and the doctors while holding the accused guilty.

26. In *Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held that:

"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.' "
> >
> > (Emphasis supplied)

27. In *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 230102014, 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.

28. 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).

29. 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."

30. 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.

31. In the light of the aforesaid analysis of law, we proceed to examine the testimony of the prosecutrix.

32. Now, what is it that she states in Court. It would be beneficial to reproduce her entire testimony, which reads as under:

> "PW-3 Kumari (name withheld) D/o Sh. Vinod Sharma, aged about 5 years, student, R/O Village Patiyud, Tehsil and District Shimla, H.P. (prosecutrix in camera)
>
> I have put certain questions to this child witness. She has replied the same correctly. She appears to be a competent witness. She does not understand the sanctity of oath being of tender age. Let her statement be recorded without oath.
>
> Without Oath.
>
> 21.12.2009.
>
> Sh. Jai Dev Sharma is my papa. The accused present in the Cou5rt stays with Sh. Jai Dev in his quarter. The quarter of Sh. Jai Dev is near to our quarter. I visit the quarter of Sh. Jai Dev some times. The accused touched his bahu (penis) with my private parts. I felt a lot of pain. The accused even gagged my mouth. I was wearing the clothes Exts. P-3 and P-4 on that day. When I got up in the morning, I went to the quarter of the accused. Sh. Jai Dev was away to his village. The blood stains had come on my clothes. I narrated the incident to my mother.
>
> xx. By Sh. M.L. Brakta, Advocate, for the accused.xx
>
> I have come to the Court without any reason. I have been brought to the Court today by my parents. It is incorrect to suggest that I was tutored by my parents to make the above statement in the Court. Self stated, my father was away on that day for doing the day's work. None tutored me outside the Court to make the statement. There are no other kids who play with me. My younger brother did not accompany me to the quarter of Sh. Jai Dev. He was sleeping. The quarter of Sh. Jai Dev has only one room. Sh. Jai Dev sleeps on a cot. The accused too sleeps on the cot. I was raped by the accused on the cot on which Sh. Jai Dev sleeps. I did not tie the string of my pajama after the rape. It had the elastic on the top. I pulled up my pajama of my own after the rape. I informed my mother about the occurrence when she was washing the clothes. It is incorrect to suggest that the accused did nothing with me and I have deposed falsely at the instance of my parents. It is incorrect to suggest that I did not visit the quarter of the accused on the relevant day."

33. The witness is very categorical and clear in her version. We do not find her testimony to have been impeached in any manner. She is neither tutored nor is she vague in deposing facts. Her version is natural and convincing. She is categorical that when she went to the room of Jai Dev Sharma, whom she calls as *Papa*, who had gone to his native village, the accused touched his penis with her private parts. She felt lot of pain and the accused had also gagged her mouth. There were blood stains on her clothes. Same day, she narrated the incident to her mother.

34. The Court below found two contradictions in her statement. The first being that no signs of blood were found on the clothes of either the prosecutrix or the accused and second, whereas the prosecutrix narrates the incident to have taken place on the cot, but the spot map so prepared by the Investigating Officer, shows the place of crime to be kitchen and not the cot.

35. In our considered view, while disbelieving this witness, view taken by the trial Court is totally perverse and fallacious. It stands explained by the mother of this witness that the clothes of the prosecutrix stood washed and the prosecutrix was given bath. This explains the absence of blood.

36. Faulty investigation, more so when attention of such fact is not drawn to the witness, cannot come in the way of dispensing justice. Investigating Officer may have faulted in giving correct description of the place where the crime took place, but then it has also come on record through the testimony of the prosecutrix that such crime took place inside the room, which is so depicted in the spot map. One must not forget the testimony of Jai Dev Sharma and Smt. Meena Kumari, where from it is evidently clear that the room, which is described as a quarter, is small and shared by the accused. Hence, absence of cot in the spot map pales into insignificance, as spot maps are only corroborative in nature. We find the substantive evidence to be inspiring in confidence. We need not look into the corroborative evidence, which in any case was neither prepared by the witness nor put to her in Court.

37. We find the version of this witness to have been corroborated by her mother on all counts, according to whom while she was washing clothes, prosecutrix insisted of going to the house of Jai Dev Sharma. Despite her refusal, she went there, but returned after 15-20 minutes. She filled up the container for giving bath to the prosecutrix. When she tried to open her clothes, prosecutrix resisted. Forcefully, she removed the clothes and saw some blood and dirty stains. When enquired, prosecutrix informed that the accused had opened his pants and her pyjama and thereafter touched his penis with her private part, as a result of which she felt pain. This witness washed the clothes and gave bath to the prosecutrix. Since her husband was not at home, she went to narrate the incident to him in village Anandpur. Telephonically, the incident was also narrated to Jai Dev Sharma. By the evening, they returned from the village and lodged the report at Police Station, Boileauganj. We do not find her version to have been shattered. Suggestion of false implication, so put by the accused, stands categorically denied by her. Thus, on material aspect, the witness has narrated the incident. We do not find her version to be doubtful.

38. Even Jai Dev Sharma has corroborated such version, according to whom, on the fateful day, he was not home, as he had gone to his native village. When the accused was confronted about the incident, he begged for pardon. However, the matter came to be reported to the police. Even from his testimony, it cannot be said that the defence taken by the accused stands probablized.

39. In our considered view, defence taken by the accused does not appear to be true. It is his case that Smt. Meena Kumari wanted to get her sister married to the accused and Jai Dev Sharma was also insisting for the same. It is not his case that such proposal was given for the first time on the date of the occurrence of the incident. He is categorical that he refused such proposal and Smt. Meena Kumari “used to blackmail” for the same. Now, if that were so, then why is it that this witness continued to stay in the room (quarter) of Jai Dev Sharma. He was gainfully employed and could have afforded to live separately, which he did not do so.

40. Through the clear, cogent, convincing and reliable piece of evidence, in our considered view, the prosecution has been able to bring home the guilt of the accused. The doctor says that there were no signs of penetration, but then, the prosecutrix is categorical. The accused had touched his penis with her private parts. That is about all which is required to constitute an offence. It is not a case of an attempt, but actual commission of crime.

41. 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.

42. 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.

43. Thus, in our considered view, findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are reversed. The appeal is allowed and we hold the accused guilty of having committed an offence, punishable under the provisions Section 376 of the Indian Penal Code, for committing rape on the prosecutrix, a minor.

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 20.6.2016. He be produced in the Court on the said date. Copy of the judgment be supplied to the accused, free of cost.

Assistance rendered by Mr. Anoop Chitkara, learned Amicus Curiae, is highly appreciable.

Appeal stands disposed of, so also pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ...Appellant.

Versus

Satpal ...Respondent.

Cr. Appeal No.91 of 2011
Reserved on:03.05.2016
Date of Decision : June 3, 2016

Indian Penal Code, 1860- Section 306**-** Deceased was married to the accused- the accused started harassing the deceased for dowry- she committed suicide - the accused was tried and acquitted by the Trial court- held in appeal that the deceased used to complain that she was being subjected to beating and harassment - accused demanded Rs. 10,000/- and when Rs. 5,000/- were given, accused returned them and demanded the whole of the amount – complainant and K had gone to the house of the accused to counsel and advise him – a mediator was called and deceased was sent to her matrimonial home-the accused had failed to intimate about the death of the deceased or to provide medical care - testimonies of prosecution witnesses regarding the demand of dowry were consistent – there was no major contradiction in the testimonies of the witnesses - the plea taken in defence that the deceased was depressed was not corroborated- the accused had failed to rebut the presumption of dowry death-the Court had wrongly acquitted the accused- appeal accepted and accused convicted of the commission of offence punishable under Section 306 of IPC. (Para- 11 to 37)

Cases referred:

Sushil Kumar Sharma. Vs. Union of India & Ors. (2005) 6 SCC 281
State of West Bengal Vs. Orilal Jaiswal (1994) 1 SCC 73,
Mohd. Hoshan A.P. & Anrs. Vs. State of A.P. (2002) 7 SCC 414
Ramesh Kumar vs. State of Chhatisgarh, (2001) 9 SCC 618

Gananath Pattnaik vs. State of Orissa, (2002) 2 SCC 619
Naresh Kumar v. State of Haryana and others, (2015) 1 SCC 797
Baljinder Kaur v. State of Punjab, (2015) 2 SCC 629
Rajinder Singh v. State of Punjab, (2015) 6 SCC 477
State of H.P. Versus Lekh Raj and another, (2000) 1 SCC 247

For the Appellant	:	Mr. R.S. Verma, Addl. AG., with Mr.Puneet Rajta, Dy. AG., and Mr.J.S. Guleria, Asstt. AG.
For the Respondents	:	Mr. P.S. Goverdhan, Advocate as Amicus Curiae. Mr. K.S. Thakur, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 07.02.2011, passed by learned Additional Sessions Judge, Una, H.P., in Sessions Case No.19/2010/Sessions Trial No.15 of 2010, titled as *State of H.P. Versus Satpal,* challenging the acquittal of respondent Satpal (hereinafter referred to as the accused), who stands charged for having committed an offence punishable under the provisions of Section 306 of the Indian Penal Code.

2. It is the case of prosecution that Smt. Nisha Kumari (deceased) was married to accused Satpal, sometime in the year 2006. Soon after the marriage, accused subjected his wife to cruelty both physical and mental. Also there were dowry demands. The matter was brought to the notice of the mediator Ram Dass (PW.4), who apart from the parents of the deceased, counselled the accused as also the deceased. But however, such atrocities continued to be perpetuated and as such on 15.07.2010, Nisha Kumari (deceased) committed suicide by consuming poison. Police received such information and Inspector Ruldu Ram Thakur (PW.7) reached the spot, where he recorded the statement of Om Prakash (PW.1), father of the deceased, which led to registration of FIR No.224/2010, dated 16.07.2010 (Ex.PW-6/A), by Amit Sharma (PW.6), against the accused, for commission of offence, punishable under the provisions of Section 306 of the Indian Penal Code, at Police Station Una, H.P. Inquest report (Ex.PC) was prepared and the dead body sent for postmortem, which was conducted by Dr. Daljeet Singh, who issued the postmortem report (Ex.PD). 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 offence punishable under the provisions of Sections 306 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as seven witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took defence of innocence and false implication.

5. Based on the testimonies of the witnesses and the material on record, trial Court acquitted the accused of the charged offence, on the ground that (a) in the absence of any corroborative evidence, testimonies of close relatives, who were interested witnesses, could not be relied upon to convict the accused; (b) no documentary proof with regard to payment was either placed or proven by the prosecution; (c) also no prior report was lodged with the police or Panchayat; (d) relationship between the accused and the deceased appeared to be cordial. In fact, during visits to the house of the deceased, the complainant party was given due respect and proper treatment by the accused.

6. 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 not correctly and completely appreciating the testimonies of the witnesses. It further erred in ignoring the relevant statutory

provisions and the law laid down by the apex Court. Findings are, thus, perverse and illegal. It has resulted into travesty of justice.

7. That sometime in the year 2006, accused Satpal got married to deceased Nisha Kumari cannot be disputed, which fact, in any event, stands clearly established through the unrebutted testimony of the father of the deceased Om Prakash (PW-1). Such marriage came to be solemnized through the mediation of Ram Dass (PW.4) also cannot be disputed.

8. That deceased expired on 15.07.2010, is also not in dispute. From the testimony of Inspector Ruldu Ram Thakur (PW.7), it is evident that when the factum of such death was brought to the notice, police acted with promptitude, by visiting the spot and conducting investigation, which is fair and proper. Inquest report (Ex.PC) reveals that the dead body was found in the matrimonial house. Undisputedly, the accused and the deceased used to jointly reside there. From the room a small packet having poisonous substance was taken into possession by the police vide memo (Ex.PC). As per report of the Forensic Science Laboratory (Ex. PE), contents of Thimet (organophosphorus insecticide), a poisonous substance, were found therein.

9. Postmortem of the dead body was conducted, report whereof (Ex.PD) was tendered in evidence.

10. The deceased died as a result of consumption of poison, thus, evidently stands established on record.

11. It is not a case of murder and the accused stands charged for having committed an offence, punishable under the provisions of Section 306 of the Indian Penal Code. To establish the same, prosecution has to prove that the accused, being the husband, subjected the deceased to cruelty.

12. "Cruelty" for the purpose of the crime in question would mean, willful conduct of the accused, which is of such a nature as is likely to drive the deceased to commit suicide or harassment with a view to coerce her to meet any unlawful demand of property or valuable security. Also, harassment on account of failure to meet such demand would also amount to cruelty. If the prosecution is able to show that suicide was committed within a period of seven years from the date of marriage, as a result of cruelty, the law by virtue of Section 113A of the Evidence Act, mandates the Court to presume that such act of suicide came to be abetted by her husband or his relatives. Also, for proving the charge of abetment to suicide, it has to be proved that the accused treated the deceased with cruelty and drove her to commit suicide.

13. In *Sushil Kumar Sharma. Vs. Union of India & Ors. (2005) 6 SCC 281*, the Apex Court has observed that:

> "11. One other provision which is relevant to be noted is Section 306 IPC. The basic difference between the two sections i.e. Section 306 and Section 498-A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the woman concerned to commit suicide, while under the former provision suicide is abetted and intended."

14. In *State of West Bengal Vs. Orilal Jaiswal (1994) 1 SCC 73*, the Apex Court has further observed that:

> "In a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of S. 498A, I.P.C and S. 113A of Indian Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the

> complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter.
>
> The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law."
>
> (Emphasis supplied)

15. The Apex Court further cautioned that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

16. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not. [*Mohd. Hoshan A.P. & Anrs. Vs. State of A.P. (2002) 7 SCC 414*].

17. Instigation is to goad, urge forward, provoke, incite or encourage to do an act. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The accused must by his acts or omission or by a continued course of conduct create such circumstances that the deceased is left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. [*Ramesh Kumar vs. State of Chhatisgarh, (2001) 9 SCC 618*]

18. The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. Cruelty for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case. [*Gananath Pattnaik vs. State of Orissa, (2002) 2 SCC 619*]

19. The Apex Court in *Naresh Kumar v. State of Haryana and others,* (2015) 1 SCC 797, has observed that "If the wife commits suicide by setting herself on fire, proceeded by

dissatisfaction of the husband and his family from the dowry, the interference of harassment against the husband may be patent."

20. With regard to dowry death, the Apex Court in *Baljinder Kaur v. State of Punjab*, (2015) 2 SCC 629, held that:

> "21. In our view, there is force in the submission of the learned counsel for the appellant. In cases related to dowry death, the circumstances showing the cruelty or harassment are not restricted to a particular instance, but normally refer to a course of conduct. Such conduct of cruelty or dowry harassment must be "soon before death". There should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her."

21. The Apex Court in *Rajinder Singh v. State of Punjab,* (2015) 6 SCC 477, in the following words, explained the meaning of "dowry", as under:

> "8. A perusal of this Section shows that this definition can be broken into six distinct parts:
>
> (1) Dowry must first consist of any property or valuable security - the word "any" is a word of width and would, therefore, include within it property and valuable security of any kind whatsoever.
>
> (2) Such property or security can be given or even agreed to be given. The actual giving of such property or security is, therefore, not necessary.
>
> (3) Such property or security can be given or agreed to be given either directly or indirectly.
>
> (4) Such giving or agreeing to give can again be not only by one party to a marriage to the other but also by the parents of either party or by any other person to either party to the marriage or to any other person. It will be noticed that this clause again widens the reach of the Act insofar as those guilty of committing the offence of giving or receiving dowry is concerned.
>
> (5) Such giving or agreeing to give can be at any time. It can be at, before, or at any time after the marriage. Thus, it can be many years after a marriage is solemnised.
>
> (6) Such giving or receiving must be in connection with the marriage of the parties. Obviously, the expression "in connection with" would in the context of the social evil sought to be tackled by the Dowry Prohibition Act mean "in relation with" or "relating to"."

22. In the very same decision, after examining the intent of the Legislators for enacting the special enactment, by applying the principle of "force and life", the Court held that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Also, that the word "soon" would not mean immediate and each case had to be judged on the given facts. There has to be proximity and link between the impact of dowry demand and the consequential death and there cannot be any straitjacket formula for determining such factor. "Soon before" was held not to be synonymous with "immediately before".

23. The Apex Court in *State of H.P. Versus Lekh Raj and another,* (2000) 1 SCC 247, has held as under:-

> "10. ... ...
>
> The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to

> adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind." (Emphasis supplied)

24. In the backdrop of narration of facts and the principle of law, one proceeds to discuss the testimony of the prosecution witnesses.

25. Inspector Ruldu Ram Thakur (PW.7) states that after reaching the spot, which in the instant case is the matrimonial house of the deceased, where the dead body was lying, he recorded the statement of Om Prakash (Ex.PA, dated 16.07.2010). We notice that on the basis of such statement, F.I.R., immediately came to be recorded. There is no delay in lodging the report with the police. Also there was no prior consultation or premeditation. Now when we peruse the said statement, we find the following facts to have been disclosed at the first opportune moment: (i) After six months of the marriage, whenever deceased used to visit her parental house, she would always complain that her husband would subject her to beatings and harassment; (ii) About one year prior to the incident, accused demanded Rs.10,000/- and when Rs.5000/- was given, accused returned the same demanding the entire amount and the deceased was again sent to get Rs.10,000/-; (iii) Despite such demand having met, accused subjected her to maltreatment; (iv) Complainant alongwith Kishori Lal went to the house of accused and counselled and advised him to maintain good relations with the deceased; (v) Even thereafter, accused continued such acts of maltreatment, which fact came to be disclosed when deceased visited and stayed in her parental house for about 18-20 days; (vi) Ram Dass (mediator) was called and on his assurance the deceased was sent to the matrimonial house; (vii) The accused still continued with such atrocities and treated her with cruelty both physical and mental, as a result of which, deceased ended her life by consuming poison; (viii) The accused neither provided any medicine to his daughter nor took her to the hospital, resulting into her death in her matrimonial house; and (ix) The accused failed to inform about the death, which fact was so disclosed by Bhagat Ram.

26. It is a settled principle of law that F.I.R. is not an encyclopedia. It need not carry the minutest details. Just bare reading of the F.I.R. reveals the complainant to have disclosed the factum of the deceased, having suffered atrocities of dowry demands, harassment and cruelty, both physical and mental. The accused stood named in the complaint.

27. In the instant case, there are two sets of evidences and both are unrebutted. Though we shall discuss their testimonies in detail, but through the testimonies of father Om Prakash (PW.1), Uncle, Ram Dass (PW.4) and brother-in-law of the deceased Kishori Lal (PW.5), in our considered view, the factum of cruelty and dowry demand stands proved and through the testimony of neighbour Bhagat Ram ((PW.3), which perhaps may be inspiring, it has also come on record that relations between the accused and the deceased were cordial and both were leading a happy married life. Also deceased used to remain tense for the reason that she could not deliver a child. Here we give benefit to the accused.

28. However, having given our thoughtful consideration, we are of the considered view that such versions are not at all contradictory. In fact, two fact situations are totally reconcilable. They do not render the testimonies of the witnesses to be doubtful, much less shaky.

29. Now it is not the law as we have already noticed above, that the testimonies of interested witnesses are not to be relied upon at all. Wherever required and only as a matter of prudence if there is doubt, Court can look for some corroboration only to strengthen the same and that too for reassuring itself with regard to the truthfulness of such statements. It is also not the requirement of law that each and every illegal act must be reported to the authorities. The evidence has to be appreciated in the given fact situation.

30. In the instant case, one cannot forget that death took place in the matrimonial house within seven years of marriage. It is not a case of murder and as is so suggested by the accused himself, deceased consumed poison. Her dead body was found by the police in her room. The defence set up by the accused is as under:-

> " I am innocent. Actually, Smt. Nisha used to remain tense as she was unable to bear the child. I have been involved in a false case by my in-laws."

31. Significantly, there is no documentary evidence on record to establish such fact. Be that as it may, when we examine the conduct of the accused, we find him not to have taken the deceased to the hospital for treatment. It is not his case, that at the time when deceased consumed poison, he was not at home. In the night of 15.07.2010, police learnt about such death. He did not inform the police. He did not inform the neighbours. He did not inform the relatives of the deceased. Also he did not take any steps for providing immediate medical treatment to the deceased.

32. Independent of the aforesaid conduct, we now proceed to examine the testimonies of prosecution witnesses on record, for if we find the prosecution to have "shown" that the accused had abetted the deceased in committing suicide, by leading credible evidence, then obviously statutory onus would shift upon the accused.

33. Bhagat Ram (PW.3) is the immediate neighbour of the accused. He states that on 15.07.2010, at about 3.00 PM, when he returned from the fields, he learnt about the death of Nisha Kumari. It was he, who went to the house of the complainant and informed about the tragedy. Noticeably, he does state that relations between the accused and the deceased were cordial. Also the deceased was leading a happy married life in the house of her in-laws, but however, she would remain tense as she could not deliver a child.

34. This witness further wants the Court to believe that even the accused was in the fields and when he returned, he raised hue and cry, Dr. Modi was called, who declared her dead. Thereafter, on the asking of the accused and his parents, he went to the house of the complainant party and informed them about the incident. But then the accused does not state all this in his statement under Section 313 Cr.P.C. We have our serious doubts about the correctness of such version. Crucially when it had come to the notice of the accused that deceased had consumed poison, why is it that he himself did not inform the police and who is this Dr. Modi remains a mystery? Accused has not examined him in defence. This witness also did not inform the police about the incident. Be that as it may, the fact of the matter is that accused did not try to take the deceased to the hospital. Why is it that the accused did not inform the complainant, he does not state. He does not state that both the deceased and the accused would not quarrel. All that he states is that no such quarrel took place in his presence. Now if the deceased was happily married, why would she consume poison. Her mental state of remaining tense for allegedly not delivering a child, was not such that she would take away her life, for it has come on record that at some point in time she had conceived. Parties were married only for five years, which is not a sufficiently long period to be resumed that a child could never

be delivered. It is also not the case of the accused that he had got his wife treated for ailment, if any.

35. Hence, this witness cannot be said to have rendered the prosecution story to be doubtful. More so, for the fact that it is not the case of prosecution that the incident of dowry demand and cruelties, physical and mental were made known to all and sundry, including the neighbours. Significantly it is not the case of this witness that deceased used to confide in him or anyone of his family members. It is also not the case of this witness that deceased was on visiting terms with him. Hence, what transpired within the four walls of the castle of the parties was obviously not required to be known to this witness. His observation of cordial relationship and happy married life is only as an outsider, having no knowledge of actual relationship of the parties. As such, his version does not render the prosecution story to be false, incorrect or improbable.

36. Om Prakash (PW.1), father of the deceased, categorically states that six months after the marriage, accused started ill-treating the deceased, who would often complain about such acts. Accused used to beat her and demand money. On one occasion, when deceased came with a demand of Rs.10,000/- set up by the accused, Rs.5000/- was given, which was not accepted and returned, for he wanted the entire demand to be fulfilled in one go. Accordingly, Rs.10,000/- was paid. Yet accused continued to physically assault the deceased. When he brought the matter to the notice of Kishori Lal (PW.5), accused who was counselled begged pardon and assured not to repeat the same again. However, accused did not mend his ways and continued to physically assault the deceased, as a result of which, on one occasion, deceased returned to her parental house and stayed for 10-20 days. At that time, on the asking of this witness, Ram Dass, who had got marriage solemnized intervened and when the accused was confronted he again begged pardon. Only with the assurance that his daughter would be safe, deceased returned to the matrimonial house. However, such harassment and beatings continued and eventually deceased ended her life by consuming poison. Factum of such death came to be known through Bhagat Ram.

37. Now, in cross-examination, we do not find the testimony of this witness to have been shattered in any manner. He has withstood the test of cross-examination. There are no improvements, embellishments or contradictions. He is clear and categorical with regard to the dowry demand and the physical assaults. That accused begged pardon not once but twice is clear. He assured to mend his ways and only thereafter the deceased was allowed to return to the matrimonial house. He has explained that the accused rarely accompanied the deceased. He has explained that dowry demand started only six months after marriage. His explanation of not having brought the matter to the notice of the Panchayat or the police, as it could have ended the relationship, is quite plausible and acceptable. Noticeably parties hail from rural background. Significantly his substantive evidence is on the lines of his version, so disclosed by him to the police when his statement (Ex.PA) came to be recorded. The intent of the accused in abetting the crime is evidently clear.

38. We find version of this witness to be fully corroborated by Ram Dass (PW.4). He is the one, who had got the marriage solemnized. He is clear that the dowry demand and the cruelties started six months after the marriage. The conduct of the accused was brought to his notice and he counselled and the accused, who after admitting his mistake, begged for pardon. Now simply because accused treated this witness nicely or was given due respect, would not render his version to be doubtful, false or incorrect. He admits that father of the accused is distantly related to him. That the accused is a nice person was an impression he carried at the time of solemnization of marriage, but then thereafter, when matter was brought to his notice, he counselled the accused and accepted his assurance of good conduct, which regretfully was not so done. Credit of this witness is sought to be impeached from his version to the effect that about one and half month prior to her death, deceased stood assaulted by the accused and sent back to her parental house. In his statement (Ex.DA) with which he was confronted, it is not so recorded. But then in view of the explanation appended to Section 162 of Cr.P.C., we do not find such fact

to be a contradiction. This we say for the reason that it has come in the testimony of Om Prakash (PW.1) that the accused had assaulted the deceased, as a result of which, she had come to her parental house and Ram Dass was asked to intervene.

39. Now all that is required to be "shown" is that the accused had subjected the deceased to mental and physical cruelty either as a result of dowry demand or otherwise, which in the instant case, the prosecution has done so. The initial burden stands discharged with the fact in issue proven on record, beyond reasonable doubt. Husband never bothered to take care of his wife. He exhibited extreme insensitivity. He continuously subjected the deceased to mental and physical torture and cruelty. Demands of dowry were persistently consistent. The allegation of cruelty and dowry demand so narrated by the witnesses cannot be said to be vague and unspecific. The witnesses are certain about the same.

40. Noticeably deceased was being perpetually harassed. There was reasonable nexus between harassment and cause of death which was abetted by the accused. The incident of 15.07.2010 stood disclosed by the witness to the police.

41. It is not the law that testimonies of interested witnesses are to be altogether and outrightly discarded. Yes, if so required, they are to be considered with little circumspection and wherever warranted with corroboration. But then in the instant case, we do not find the witnesses to have deposed falsely or their version to be in doubt.

42. One cannot forget that in the instant case, the accused has failed to discharge the onus which heavily rested upon him. Prima facie, prosecution was able to establish its case, beyond reasonable doubt. What prompted the deceased to take away her life, in her matrimonial house, he could not explain. It is not that the deceased was suffering from physical or mental ailment. It is not that she was either hypersensitive or not able to adjust to family life. Also she was not demanding or had set her conditions to live with the accused. Even her upbringing was normal.

43. Court below, seriously erred in correctly and completely appreciating the testimonies of the prosecution witnesses as also the law as aforesaid.

44. 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.

45. 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. The accused abetted the deceased to take away her life. Despite fulfilment of certain demands, accused unrelentingly persisted with the same and continuously harassed and tortured the deceased. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

46. Thus, in our considered view, findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are reversed. The appeal is allowed and we hold the accused guilty of having committed offence, punishable under the provisions of Section 306 of the Indian Penal Code, for treating deceased Nisha Kumari with cruelty and thereby abetting her to commit suicide.

47. For the purpose of hearing the accused-convict on the quantum of sentence, the appeal be listed on 21.06.2016. He be produced in the Court on the said date. Copy of the judgment be supplied to the accused, free of cost.

48. This Court places on record, with appreciation, the efforts put in by Sh.P.S. Goverdhan, learned Amicus Curiae, in assisting the Court.

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
Shyam Lal ... Respondent.

Cr. Appeal No 466 of 2009.
Reserved on 17.5.2016.
Decided on: 3.6.2016.

Indian Penal Code, 1860- Section 304-B- Deceased was married to the accused- accused demanded dowry and when she failed to satisfy the demand, the accused harassed her – the deceased committed suicide by consuming poison- the accused was tried and acquitted by the Trial court - held in appeal that the deceased died an unnatural death within 7 years but mere fact that death had taken place within 7 years does not mean that presumption will not have to be substantiated by the prosecution by placing on record, the cogent evidence- the prosecution has to adduce evidence to show that soon before her death deceased was subjected to cruelty and harassment- PW-1 admitted in cross-examination that relations between the accused and deceased were cordial – no specific instance of demand of dowry or harassment was given – the matter was not reported to police or any other authority - no signs of external injuries were noticed - testimonies of prosecution witnesses are contradictory- Trial Court had rightly acquitted the accused- appeal dismissed. (Para- 13 to 22)

Cases referred:
Surinder Singh Vs. State of Haryana, (2014) 4 Supreme Court Cases 129
V.K. Mishra and another Vs. State of Uttarakhand and another, (2015) 9 Supreme Court Cases 588

For the appellant. : Mr.V.S. Chauhan, Addl. Advocate eneral with Mr. Vikram Thakur, Dy. Advocate General,
For the respondent : Mr. P.P. Chauhan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

This appeal has been filed against the judgment passed by learned Sessions Judge, Solan in Session Trial No. 13-NL/7 of 2007 dated 9.4.2009, vide which the learned Trial Court has acquitted the accused for offence punishable under Section 304-B of Indian Penal Code (in short 'IPC').

2. The case of the prosecution in brief was that accused was married to Surindera, (hereinafter to be referred as 'deceased'), daughter of Romesh Chand and Vidya Devi of village Duglu on 31.1.2005. The parents gave dowry to their daughter according to their capacity but

accused was dissatisfied with dowry and started harassing her with a view to raise demand to her parents for Fridge, Colour TV and other items. The deceased on her visits to her parents used to tell them about the said behaviour and demands of the accused. On 6.5.2007, accused visited his in-laws at village Duglu, where his father-in-law told him that he was not in a position to meet his demands, but as and when he would be in a position he would meet his demands and he should not harass his daughter. Thereafter, accused returned to his house along with his wife. On the intervening night of 20-21st May, 2007 at about 3:00 a.m. Jaswinder, brother of accused informed father of deceased that his daughter was seriously ill and requested him to come to his house. On this, Romesh Chand, father of deceased telephonically inquired from the neighbourhood of accused about the welfare of his daughter, who informed him that deceased was no more. When Romesh Chand came to know about the death of his daughter, he collected his village fellows and went to the house of accused and reached there in the morning on 21.5.2007. They found the deceased lying in a room in the house of accused. They inquired from accused as to what had happened. The accused initially kept quiet but later on informed that deceased had consumed poison. Romesh Chand asked accused to return all dowry articles, which were returned by him. Thereafter, one Kuldip who had accompanied Romesh Chand, telephonically informed the police about the manner of death of the deceased and police after making entry of the information so received, in the daily diary register, reached the house of accused. The police party was headed by Som Nath, SHO, who after inspecting the dead body, recorded statement of Romesh Chand under Section 154 Cr.P.C. and on the basis of the same, a case was registered under Section 304-B IPC. Inquest report was prepared and photographs of the spot were also taken. Thereafter, Dy. Superintendent of Police, Nalagarh visited the spot and took over the investigation of the case. After complying all the formalities, challan under Section 304-B IPC was prepared and presented in the Court of learned JMIC, Nalagarh, who committed the case to the Court of learned Sessions Judge, Solan for trial.

3. The accused pleaded not guilty and claimed to be tried.

4. In order to substantiate its case, prosecution, in all, has examined 14 witnesses.

5. PW1-Romesh Chand father of deceased has deposed that he had one daughter and two sons and deceased was the eldest and married to accused on 31.1.2005. He further stated that he gave dowry to his daughter according to his capacity. His daughter used to visit off and on. Deceased also told his wife (deceased's mother) that accused was harassing her on account of dowry and demanding Fridge, Colour TV and Toknia, a vessel used for keeping water. His wife told him about these facts. On 6.5.2007, his daughter alongwith accused had come to their village to attend marriage. He advised accused and told him that as and when he was in a position to give these articles, he would certainly give and requested him not to harass his daughter. On the intervening night of 20/21-5-2007 at about 3:00 a.m., he received a phone call from Jasbinder 'Dever' of his daughter, that his daughter was seriously ill. Then, he telephoned a lady in the neighbourhood of his daughter to inquire about the deceased, who informed him that his daughter had expired. Thereafter, he went around his village and told Kuldip, Prem Lal and other persons about the same. Then, 20-25 persons, ladies and gents, from his village gathered and they all came to the village of his daughter. On reaching there, they found that deceased was lying in the room of the accused and he asked his son-in-law, as to what has happened. The accused initially remained quiet and later on told him that deceased has consumed poison. He further deposed that deceased has committed suicide by consuming poison on account of harassment being meted out to her by the accused on account of demand of dowry. He has also deposed that he told accused that his daughter is no more, therefore, he would take back the dowry articles and collected the same and kept these in a nearby field, in the meanwhile police came. In his cross-examination, he has admitted that it was correct that after marriage deceased and accused used to visit them. He has also admitted that relationship between his daughter and accused were cordial. He also stated that his daughter did not tell him about her being harassed by accused. He has also stated that he had not told the factum of his daughter being harassed to the police, nor he had made any complaint in this regard to the Panchayat etc. but he has

qualified this by saying that this was a family affair. He has denied the fact that his daughter was getting medical treatment, as she was issueless.

6. PW2-Vidya Devi is the mother of deceased who has also narrated the events leading to the death of her daughter and substantiated the case of the prosecution. She has deposed that about one month before her death, deceased came to their house and told her that accused harassed her and was demanding Fridge, TV and Toknia and this fact was told by her to her husband. In her cross-examination, she has stated that she did not tell about the harassment of her daughter to the Panchayat or police.

7. PW3-Kuldeep Singh has deposed that he knew Romesh Chand, PW1, and deceased daughter of Romesh Chand. On 21.5.2007, at about 3:30 a.m., Romesh Chand came to his house and requested him to accompany him to village Katli, to the house of in-laws of deceased, as his daughter has expired. 20-25 persons accompanied him to village Katli. He has also deposed that he inquired from Romesh Chand as to how deceased had died and he (Romesh Chand) told him that he was not aware and actual position will be known after reaching village Katli. Romesh Chand told him that accused used to harass deceased on account of demand of dowry. He has further stated that when they reached the village of deceased, they saw deceased was lying in the room and when Romesh Chand inquired about the death of his daughter from accused, he initially remained quiet and later on said that she had consumed poison, as a result of which, she expired. In his cross-examination, he has stated that he had attended the marriage of deceased and he denied the suggestion that he had deposed falsely that when they were on their way from village Duglu to Katli, Romesh Chand told him regarding the harassment being meted out to deceased by accused on account of dowry. PW4-Prakash Chand is signatory to the recovery memo vide which 'dupatta' was taken into possession and he has also admitted that photographs were also taken on the spot. PW6-Dr. Bhag Singh Dhiman had conducted the post-mortem of the dead body of deceased-Surindera and he has stated that, in his opinion, deceased died due to consumption of poison. PW7-Nirmal Singh had taken photographs, Ext. P3 to Ext.P8 at the spot.

8. These are some of the relevant witnesses whose scrutiny/testimonies are relevant for the purpose of adjudication of the present case.

9. On the basis of material produced on record, the learned Trial Court came to the conclusion that the prosecution had failed to bring home the guilt of accused under Section 304-B IPC and as such the accused deserves to be acquitted. Feeling aggrieved by the said judgment, the present appeal has been filed by the State.

10. Mr. V.S. Chauhan, learned Addl. Advocate General has submitted that judgment passed by the learned Trial Court is not sustainable in the eyes of law because the Trial Court has erred in acquitting the accused despite the fact that the prosecution had proved beyond reasonable doubt that accused was guilty of the charges leveled against him. As per him, the prosecution witnesses had corroborated the case of prosecution and the testimonies of said witnesses inspired confidence and their credibility was not impinged by the defence. In these circumstances, according to him, the findings returned by the learned Trial Court are not only perverse but they are also contrary to the material produced on record by the prosecution. According to him, there remained no iota of doubt that the deceased has ended her life on account of the harassment meted out to her by accused, thus he submitted that the judgment passed by the learned Trial Court, was required to be set aside and the accused ought to be convicted for the offence leveled against him.

11. On the other hand, Mr. P.P. Chauhan, learned defence counsel has submitted that there was no merit in the appeal filed by the State, as the judgment of the learned Trial Court was based on correct appreciation of evidence on record and did not warrant any interference. Mr. Chauhan has further argued that none of the ingredients of Section 304-B IPC were proved beyond any reasonable record against the accused by the prosecution. He has argued that the onus was on the prosecution to have proved by way of placing material on record

that deceased before her death was subjected to cruelty or harassment by her husband or relatives in connection with the demand of dowry, as a result of which, the deceased committed suicide. Accordingly, he submitted that the judgment passed by the learned Trial Court was a reasoned judgment and the findings returned in the same were based on record available before it, and the same warranted no interference.

12. We have heard learned counsel for the parties and gone through the records of the case.

13. 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.

14. Section 113-B of the Evidence Act, 1872 reads as under:-

> "**113-B. Presumption as to dowry death.** - When the question is whether a person has committed the dowry death of a woman, and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

15. Section 304-B of the IPC reads as under:-

> "**304-B. Dowry death**. – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death."

16. The Hon'ble Supreme Court in **Surinder Singh Vs. State of Haryana**, (2014) 4 Supreme Court Cases 129, has held as under:-

> "17. Thus, the words 'soon before' appear in Section 113B
>
> of the Indian Evidence Act, 1872 and also in Section 304B of the IPC. For the presumptions contemplated under these Sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words 'soon before' is, therefore, important. The question is how 'soon before'? This would obviously depend on facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential
>
> amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, 'soon before' is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

> 18. In this connection we may refer to judgment of this Court in Kans Raj v. State of Punjab, where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222-23, para 15)
>
> "15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non- existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough." Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."

17. Thus, it is evident that for the purposes contemplated in Section 113-B of the Evidence Act 1872 and Section 304-B I.P.C., to spring into action, it is necessary to demonstrate that cruelty or harassment was caused soon before the death. Therefore, the interpretation of the words "soon before" assumes great significance and importance and these words have to be interpreted keeping in view the facts and circumstances of each case. The question obviously will be how "soon before" her death such woman was subjected by the accused to cruelty or harassment for or in connection with demand for dowry. The cruelty or harassment will differ from case to case and it will obviously be relating to the mindset of people which will also vary from person to person. Besides cruelty being both mental and/or physical it can also be verbal or emotional.

18. In the context of the present case, it is not disputed that PW-1 and PW-2 are very closely related to the deceased. In these circumstances, their statements have to be minutely scrutinized in order to ascertain their trustworthiness and truthfulness. Because the death has taken place within 7 years from the date of the marriage of the accused, this does not mean that the presumption as contemplated in Section 304-B I.P.C. will not have to be substantiated by the prosecution by placing on record cogent and reliable material.

19. To sustain the conviction under Section 304B IPC, the following essential ingredients are to be established:-

(i) The death of a woman should be caused by burns or bodily injury or otherwise than under a 'normal circumstance';

(ii) such a death should have occurred within seven years of her marriage;

(iii) she must have been subjected to cruelty or harassment by her husband or any relative of her husband;

(iv) such cruelty or harassment should be for or in connection with demand of dowry and

(v) such cruelty or harassment is shown to have been meted out to the woman soon before her death.

20. Thus, to attract conviction under Section 304B IPC, the prosecution should adduce evidence to show that "soon before her death", the deceased was subjected to cruelty or harassment. There must always be proximate and live link between the effects of cruelty based on dowry demand and the concerned death. In the case of Hira Lal & Ors. vs. State(Govt. of NCT) Delhi, (2003) 8 SCC 80, it was observed as under:-

> *"9. A conjoint reading of Section 113-B of the Evidence Act and Section 304- B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113- B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods "soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession". The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."*

21. The Hon'ble Supreme Court in **V.K. Mishra and another** Vs. **State of Uttarakhand and another**, (2015) 9 Supreme Court Cases 588 has again reiterated that in order to attract application of Section 304B IPC, the essential ingredients are as follows:-

> *1. The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.*
>
> *2. Such a death should have occurred within seven years of her marriage.*
>
> *3. She must have been subjected to cruelty or harassment by her husband or any relative of her husband.*
>
> *4. Such cruelty or harassment should be for or in connection with demand of dowry.*
>
> *5. Such cruelty or harassment is shown to have been meted out to the woman soon before her death.*

On proof of the essential ingredients mentioned above, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. A conjoint reading of Section 113B of the Evidence Act and Section 304B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. 'Soon before' is a relative term and it would depend upon circumstance of each case and no strait-jacket formula can be laid down as to what would constitute a period 'soon before the occurrence'. There must be inexistence a proximate live link between the facts of cruelty in connection with the demand of dowry and the death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned it would be of no consequence."

22. In the present case, a perusal of statement of PW1 makes it clear that at no stage the deceased had, in fact, told him that accused was harassing deceased on account of dowry. In his cross-examination, he has admitted the suggestion that relation between deceased and accused were cordial. He has further mentioned in his statement that when he reached in the village of accused, they demanded back the dowry, which he (Romesh Chand) had given to his daughter and the same was returned back. He has also mentioned in his cross-examination that the factum of alleged harassment of his daughter was neither told to Panchayat nor police. Besides this, in his statement there is no specific incidence or instance of cruelty indicated from which it can be presumed that the said act was a catalyst resulting in the deceased consuming the poison. If we see his initial statement under Section 154 Cr.P.C., there also general assertions, are made that accused used to harass his daughter on account of dowry but there are no specific instances of cruelty alleged against the accused. Similarly, PW2, who is the mother of deceased, has also stated in her cross-examination that she has also made general allegations of demand of dowry against the accused. She has stated in her cross-examination that the alleged acts of harassment of her daughter was neither reported to the Panchayat nor to the police. PW-6, Dr. Bhag Singh, who has conducted the post- mortem of deceased, has stated that the cause of death was consumption of poison. A perusal of the post-mortem report i.e. Ext.PW6/A will demonstrate that it is mentioned therein that there was no sign of external injury on the body of the deceased. This also belies the fact that deceased was subject to any physical harassment/cruelty by the accused. In case the deceased was being harassed by accused on account of dowry demand then the prosecution has not been able to demonstrate as to why the parents of the deceased did not take up the matter of the deceased being persistently harassed by accused with appropriate authority. As already mentioned above, the statement of the father made under Section 154 Cr.P.C. also does not disclose that the deceased was physically harassed by accused. Thus, it is evident that there are vital contradictions and inconsistencies in the statements of PW1 and PW2. These witnesses are closely related to the deceased. On the basis of material which has been placed on record by the prosecution at the most the conduct of the accused person creates suspicion that alleged acts might have resulted in the deceased taking extreme steps of committing suicide. However, it cannot be said that his alleged guilt has been proved beyond reasonable doubt.

Accordingly, we hold that the view which has been taken by the learned Trial Court after appreciating the material placed by prosecution on record is one of the reasonable and plausible views which could have been arrived at, in the facts and circumstances of the case. Therefore, we do not find any perversity in the judgment passed by the learned Trial Court. The judgment has been passed by appreciating all the material placed on record and the same cannot be said to be either cryptic or perverse and the conclusions arrived at are borne out from the material placed on record by the prosecution. Therefore, we do not find any merit in the appeal and the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.

Versus

Vinod alias Lucky Rana & Ors. ... Respondents.

Cr. Appeal No. 23 of 2008.
Reserved on: 1.6.2016.
Decided on: 03.06.2016.

Indian Penal Code, 1860- Section 341, 324, 147 and 149- Complainant was going towards Kangra - when he reached at Chhatri, the accused restrained and gave him beatings by grip (a pointed object) – Trial court convicted five accused- an appeal was preferred which was partly allowed and conviction of only one accused was upheld- the State preferred an appeal against the acquittal of remaining accused- held, that complainant or his driver had not identified any person except the convicted accused- no identification parade was conducted and no reason was assigned for non holding of identification parade- the Appellate Court had rightly acquitted the remaining accused- Appeal dismissed. (Para- 8 to 11)

For the Appellant. : Mr. V.S. Chauhan, Addl. Advocate General.
For the respondents. : Mr. Anil Kumar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

This appeal has been filed by the State against judgment of acquittal dated 7.7.2007, passed by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, in Criminal Appeal No. 34-D/2005/03, vide which respondents/accused herein, have been acquitted by the learned First Appellate Court by setting aside judgment of conviction passed against them by the Court of learned JMIC(1), Dharamshala in Criminal Case No. 11-II/03 dated 3.4.2003 and 4.4.2003.

2. The case of the prosecution, in brief, is that on 31.12.2002 at around 9:15 p.m. complainant, Ashwani Kumar, was coming in his personal vehicle Tata-407 from Jassor towards Kangra. When he reached at a place known as Chattri on the National Highway, all accused by forming an unlawful assembly in prosecution of their common object committed rioting and wrongfully restrained the complainant and his driver from proceeding in a direction in which they had right to proceed by standing on the road. The accused also gave beatings to the complainant with a pointed object i.e. Grip and caused injury to him. The matter was reported by the complainant to police, on the basis of which Rapat, Ext.PW5/A, was recorded and FIR Ext.PW6/B was registered against all the accused. After investigation, challan was filed against all accused for trial under Sections 341, 324, 147 and 149 of Indian Penal Code (in short 'IPC'). The accused pleaded not guilty and claimed trial.

3. The Learned Trial Court on the basis of material produced before it, by the prosecution, convicted the accused (5 in number) under Sections 341, 324, 147 read with Section 149 IPC and sentenced them to under simple imprisonment for one month each and to pay fine of Rs. 250/- each under Section 341 IPC and to undergo rigorous imprisonment for six months each and to pay fine of Rs. 500/- each under Section 324 IPC and also to undergo rigorous imprisonment for three months each and to pay fine of Rs. 250/- each under Section 147 IPC. All the sentences were ordered to run concurrently.

4. The learned First Appellate Court vide its judgment dated 7.7.2007 set aside the judgment of conviction passed by the Trial Court against the present respondents, though it

upheld the judgment of conviction passed against accused Yash Pal alias Jassu. Feeling aggrieved by the said judgment of acquittal passed in favour of the present respondents, the State has preferred this appeal.

5. Mr. Chauhan, learned Addl. Advocate General has strenuously argued that judgment of acquittal passed by the learned First Appellate Court is not sustainable in the eyes of law. According to him, the learned Trial Court on the basis of correct appreciation of material produced before it by the prosecution held that the prosecution had been able to establish its case beyond reasonable doubt against all accused and accordingly it convicted all accused. This well reasoned judgment passed by the learned Trial Court was wrongly set aside qua present respondents by the learned First Appellate Court by totally misreading and mis-appreciating the evidence on record. Mr. Chauhan has further argued that learned First Appellate Court had erred in coming to the conclusion that the identity of present respondents was not proved beyond any shadow of doubt by the prosecution.

6. On the other hand Mr. Anil Kumar, learned counsel for the respondents/accused has argued that the judgment passed by the learned First Appellate Court, whereby it has set aside the judgment of conviction passed by the learned Trial Court is a reasoned judgment and the conclusions arrived at by it are based on the basis of material on record. As per him, the learned Trial Court had erred in convicting the present respondents and the learned First Appellate Court has rightly set aside the said judgment of conviction, otherwise it would have had amounted to travesty of justice. He has contended that the prosecution had failed to prove beyond any reasonable doubt that A2 to A5 were involved in the alleged incident and that their identity as accused, who committed the alleged offences, was not proved reasonable doubt by the prosecution. He accordingly prayed that there was no merit in the present appeal and the same be dismissed.

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

8. In my considered view, there is no infirmity or perversity in the judgment which has been passed by the learned First Appellate Court in acquitting the present respondents by setting aside the judgment of conviction passed against them by the learned Trial Court. A perusal of the statements made by the complainant as well as his drivers i.e. PW3 and PW4 demonstrate that save and except the identification of Yashpal, no other accused was identified either by PW3 i.e. the complainant or his driver PW4. Incidentally, as far as PW4 is concerned, he has stated that when complainant lodged report with the police, the name of Jassu (accused Yashpal) was got reported by the complainant with the police. PW3 in his statement has categorically stated that out of five assailants, he knew accused Yashpal @ Jasssu, whereas he did not knew other four assailants. Thus, as per the complainant he could recognize only one of the accused i.e., Jassu and other accused could not be identified by him but as per him he could recognize them.

9. Incidentally, a perusal of his statement will demonstrate that when he identified present respondents, he has not disclosed to police that they were the same persons who had given beatings to him on the date of occurrence of the incident. No identification parade has been conducted to identify four assailants, who were not known to the complainant and whom he had not identified when the crime was committed. PW4 on the other hand has stated that he could not recognize any of the accused as it was dark. If we read his statement harmoniously with the statement of PW3 who has also categorically stated that he identified only accused Yashpal and he could not identify other assailants then it is evident that except accused Yahpal no other assailants was identified even by the complainant. Incidentally, the other driver accompanying complainant, Raj Kumar, has not been examined by the prosecution on the ground that he had been won over by the accused. The learned First Appellate Court has held that even if this witness was won over, then also he ought to have been examined in the Court, so that if he did not support the case of the prosecution, he could have declared hostile and leading questions

could have been put to him and some truth could have been extracted. It has further held that non-examination of the said witness has also further established the fact that the identity of the accused could not be established beyond shadow of doubt except Yashpal.

10. Another relevant factor which has weighed with the learned First Appellate Court and rightly so is, as to why the investigating agency did not hold identification parade. In my considered view, in the facts of the present case, accused Yashpal @ Jassu was identified at the spot by the complainant as being one of the assailants as he was known to him, therefore, identification parade qua him was not required but for the purposes of identifying other persons who were not otherwise known to the complainant, it was necessary that investigating agency had conducted identification parade to ascertain as to whether the present respondents were the same persons who had assaulted the complainant on the fateful night. This not having been done, also clouds the story of the prosecution with suspicion and on this material, it cannot be said beyond reasonable doubt that present respondents were, in fact, part of the unlawful assembly.

11. Therefore, in my considered view, there is no infirmity with the judgment passed by the learned First Appellate Court to the extent it has acquitted the present respondents by setting aside the judgment of conviction passed against them by the learned Trial Court. The prosecution has not been able to establish its case against the said respondents beyond reasonable doubt. Accordingly, the present appeal is dismissed being devoid of any merit. Bail bonds, if any, furnished by the respondents are discharged.

With the said observation, the petition stands disposed of, so also pending application(s) if any.

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

The National Insurance Co. Ltd. .....Appellant.

Versus

Tek Chand and others .....Respondents

FAO (MVA) No. 343 of 2010
Date of decision: 3rd June, 2016.

Motor Vehicles Act, 1988- Section 166- Claimants had specifically pleaded that respondent no. 2 was driving the vehicle in a rash and negligent manner which caused the accident- PW-2 had deposed that accident was the outcome of rash and negligent driving of the driver- the respondents had failed to lead any evidence to show that accident had taken place due to mechanical defect - thus it was rightly held that accident was the outcome of rashness and negligence of the driver- appeal dismissed. (Para 10-12)

For the appellant: Mr. Narender Sharma, Advocate.
For the respondents: Mr.Devender K. Sharma, Advocate, for respondent No.1.
Nemo for respondents No. 2 and 3.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 24.5.2010, made by the Motor Accident Claims Tribunal, Mandi, H.P. in Claim Petition No. 16/2002/116 of 2005, titled *Sh. Tek Chand versus Sh. Hemant Kumar and others*, for short "the Tribunal", whereby

compensation to the tune of Rs.54,762/- alongwith interest @ 9% per annum came to be granted in favour of the claimant, and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Insured, claimant and driver have not questioned the impugned award on any ground. Thus, the same has attained the finality so far as it relates to them.

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

4. Learned counsel for the appellant argued that the claimant has failed to prove the rash and negligent driving of the driver, namely, Dinesh Kumar and that the owner has committed willful breach. The argument is devoid of any force, for the following reasons.

5. Respondents resisted the claim petition and following issues came to be framed.

(i) *Whether the petitioner suffered injuries as a result of rash and negligent driving of driver of truck No. HP-49-2221?OPP*

(ii) *Whether the vehicle in question was being driven in contravention of the terms and conditions of the insurance police and without a valid driving licence? OPD-3.*

(iii) *To what amount and from whom the petitioner is entitled? OPP.*

(iv) *Relief.*

6. Parties have led evidence.

7. Claimant examined three witnesses, namely Tek Chand (PW1), Shyam Lal (PW2) and Dr. Sanjeev Raj Kapoor (PW3).

8. Respondents have not led any evidence. Thus, the evidence led by the claimant has remained unrebutted.

9. The claimant has also placed on record documents, the description of which are given at page 8 of impugned award.

10. The claimant has specifically pleaded in the claim petition that respondent No.2 Dinesh kumar was driving the offending vehicle, i.e, Truck No. HP-49-2221 on 17.3.2001 at about 9.30 P.M. at village Gulel and caused the accident. The deceased suffered injuries and succumbed to the same. PW2 Shyam Lal deposed that the accident was outcome of rash and negligent driving of the driver Dinesh Kumar and the findings returned by the Tribunal to that effect have not been questioned by the driver. The FIR was lodged against the driver which is a prima facie proof in favour of issue No.1.

11. The driver and owner have filed the reply and admitted the accident and cause of death of the deceased but have stated that the accident occurred due to sudden mechanical defect.

12. It was for respondents No. 1 and 2 to dislodge the evidence of the claimant and prove that the accident was outcome of some mechanical defect in the vehicle, failed to lead any evidence. In fact, driver and owner have admitted the cause of the death of the deceased. They have even not questioned the said findings, have attained the finality. It was for the insurer to prove issue No.3, has not led any evidence. Thus, the findings returned on issue No. 3 are upheld.

13. Having said so, no interference is required. The impugned award is upheld and the appeal is dismissed, alongwith pending applications, if any.

14. 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.

The New India Assurance Company Ltd. ..... Appellant
Versus
Smt. Indu Bala and others ..... Respondents

FAO(MVA) No. 472 of 2010.
Judgment reserved on: 1.6.2016
Date of decision: 3rd June, 2016

Motor Vehicles Act, 1988- Section 149- Tribunal held the driving license was fake but directed the insurer to indemnify the insured without any right of recovery- held, that owner had nowhere pleaded or proved that he had checked the driving license and had satisfied himself regarding the genuineness of the same- the insurance company examined clerk of Licensing Authority, Agra who stated that license possessed by the driver of the offending vehicle was not issued by his office- he admitted that there are two RTOs in Agra -thus, it cannot be stated that license of the driver was proved to be fake- onus to prove breach of terms and conditions of the policy was upon the insurer and the insurer was to prove that driver did not have a valid and effective driving license at the time of the accident-in these circumstances, the Tribunal had wrongly held the license to be fake - Appeal dismissed. (Para 6-34).

Cases referred:
United India Insurance Company Ltd. vs. Lehru and others AIR 2003 SC 1292
National Insurance Company Ltd. vs. Amar Chand and others (2005) 4 ACC 674
Bhoop Singh vs. Puran Chand and others (2009) 3 ACC 588
Pralhad and others vs. State of Maharashtra and another (2010) 10 SCC 458
Sushil Kumar vs. Rakesh Kumar (2003) 8 SCC 673
Ravinder Singh Gorkhi vs. State of U.P. (2006) 5 SCC 584,
Subhash Maruti Avasare vs. State of Maharashtra (2006) 10 SCC 631
Oriental Insurance Company Ltd. vs. Poonam Kesarwani and others (2010) ACJ 1992
New India Assurance Company Ltd. vs. Sunita Rani and others (2014) ACJ 1964
National Insurance Company Ltd. vs Swaran Singh and others, AIR 2004 Supreme Court, 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC, 217

For the appellant : Mr. Ratish Sharma, Advocate.
For the respondents : Mr. Vivek Sharma, Advocate, for respondents No. 1 and 2.
Mr. B.S. Chauhan, Senior Advocate, with Mr. Munish Sharma, Advocate, for respondent No.3.
Mr. Naresh Verma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The Insurance Company has filed the instant appeal under Section 173 of the Motor Vehicles Act, 1988 questioning therein the award dated 4.8.2010 passed by learned Motor Accident Claims Tribunal, Bilaspur (H.P.) (for short 'Tribunal') with a prayer that the same be either quashed and set-aside or in the alternative the Insurance Company be exonerated.

2. Briefly stated, facts of the case as alleged by the claimants are that Sh. Ashwani Kumar, husband of claimant/ respondent No.1 and father of claimant/respondent No.2 died in an accident which took place on 5.8.2007 at about 11.00 a.m. near village Kularu on NH-88 in District Bilaspur. Deceased was allegedly driving Swaraj Mazda tempo No. HP-24A-1172, which

met with an accident with TATA-1210 Truck No. HP-22-5912 owned by respondent No.3 and driven by respondent No.4. FIR was registered against the truck driver. Sh. Ashwani Kumar sustained injuries and breathed his last in hospital on the same day and it is his dependent who filed the claim petition.

3. The respondents No. 3 and 4 in their reply averred that truck No. HP-22-5912 driven by respondent No.4 was going to Barnala. At the place of occurrence, there was a turn, the tempo driven by deceased was coming from opposite side, which was being driven in rash and negligent manner and to that side on the turn a tanker was standing. The deceased all of a sudden to over take the tanker, turned his tempo towards right side where the truck was going on opposite side and as such it struck with the truck due to negligence of tempo driver (i.e. deceased) and there was no fault of the truck driver. The insurance company took several defences in their reply, including the defence that the driver of the truck was not having valid and effective driving licence to drive the vehicle and there was violation of the terms of the policy and insurance company is not liable to pay any amount.

4. On 4.7.2008 the learned Tribunal framed the following issues:

1. *Whether deceased Shri Ashwani Kumar died in accident on account of rash and negligent driving of respondent No.2 of truck No. HP-22-5912 which occurred on 5.8.2007, at about 11 A.M. near village Kulari on NH-88, District Bilaspur, H.P.? OPP.*
2. *If issue No.1 supra is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? OPP*
3. *Whether the accident occurred due to the rash and negligent driving of the deceased? OPR1&2.*
4. *Whether the driver of the vehicle was not holding a valid and effective driving licence at the time of accident, if so, its effect? OPR-3.*
5. *Whether the vehicle was being driven at the relevant time in contravention of the Rules and Regulation of the Motor Vehicles Act? OPR-3.*
6. *Whether the petition is bad for non-joinder of necessary parties? OPR-3*
7. *Relief.*

5. In the instant appeal, this Court is primarily concerned with the findings rendered on issues No. 4 and 5 as the findings on these issues alone have been assailed by the appellant. With regard to issue No.4, the learned Tribunal held that the driving licence of respondent No.4 was fake and thereafter applying the ratio of the judgment of the Hon'ble Supreme Court in ***United India Insurance Company Ltd. vs. Lehru and others AIR 2003 SC 1292*** directed the Insurance Company to indemnify the owner that too without right of recovery and it is this finding which has been questioned in this appeal.

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

6. It is vehemently argued by Mr. Ratish Sharma, learned counsel for the appellant that the judgment rendered in ***Lehru's*** case (supra) was not intended to operate as an universal panacea but had to be applied to the facts and circumstances obtaining in a given case. He would vehemently argue that in absence of any pleadings and evidence having been led by the owner regarding the satisfaction of validity of driving licence possessed by the driver, the Tribunal could not have relied upon ***Lehru's*** case.

7. Learned counsel for the appellant has also invited my attention to joint reply filed by the owner and driver and also to the statement of driver of the truck, who appeared as RW-1 wherein it is established that nowhere in the entire pleadings or evidence has the owner stated that he had checked the licence of the driver before hiring him and had prima-facie satisfied himself regarding the genuineness thereof. I fully agree with the submission put forth by learned

counsel for the appellant that sympathy can only be with the victim of the accident and not owners or drivers, who violate the law. There can be no dispute with regard to this proposition as laid down by this Court in ***National Insurance Company Ltd. vs. Amar Chand and others (2005) 4 ACC 674*** wherein it was held:

> "*27. From a perusal of the bare provisions of the Motor Vehicles Act as well as the judgments of the various Courts and especially the observations of the Apex Court in Swaran Singh's case (supra), it is clear that the insurance company can defend an action on the ground that the petitioner was not duly licensed on the date of the accident. Can a person whose license has expired and not renewed within thirty days of its expiry, as provided under Sections 14 and 15 of the Motor Vehicles Act, be considered to be duly licensed on the date of the accident? In my humble opinion, the answer to this question has to be in negative.*
>
> *28. The Apex Court in Swaran Singh's case (supra) in paras 45 & 46 quoted above has clearly laid down that the license remains valid only for a period of thirty days from the date of its expiry. The question as to what happens if the license is not renewed within thirty days has not been answered in this judgment. From the bare reading of the provisions as well as the interpretation given by the Hon'ble Supreme Court it can be said that after thirty days of the expiry there is no driving license. The driver has neither an effective driving license nor can be said to be duly licensed. It would run counter to the very provisions of the Motor Vehicles Act if it is held that though the license had expired and not been renewed even within the time allowed in law, the driver is duly licensed. A driver, who permits his license to expire and does not get it renewed till after the accident, cannot claim that it should be deemed that the license is renewed retrospectively. The proviso to Section 15 of the Motor Vehicles Act clearly provides that if the license is not renewed within thirty days of its expiry, the driving license shall be renewed with effect from the date of its renewal. This renewal can never be retrospective. Therefore, it has to be held that if the driving license is not renewed within thirty days it will only be a valid driving license from the date of its renewal. The driver cannot be deemed to be duly licensed on the date of accident if thirty days have already expired from the date of expiry of his license and the same has not been renewed within thirty days.*
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> *29. The other contention of Ms. Jyotsna Rewal Dua is that the Insurance Company must not only prove that the driver was not duly licensed but must also prove that he was disqualified from holding such a license. This contention cannot be accepted. The policy condition in the present case is very clear. According to it, the person must hold a valid driving license and should also not be disqualified from holding or obtaining such a driving license. If either of the conditions is not satisfied the Insurance Company can defend the action on the ground that there is violation of the terms of the policy and the provisions of the Motor Vehicles Act. The Apex Court in Swaran Singh's case (supra) has clearly held that Clause (a) of Section 149(2) is disjunctive in nature. The Insurance Company can avoid its liability either by showing that a named person was driving the vehicle or that it was being driven by a person who did not have a duly granted license or that the driver is a person disqualified for holding or obtaining a driving license. Reading both the policy and the Motor Vehicles Act conjointly the only reasonable interpretation is that the Insurance Company could avoid its liability if it could prove any of these three conditions.*
>
> *30. One can imagine of a situation where even though a person may have a valid license, he, in fact, is disqualified from holding the same. For example, a 16 years old person by misrepresenting his age or filing forged documents obtains the driving license by showing that his age is 18 years. In this case even though the driver had a valid driving license, the Insurance Company can avoid its liability if*

it shows that the driver in fact was not qualified to obtain such a licence. Similarly, even after license has been acquired a person may acquire a disability which would disentitle him to hold such a license. He may suffer physical impairment to such an extent that he is not legally permitted to hold a driving license. Therefore, a disqualification acquired during the validity of the driving license is also sufficient to bring the exclusion clause into operation.

31. In view of the above discussion, it is abundantly clear that the arguments raised by the Insurance Company have to be accepted. In order to enforce the award against the Insurance Company the Court must be satisfied that the driver was duly licensed on the date of accident. Even if he is duly licensed, it is open to the Insurance Company to establish by leading appropriate evidence that he was either disqualified from obtaining such license or that he has been disqualified for retaining such a license due to physical or legal disability. To hold otherwise would amount to giving premium to persons who do not follow the Rule of Law.

32. The next submission made is that since the Motor Vehicles Act is a beneficial piece of legislation it must be construed in favour of the claimant. There can be no doubt that in case two interpretations are possible the one which is in favour of the claimant should be given. However, it would be too much to hold that violence should be done to the clear and plain language of the statute. The Court can protect the rights of the claimants by asking the Insurance Company to deposit the amount and recover it from the insured. However, there can be no sympathy with the owner or driver who violates the law. Sympathy can only be with the victims of the accident. It is their rights which have to be protected and not the rights of the owners of vehicles. If the contention of the learned Counsel is accepted then people will feel free to drive vehicles without any licence.

33. The last contention raised on behalf of respondent No. 3 is that since the driver had at one time held a valid driving license, therefore, there is no breach of policy on the part of the insured. Reliance is placed upon the judgment of the Apex Court in Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan 1987 ACJ 411 : AIR 1987 SC 1184; Sohan Lal Passi v. P. Sesh Reddy ; and Swaran Singh's case (supra). No doubt, the law is well settled that the Insurance Company must prove that the insured is guilty of breach of policy. How and in what manner the breach is to be proved is a matter to be decided on the facts and circumstances of each case. The Apex Court in Swaran Singh's case (supra) while holding that the breach has to be proved by the Insurance Company also held as follows :

> *"(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 wherefor would be on them.*
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> *(v) The Court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.*
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> *XXX XXX XXX*
>
> *(vii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree."*

34. When an employer employees a driver, it is his duty to check that the driver is duly licensed to drive the vehicle. Section 5 of the Motor Vehicles Act provides that no owner or person incharge of a motor vehicle shall cause or permit any person to drive the vehicle if he does not fulfil the requirements of Sections 3 and 4 of the Motor Vehicles Act. The owner must show that he has verified the license. He must also take reasonable care to see that his employee gets his license renewed within

time. In my opinion, it is no defence for the owner to plead that he forgot that the driving license of his employee had to be renewed. A person when he hands his motor vehicle to a driver owes some responsibility to society at large. Lives of innocent people are put to risk in case the vehicle is handed over to a person not duly licensed. Therefore, there must be some evidence to show that the owner had either checked the driving license or had given instructions to his driver to get his driving license renewed on expiry thereof. In the present case, no such evidence has been led.

35. In the present case, the employer is a company and the employee was to drive an ambulance. There is no material placed on record by the employer to show as to when the driver was employed and whether his driving license was checked at the time when he was given employment. These facts were only within the knowledge of the employer and no other person could have proved these facts. The employer led no evidence in this regard and, therefore, adverse inference has to be drawn against the employer."

8, There can also be no dispute with the ratio of the judgment rendered by this Court in ***Bhoop Singh vs. Puran Chand and others (2009) 3 ACC 588*** wherein it has been held that once the driving licence is proved to be fake, then the Tribunal is justified in exonerating the insurance company.

But then the moot question is as to whether the driving licence possessed by the driver was in fact proved by the insurance company to be fake?

9. Learned counsel for the appellant would vehemently contend that such plea cannot even be looked with by this Court as the same has attained finality inasmuch as none of the respondents have questioned the award by filing appeal or even cross-objections qua such findings.

10. Order 41 Rule 33 of the Code of Civil Procedure reads as under:

"33. Power of court of Appeal.*- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised In favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:*

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."

11. It cannot be disputed that the object of the aforesaid rule is to empower the Appellate Court to do complete justice between the parties. This rule gives the Court ample power to make an order appropriate to the ends of justice. It enables the Appellate Court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though the appeal is as to part only of the decree; and such party or parties may not have filed an appeal. The necessary condition for exercising the power under the rule is that the parties to the proceedings are before the Court and the question raised properly arises out of the judgments of the lower Court. In that event, the Appellate Court can consider any objection to any part of the order or decree of the Court and set it right. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised and each case therefore must depend upon its own facts. Although, the general

principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily, the Appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal. But in exceptional cases, the rule enables the Appellate Court to pass such decree or order as sought to have been passed even if such decree or order would be in favour of parties who have not filed any appeal.

12. The scope of the rule has repeatedly came up for consideration before the Hon'ble Supreme Court, but I need only refer to the judgment rendered in ***Pralhad and others vs. State of Maharashtra and another (2010) 10 SCC 458*** wherein it was held:

> *"18. The provision of Order 41 Rule 33 CPC is clearly an enabling provision, whereby the appellate Court is empowered to pass any decree or make any order which ought to have been passed or made, and to pass, or make such further or other decree or order as the case may require. Therefore, the power is very wide and in this enabling provisions, the crucial words are that the appellate court is empowered to pass any order which ought to have been made as the case may require. The expression "order ought to have been made" would obviously mean an order which justice of the case requires to be made. This is made clear from the expression used in the said Rule by saying "the court may pass such further or other order as the case may require". This expression "case" would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.*
>
> *19. In fact, the ambit of this provision has come up for consideration in several decisions of this Court. Commenting on this power, Mulla (Civil Procedure Code, 15th Edn., p. 2647) observed that this Rule is modeled on Order 59 Rule 10 (4) of the Supreme Court of Judicature of England, and Mulla further opined that the purpose of this Rule is to do complete justice between the parties.*
>
> *20. In Banarsi vs. Ram Phal (2003) 9 SCC 606, this Court construing the provisions of Order 41 Rule 33 CPC held that this provision confers powers of the widest amplitude on the appellate Court so as to do complete justice between the parties. This Court further held that such power is unfettered by considerations as to what is the subject matter of the appeal or who has filed the appeal or whether the appeal is being dismissed, allowed or disposed of while modifying the judgments appealed against. The learned Judges held that one of the objects in conferring such power is to avoid inconsistency, inequity and inequality in granting reliefs and the overriding consideration is achieving the ends of justice. The learned Judges also held that the power can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before the Court; secondly, this power cannot be exercised in favour of a claim which has been given up or lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party. (See SCC p. 619, para 15 : AIR para 15 at p. 1997).*
>
> *It has also been held by this Court in Samundra Devi vs. Narendra Kaur (2008) 9 SCC 100 SCC (para 21), that this power under Order 41 Rule 33 CPC cannot be exercised ignoring a legal interdict.*
>
> *22. In view of the aforesaid interpretation given to Order 41 Rule 33 CPC by this Court, we are of the opinion that the High Court denied the relief to the appellants to which they are entitled in view of the Constitution Bench decision in K.S. Paripoornan vs. State of Kerala, (1994) 5 SCC 593.by taking a rather restricted and narrow view of the scope of Order 41 Rule 33 CPC and also on a misconstruction of the ratio in Paripoornan."*

13. It is vehemently argued by Mr. B.S. Chauhan, Senior Advocate, assisted by Mr. Munish Sharma, Advocate that there is no evidence worth the name whereby it can even remotely be suggested that the driving licence possessed by the driver has been proved to be fake and, therefore, the findings of the learned Tribunal to this effect deserves to be set-aside.

In order to appreciate this plea, it would be necessary to advert to the evidence led by the Insurance Company.

14. The insurance company has examined A.K. Tiwari, Clerk in the office of Licencing Authority, Agra (U.P.) as RW2, who has stated that the licence No. 23093/AG/04 dated 31.12.2004 as possessed by driver of the offending vehicle was not issued by their office and has also exhibited one paper purported to be the complete report and the same is Ext. RW-2/A. In his cross-examination, this witness has clearly stated that he has not brought any record pertaining to 31.12.2004 and has further admitted that there are two RTOs in Agra, one being RTO, Enforcement and the other being RTO Office. Now, in absence of there being any record, could it be held that the licence possessed by the driver was fake?

15. Though, Mr. Ratish Sharma, learned counsel for the appellant would vehemently contend that in addition to the statement the insurance company has also proved on record the detailed report pertaining to the licence Ex.RW-2/A, but I am afraid I cannot agree with such submission as this report cannot be said to be a public document and being per se not admissible cannot be read in evidence under the Indian Evidence Act.

15. Sections 35, 74 and 76 of the Indian Evidence Act, read as under:

> "***35***. ***Relevancy of entry in public 1[record or an electronic record] made in performance of duty***.—*An entry in any public or other official book, register or 1[record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or 1[record or an electronic record] is kept, is itself a relevant fact.*
>
> ***74***. *Public documents.—The following documents are public documents :—*
>
> *(1) Documents forming the acts, or records of the acts—*
>
> *(i) of the sovereign authority,*
>
> *(ii) of official bodies and tribunals, and*
>
> *(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country; [of any part of India or of the Commonwealth], or of a foreign country;"*
>
> *(2) Public records kept [in any State] of private documents.*
>
> ***76***. *Certified copies of public documents.—Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.*
>
> *Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section."*

16. RW-2 admittedly is not the author of this document nor has the same been prepared by him from the official records. In such circumstances, the so called report is only a waste paper having no evidentiary value.

17. In ***Sushil Kumar vs. Rakesh Kumar (2003) 8 SCC 673***, the Hon'ble Supreme Court was confronted with the admission register vis-à-vis its admissibility under Section 35 of the Indian Evidence Act and it was observed as under:

> *"33. Under Section 35 of the Indian Evidence Act, a register maintained in terms of a statute or by a statutory authority in regular course of business would be a relevant fact. Had such a vital evidence been produced, it would have clinched the issue. The respondent did not choose to do so.*
>
> *34. In the aforementioned backdrop, the evidences brought on record are required to be considered. The admission register or a transfer certificate issued by a primary school do not satisfy the requirements of Section 35 of the Indian Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any responsible person."*

18. In ***Ravinder Singh Gorkhi*** vs. ***State of U.P. (2006) 5 SCC 584***, the proof of school leaving certificate under Section 35 of the Indian Evidence Act, which was not an original one was considered and the Hon'ble Supreme Court held as under:

> " 17. *"The school leaving certificate was said to have been issued in the year 1998. A bare perusal of the said certificate would show that the appellant was said to have been admitted on 01.08.1967 and his name was struck off from the roll of the institution on 06.05.1972. 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. The entries made in the school leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Head Master that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school; there was no reason as to why the same had not been produced.*
>
> *19. The school leaving certificate was not an original one. It was merely a second copy. Although it was said to have been issued in July 1972, the date of issuance of the said certificate has not been mentioned. The copy was said to have been signed by the Head Master on 30.04.1998. It was accepted before the learned Additional Sessions Judge, Bulandshahr on 27.01.1999. The Head Master has also not that the copy given by him was a true copy of the original certificate. He did not produce the admission register.*
>
> *23. Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder : (i) it should be in the nature of the entry in any public or official register;; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto.*

35. We have not been shown as to whether any register was required to be maintained under any statute. We have further not been shown as to whether any register was maintained in the school at all. The original register has not been produced. The authenticity of the said register, if produced, could have been looked into. No person had been examined to prove as to who had made entries in the register. The school leaving certificate which was not issued by a person who was in the school at the time when the appellant was admitted therein, cannot be relied upon."

19. In ***Subhash Maruti Avasare*** vs. ***State of Maharashtra (2006) 10 SCC 631***, it was held by the Hon'ble Supreme Court that by mere filing of a document, its contents are not proved and it was further held that a certificate issued by an expert should be brought on record by examining him.

20. In ***Oriental Insurance Company Ltd. vs. Poonam Kesarwani and others (2010) ACJ 1992,*** the learned Division Bench of Allahabad High Court like in the present was dealing with the fake licence wherein a letter issued by RTO was sought to be read in evidence, but the Court did not permit it as the same not the public document. In this context, it is apt to refer to the necessary observations, which reads thus:

"3. The questions which arise for consideration in this appeal are whether the letter/certificate issued by Regional Transport Officer, Raipur (Chhattisgarh) can be considered to be a public document as defined in Section 74 of the Indian Evidence Act, 1872, which required no proof or it was required to be proved by the person producing it before the Tribunal by examining witnesses; whether under rule 150 (2) of the Central Motor Vehicles Rules, 1989 insurance company can also receive information in Form 54; whether in an appeal under Section 173 (1) an order passed under Section 170 of the Motor Vehicles Act, 1988 can be challenged?

9. The question is whether the letter/certificate issued by the Regional Transport Officer, Raipur (Chhattisgarh) can be considered to be a public document as defined in Section 74 of the Indian Evidence Act, 1872, which required no proof or it was required to be proved by the person producing it before the Tribunal by examining witnesses? A public document is a document that is made for the purpose of public making use of it. When a public officer is under a duty to make some entries in the official book or register, the entries made therein are admissible in evidence to prove the truth of the facts entered in the official book or register. The entries are evidence of the particular facts which was the duty of the officer to record. The law reposes confidence in the public officer entrusted with public duties and the law presumes that public officers will discharge their duties with responsibility. A driving licence is issued under Chapter II of the Act. Section 26 of the Act makes it mandatory for the State Government to maintain a register known as State Register of Driving Licences. The entries with regard to issuance or renewal of driving licence by the licensing authorities which contains particulars of the licence and the licence holder are entered by the Regional Transport Officer/the licensing authority in discharge of their official duty enjoined by law. The State Register of Driving Licences is record of the acts of public officers. The State Register of Driving Licences is a public record. It can be inspected by any person. We are of the considered opinion that the State Register of Driving Licences is a public document as defined by Section 74 of the Evidence Act.

10. Section 76 of the Evidence Act gives the right to obtain a certified copy of a public document which any person has a right to inspect on payment of fee. A certified copy of the entries made in the public record is required to be issued on payment of fee in Form 54 as laid down by rule 150 (2). Form 54 being a certified copy of a public document, namely, the State Register of Driving Licences need not

be proved by examining a witness. Once a certified copy of the entries made in the register maintained under Section 26(1) read with rule 23 is issued in Form 54 it is admissible in evidence under Section 77 of the Evidence Act, and no further proof of Form 54 by oral evidence by examining witnesses is required.

12. The aforesaid information is in the form of a letter written to the investigator appointed by the insurance company. It cannot be deemed to be a certificate or certified copy in Form 54 of the Rules. Deposit of fee would not convert the letter into a certificate under rule 150. Therefore, the aforesaid letter issued by the Regional Transport Officer, Raipur (Chhattisgarh) was required to be proved by the insurance company before the Tribunal by oral evidence by examining witnesses. Insurance company had failed to lead any evidence to prove the aforesaid letter by examining witnesses before the Tribunal. The Tribunal rightly refused to place reliance on the letter dated 20.4.2005."

21. Identical issue came up before learned Punjab and Haryana High Court in ***New India Assurance Company Ltd. vs. Sunita Rani and others (2014) ACJ 1964*** wherein a report from the Licensing Authority, Gwalior was sought to be relied upon as evidence and the Court held:

"3. A perusal of Ext. R-2 would show that it is a report coming from Licensing Authority, Gwalior. It is not evident as to by what mode it came and in the absence of anyone to prove that this report was made by the Licensing Authority after consulting the record of the Authority, it cannot be held admissible in evidence.

4. A document, even if received by post, cannot be presumed to have been received from the Licensing Authority and cannot be believed to be a genuine document. The requirement of proving the said document was still there. I cannot agree with the decision in Jagmohan Singh's case, Civil Revision No. 5768 of 2001; decided on 31.1.2002 (P&H), in this regard. The insurance company could not be absolved of its liability to prove this report, Ext. R-2, and merely putting of exhibit on the same, would not prove it."

22. Adverting to the facts of the case, it would be noticed that the Insurance Company has none to blame except itself because instead of calling for the records from the Licensing Authority, Agra, it only choose to summon the record of driving licence possessed by the respondent as would be evident from the application filed by the insurance company, the relevant portion whereof reads as under:

"….Licence Clerk of Licensing Authority, M.V. Deptt. Agra, Utter Pradesh (U.P.) alongwith complete record of driving licence No. 23093/AG/04 dt. 31.12.2004 issued to Rashid Mohammed S/o Sh. Jan Mahommed, including record of Learning Licence issued to him by your office or any other office."

23. As already observed earlier, the witness RW-2 did not bring any record of driving licence issued on 31.12.2004 as the same were never sought for by the appellant. Apart from the above, even when this fact came to appellant's knowledge it did not choose to defer the statement of the witness (RW-2) and rather proceeded to get his statement recorded.

24. Above all, the appellant even while filing the instant appeal has not cared to file an application for additional evidence to prove that the licence possessed by the driver of offending vehicle was fake. There can be no denial of the fact that evidence means legally admissible evidence which in the instant case is conspicuously absent.

25. It cannot be disputed that it is for the insurer to prove that the insured owner has committed the breach of insurance policy and that the driver was not having a valid and effective driving licence. (Refer ***National Insurance Company Ltd.*** versus ***Swaran Singh and***

others, AIR 2004 Supreme Court, 1531 and ***Pepsu Road Transport Corporation*** versus ***National Insurance Company, (2013) 10 Supreme Court Cases, 217***).

26. Having held so, I am of the considered view that the findings regarding the licence Ex.RW-2/A recorded by the learned Tribunal with respect to the driving licence being fake are unsustainable in the eyes of law as the appellant has failed to lead evidence in this behalf and even the evidence so led, was not legally admissible evidence and is, therefore, required to be discarded and rejected. Once the appellant has failed to prove that the driving licence was fake, then the findings to this effect recorded by the learned Tribunal cannot be sustained.

27. In view of the aforesaid discussion, though for a different reason, the findings recorded by the learned Tribunal call for no interference. There is no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Yash Pal @ Jassu ....Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

Cr.R. No. 106 of 2007 with
Reserved on: 1.6.2016.
Decided on: 03.06.2016.

Indian Penal Code, 1860- Section 341, 324, 147 and 149- Complainant was going towards Kangra – when he reached at Chhatri, all the accused restrained and gave beatings to him by grip (a pointed object) – Trial court convicted five accused- an appeal was preferred which was partly allowed and conviction of only one accused was upheld - held in revision, testimony of the complainant was duly corroborated by his driver- medical officer had found the injuries which could have been sustained by a pointed object- statements of PWs 3, 4 and 6 do not leave any doubt that petitioner was identified as one of the accused who had wrongfully restrained the complainant - there was no necessity to hold test identification parade as the petitioner was known to the complainant- the Courts had rightly convicted the accused- revision dismissed.

(Para 9-17)

Case referred:

Surendra Narain alias Munna Pandey Vs. State of U.P. AIR 1998 Supreme Court 192

For the petitioner. : Mr. Rajesh Mandhotra, Advocate

For the respondent. : Mr. V.S. Chauhan, Addl. Advocate General

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

The present petition has been filed against judgment passed by the Court of learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, in Criminal Appeal No. 34-D/2005/03 dated 7.7.2007, vide which the Learned Appellate Court has upheld the judgment of conviction passed by the Court of learned JMIC(1), Dharamshala in Criminal Case No. 11-II/03 dated 3.4.2003 and 4.4.2003 against the petitioner by disallowing his appeal while allowing the appeal of other co-accused, who have been acquitted of the offences alleged against them by modifying the judgment passed by the Learned Trial Court.

2. The case of the prosecution in brief is that on 31.12.2002 at around 9:15 p.m. complainant, Ashwani Kumar, was coming in his personal vehicle Tata-407 from Jassor towards Kangra. When he reached at a place known as Chattri on the National Highway, all accused by forming an unlawful assembly in prosecution of their common object committed rioting and wrongfully restrained the complainant and his driver from proceeding in a direction in which they had right to proceed by standing on the road. The accused also gave beatings to the complainant with a pointed object i.e. Grip and caused injury to him. The matter was reported by the complainant to police, on the basis of which Rapat, Ext.PW5/A, was recorded and FIR Ext.PW6/B was registered against all the accused. After investigation, challan was filed against all accused for trial under Sections 341, 324, 147 and 149 of Indian Penal Code (in short 'IPC'). The accused pleaded not guilty and claimed trial.

3. The Learned Trial Court on the basis of material produced before it by the prosecution, convicted the accused (5 in number) under Sections 341, 324, 147 read with Section 149 IPC and sentenced them to under simple imprisonment for one month each and to pay fine of Rs. 250/- each under Section 341 IPC and to undergo rigorous imprisonment for six months each and to pay fine of Rs. 500/- each under Section 324 IPC and also to undergo rigorous imprisonment for three months each and to pay fine of Rs. 250/- each under Section 147 IPC. All the sentences were ordered to run concurrently.

4. Feeling aggrieved by the said judgment passed by the Learned Trial Court, all the accused preferred joint appeal.

5. The Learned Appellate Court vide its judgment dated 7.7.2007 held that the prosecution had established beyond shadow of doubt that passage of complainant, Ashwani Kumar, was obstructed by the accused when he reached near Chattari and the prosecution had also established beyond any shadow of doubt that one of the person who had obstructed the passage was Jassu @ Yashpal, that is, the present petitioner. The Learned Appellate Court further held that as far as the identity of A2 to A5 is concerned, the prosecution had not succeeded in establishing the same beyond any shadow of doubt that A1 Yashpal was accompanied by A2 to A5 while beating complainant, Ashwani Kumar and his driver. Accordingly, the Learned Appellate Court acquitted A2 to A5 by giving them benefit of doubt. However, as far as the appeal by the present petitioner is concerned, the same was dismissed as it was held by the Learned Appellate Court that it stood established beyond any reasonable doubt that accused had caused injury on the person of Ashwani Kumar accompanied by four other persons and he had been rightly convicted by the Learned Trial Court.

6. Mr. Rajesh Mandhotra has strenuously argued that the judgment passed by both the learned Courts below vide which the petitioner had been convicted for the offences alleged against him were perverse and not sustainable in the eyes of law. He submitted that no offence as alleged against the petitioner was, in fact, ever committed by him. It was a case of mistaken identity and the prosecution had failed to establish on record that petitioner Yashpal, in fact, is accused Jassu who has allegedly identified by the complainant as being one of the assailants who wrongfully restrained him and assaulted him. According to Mr. Mandhotra, the learned Courts below had failed to appreciate that the statements of PW3 i.e. the complainant and his driver PW4 were full of inconsistencies and they do not inspire confidence on the basis of which a person could have been convicted. He further argued that there is no material on record to substantiate that the person identified to be Jassu by the complainant, in fact, was petitioner Yashpal. According to him, the complainant nowhere identified petitioner Yashpal to be the same person i.e. Jassu who along with four other persons wrongfully restrained him and assaulted him. Besides this, Mr. Mandhotra argued that even otherwise the said judgments were bad and not sustainable because the findings arrived at by both the learned Courts below as far as the petitioner is concerned, were not borne out from the record. Both the Courts below have failed to appreciate that there was no material on record to substantiate that it was, in fact, the petitioner who had inflected injury on the complainant. He further argued that keeping in view the fact that the alleged incident took place during night hours and total number of assailants was five in

number, out of which four have been acquitted by the Learned Appellate Court in appeal, the petitioner also deserved acquittal because he was also entitled to the same benefit of doubt which the Learned Appellate Court gave to other four accused i.e. A2 to A5.

7. On the other hand Mr. Chauhan, learned Addl. Advocate General submits that there was no perversity in the judgment passed by the learned Courts below vide which the present petitioner had been convicted for the offences with which he was charged. Mr. Chauhan has further argued that there is no cross-examination of the complainant on behalf of the present petitioner to the effect that the petitioner was not Jassu who was identified by the complainant as one of the assailants on the fateful night. He has further argued that, in fact, neither in the grounds of revision petition nor in the grounds of appeal filed before the Learned Appellate Court it has been urged on behalf of the present petitioner that it is a case of mistaken identity and that he was not Jassu who was allegedly identified by the complainant to be one of the assailants. According to Mr. Chauhan, it was a total new case which was being built up by the petitioner which otherwise was without any substance. According to him, the statements of the prosecution witnesses and other material placed on record by the prosecution proved beyond reasonable doubt that it was the petitioner who had wrongfully restrained the complainant along with four other persons and had also caused injuries upon the person of the complainant and therefore, the judgments passed by learned Courts below convicting the said petitioner were not perverse and the findings of the learned Courts below were based on the material on record.

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

9. The complainant has appeared in the witness box as PW3. In his statement, he has deposed that on the fateful night he was traveling in his vehicle along with his drivers Budhi Singh and Raj Kumar and when they reached Chattri five persons were drunk blocked the road of their vehicle. On this, his driver Budhi Singh stopped the vehicle. The accused opened the driver's door and started beating the driver. When the complainant intervened they started beating him and in this course they hit him with a grip on his face. He has further deposed that he identified one of the assailants who was Jassu, whereas he could not identify the other persons. In his cross-examination he has reiterated that when they reached Chattri at around 9:20 p.m. all accused came and stood in front of their vehicle. He has also stated in his cross-examination that he knows accused Jassu. There is no cross-examination of this witness to the effect that accused Yashpal was not the same Jassu who was identified by the complainant as one of the assailants on the fateful night. PW4, Budhi Singh, driver of the complainant has also supported the story of the prosecution and a perusal of his statement as well as his cross examination demonstrates that there was no major contradiction between his statement and that of PW3 as far as occurrence of the event is concerned. He has stated that when his employer had lodged report with the police, he had the name of Jassu recorded by him with police. ASI Kailash Chand has deposed as PW6 and he has stated that accused were identified by the complainant.

10. PW1 Dr. Mohan Chaudhary has substantiated that the complainant had received injuries which was caused by a pointed weapon.

11. In my considered view the petitioner has not been able to establish on the basis of material on record that this is a case of mistaken identity. Statements of PW3, PW4 and PW6 read harmoniously do not leave any iota of doubt that it was the petitioner who had identified by the complainant as one of the accused who wrongfully restrained him and caused injury to his body.

12. There is no suggestion at any stage given to PW3 by the defence on behalf of the present petitioner that Jassu who was being referred to by the complainant as one of the assailants was not petitioner but someone else. Further the petitioner has not only been named in the FIR by the complainant as the person who was identified by him as one of the assailants but he has also identified by the complainant in the Court as one of the assailants.

13. Further in my considered view, there was no need to hold any test identification parade. The contention of the learned counsel for the petitioner that there is no material on record that any test identification parade was held in which the present petitioner was identified as one of the assailants by complainant is also misconceived because in the present case the petitioner was known to the complainant and the complainant has identified him as one of the assailants by stating that he has identified one of the five assailants, who was Jassu, that is, the present petitioner.

14. Even otherwise, it is well settled law that failure to hold test identification parade even after the demand of accused is not always fatal and it is only one of the relevant factors to be taken into consideration along with the other evidence produced on record. If the claim of the eye witnesses that they knew accused is found to be correct then failure to hold test identification parade has been held inconsequential by the Hon'ble Supreme Court in **Surendra Narain alias Munna Pandey** Vs. **State of U.P**. AIR 1998 Supreme Court 192.

15. Therefore, in my considered view there is no infirmity that the judgments passed by learned Courts below in convicting the petitioner of the offences alleged against him. There is no merit in the contention of the petitioner that this is a case of mistaken identity or that the prosecution even otherwise has not been able to prove its case against the accused beyond reasonable doubt. The judgment passed by the learned Courts below are well reasoned judgments and the findings arrived at by the learned Courts below with regard to the present petitioner are substantiated on the basis of record/material produced on record by the prosecution. Therefore, it cannot be said that the findings of conviction returned by learned Courts below against the accused are either perverse or not sustainable in the eyes lf law.

16. As far as the contention of learned counsel for the petitioner that the present petitioner ought to have been acquitted by the Learned First Appellate Court keeping in view the fact that all other co-accused were acquitted by giving them benefit of doubt is concerned, it is settled law that acquittal of one or more accused is no ground to acquit other co-accused in case there is sufficient material available on record to bring home guilt of a particular accused. In the present case, the prosecution has produced on record sufficient material to bring home the guilt of present accused/petitioner. It has also been stated at the bar by learned Addl. Advocate General that the judgment of acquittal passed against the co-accused has been assailed by way of an appeal by the State in this Court.

17. Lastly the learned counsel for the petitioner has argued on the quantum and has submitted that even otherwise the sentence imposed upon the petitioner is harsh as compared to the offences alleged against him. However, keeping in view the fact that incident took place as far back as in the year 2002 and the present petitioner has been undergoing the trauma of trial since then, in my considered view, the interest of justice will be served in case the sentence imposed upon the petitioner is modified as under:-

Section	**Sentence imposed**	**Fine**
341	Simple Imprisonment of one month	Rs. 250/-
324	Simple Imprisonment of one month	Rs. 10,000/-
147	Simple Imprisonment of one month	Rs. 10,000/-

All the sentences shall run concurrently.

With the said modification, the petition 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.

Kalyan Singh alias Bitto ...Appellant.
Versus
State of Himachal Pradesh ....Respondent.

Cr. Appeal No 43 of 2013.
Reserved on 16.5.2016.
Decided on: 13.6.2016.

Indian Penal Code, 1860- Section 302 and 201- Accused and deceased were married to each other- accused used to harass the deceased under the influence of liquor- deceased left for Dera Sacha Sauda- accused contracted second marriage in her absence- deceased delivered a male child- brother of the deceased requested the accused to take the deceased and her child but the accused told that he was ready to take the child but not the deceased- matter was compromised- proceedings under Domestic Violence Act were also initiated - deceased made a complaint with M that accused had kept her in Dogari and she was apprehending that the accused would kill her- when M made inquiry from the accused about the deceased, accused told that deceased had gone to attend Bhagwat and had fled away with some Sadhu- when the deceased could not be found, his brother made inquiry- a report was made against the accused on the basis of suspicion – accused made a disclosure statement that he could show the places where dead body of the deceased was buried- place was identified and when digging was conducted one human skeleton was found- investigation revealed that accused had killed the deceased- accused was tried and convicted by the trial Court- held, in appeal that case is based upon the circumstantial evidence – circumstances from which the guilt of the accused is to be drawn, must be complete and incapable of any other hypothesis except guilt- deceased was last seen with the accused after compromise- she was missing till her dead body was exhumed- accused had given different explanations to different persons regarding the whereabouts of the deceased- explanations were misleading and dead body was recovered at the instance of accused- it was duly proved that death of the deceased was homicidal- all these circumstances, pointed towards the guilt of the accused- he was rightly convicted by the trial Court- appeal dismissed. (Para-10 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
Vutukuru Lakshmaiah Vs. State of Andhra Pradesh (2015) 11 Supreme Court Cases 102
Jagtar Singh Vs. State of Haryana, (2015) 7 Supreme Court Cases 675

For the appellant. : Mr. Satyen Vaidya, Sr. Advocate with Mr.Vivek Sharma, Advocate.
For the respondent . : Mr.V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, & Puneet Rajta, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

This appeal has been filed against the judgment passed by learned Sessions Judge, Sirmaur District at Nahan in Sessions Trial No. 18-ST/7 of 2012 dated 22.1.2013, vide which the learned Trial Court has convicted accused for offence punishable under Section 302, 201 IPC and sentenced him to undergo rigorous imprisonment for life and to pay Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for six months under Section 302

IPC. Accused has been further sentenced to undergo rigorous imprisonment for a period of two years and to pay fine of Rs. 2,000/- and in default of payment of fine, to undergo simple imprisonment for three months under Section 201 IPC. Both the sentences are to run concurrently.

2. In brief, the case of the prosecution was that Smt. Satya Devi, (hereinafter to be referred as 'deceased'), was married to accused, Kalyan Singh (in short 'accused') in Renuka Temple on 12.10.2007. Theirs was a love marriage. After her marriage, deceased stayed in her matrimonial house at village Kuffri. After about two months of marriage, accused started maltreating and quarrelling with deceased under the influence of liquor on the ground that deceased belonged to a poor family. This fact was disclosed by deceased to her brothers Guman Singh, Bhim Singh and Inder Singh. Thereafter, deceased left for Dera Sacha Sauda, Sirsa and during the said period, accused contracted second marriage. When deceased came back from Sirsa, she had pregnancy of 6-7 months and delivered a male child at Rajgarh. Deceased's brother, Inder Singh, contacted accused and asked him to take back his sister and child but accused told him that he was ready to take the child but not the deceased. In November, 2008, Smt. Meera Tomer, Community Organizer, Nagar Panchayat received a letter from deceased, which was addressed to Sh. Mohinder Bhaglalia, Co-coordinator of ARTI, NGO, Rajgarh, vide which deceased had made a complaint against her husband. This letter was sent to Mohinder Bhangalia, who thereafter called deceased and accused to his NGO for counseling on 8.12.2008 and 10.12.2008. Thereafter, accused amicably settled the matter with deceased and agreed to have his wife and child entered in the Panchayat record but he did not fulfill his promise. Deceased went to Totu, Shimla under the supervision of Protection Officer, ICDS, Shimla and filed proceedings against accused under the Domestic Violence Act in the Court of JMIC, (6), Shimla. In the said proceedings accused entered into compromise with deceased and the matter was accordingly disposed of by the said Court, vide order dated 2.7.2009. Deceased and accused visited NGO of Mohinder Bhangalia on 9.7.2009 and thereafter accused left for his house along with his wife and child. Brother of deceased Guman Singh also left for his house. When Guman Singh came back to his house from the house of accused on third day, deceased told him that she apprehended danger to her life from accused. After 3-4 days, Mohinder Bhangalia also received a telephonic call from deceased, wherein she told him that accused had kept her in Dogari and he was not talking to her and she apprehended that accused would kill her. After about three months, when Mohinder Bhangalia contacted accused and inquired about his wife, accused told him that deceased had gone to attend some Bhagwat from where, she had fled away with some 'Sadhu'. On this Mohinder Bhangalia asked the accused as to whether he had lodged any report with the police, to which accused told him that he had not reported the matter to the police. Further the case of prosecution is that, for some time, after deceased had gone with accused, she used to complains against accused with her brother, Guman Singh, on telephone but subsequently she stopped calling him. After some time, accused called Bhim Singh, elder brother of deceased and told him that deceased had left for Sirsa but when they inquired at Sirsa, they found that deceased was not present there. When the deceased was not traceable for a year, her brother, Inder Singh, visited the house of accused who told him that deceased had gone to Renuka for some religious affair and as and when deceased comes back, he will visit their house along with deceased. However, when accused did not visit the house of Inder Singh, they got suspicious that accused might have killed their sister and upon this, her brother, Guman Singh, reported the matter to ASI Dulo Ram, In-charge, PP, Nohradhar, Ext. PW1/A, on the basis of which, FIR, Ext.PW4/A, was registered in Police Station, Sangrah by Babu Ram, who was the then investigating officer. The matter was investigated by the police and the accused was arrested on 8.1.2012. While in police custody, accused made a disclosure statement in PP, Nohradhar before SI Harpal Singh that he could demarcate the place where the dead body of deceased was buried. On this, SI Harpal Singh moved an application to Executive Magistrate, Nohradhar for permission to exhume the dead body of deceased. On 11.1.2012, accused led the police to Panjah Khad and demarcated the place where the dead body of deceased was buried. After permission from Executive Magistrate, Nohradhar who was also present on the spot, when

the digging was conducted on the spot, one human skeleton was found which was identified by Guman Singh to be that of his sister Satya Devi. SI Harpal Singh conducted inquest over the skeleton and prepared inquest reports, Ext. PW27/B and Ext.PW27/C and thereafter he put the skeleton into a carton under the supervision of PW13, Dr. Jatinder Thakur, and moved an application, Ext.PW13/A, for conducting the post-mortem examination and sent the same to Civil Hospital, Rajgarh from where PW13 sent the same to IGMC, Shimla. The post-mortem examination of the skeleton was conducted by Dr. Sangeet Dhillon and report of the same is, Ext.PW30/B. On 13.1.2012, accused made disclosure statement that he could get one iron rod recovered from his residential house. On the basis of the disclosure statement, recovery of iron rod from the upper story was made. On 22.2.2012, Dr. Pankaj Chandel obtained blood samples of the son of the deceased and brother Guman Singh on FTA cards for the purpose of identification of the skeleton on the basis of DNA profiling. The investigation further revealed that accused was having a second wife and he did not want to give share in his property and maintenance allowance to his first wife deceased-Satya Devi and therefore, accused along with his brother accused-Surinder Singh killed the deceased on the night of 15.7.2009 by giving her beatings with iron pipe and in order to destroy the evidence, they buried deceased body in Panjah Khad. After the completion of investigation, accused persons were sent for trial under Sections 302, 201 read with Section 34 IPC.

3. The accused pleaded not guilty and claimed to be tried.

4. The prosecution, in all, examined 30 witnesses in order to substantiate its case. On completion of trial on the basis of the material placed on record by prosecution, the learned Trial Court acquitted accused Surinder Singh by holding that prosecution has failed to bring home the guilt of said accused. However, as far as accused-Kalyan Singh was concerned, it held that the prosecution has established its case against him beyond reasonable doubt. Accordingly, learned Trial Court convicted accused Kalyan Singh.

5. Feeling aggrieved by the said conviction imposed upon him, the present appeal has been filed by accused, Kalyan Singh, against the judgment of learned Trial Court.

6. Mr. Satyen Vaidya, Learned Senior Counsel appearing for the appellant has argued that the judgment passed by the learned Trial Court is perverse and not sustainable in law. According to him, the conclusion arrived at by the learned Trial Court to the effect that the prosecution had proved its case beyond reasonable doubt against accused-Kalyan Singh was not borne out from the record. He further argued that in the present case there were two accused and the co-accused had been acquitted by the learned Trial Court on the ground that prosecution had not been able to prove its case against him beyond reasonable doubt. Accordingly, he argued that when both the accused were charged with the same offences, then the acquittal of one warranted the acquittal of other also. Therefore, he urged that the conviction of the appellant was totally unwarranted and in fact amounted to travesty of justice. He further argued that admittedly in the present case there is no eye witness, who can connect the appellant with the charges alleged against him. Therefore, the learned Trial Court has erred in not appreciating that in the absence of cogent circumstantial evidence, the prosecution had failed to link all the circumstances by an unbroken chain so as to bring the guilt of the accused home. Thus, according to him, the conviction of accused was unwarranted and the findings returned by the learned Trial Court were based on conjectures and surmises rather than material produced on record by the prosecution. He further argued that the prosecution witnesses were not trustworthy and their credibility stood impinged by the defence. According to him, the deposition of the witnesses of prosecution was not so credible so as to be made basis of conviction of a person. Thus, he prayed that the judgment passed by the learned Trial Court was completely erroneous and the same was liable to be set aside and the appellant was liable to be acquitted of the offences alleged against him.

7. On the other hand, Mr. V.S. Chauhan, learned Addl. Advocate General has argued that the appeal filed by the convict is without any merit. According to him, the findings arrived at by the learned Trial Court are neither perverse nor it can be said that the conviction of

the accused is not substantiated on the basis of material produced on record by the prosecution. According to him, the learned Trial Court has rightly come to the conclusion that the prosecution has proved beyond reasonable doubt that convict was guilty of offences alleged against him. He has further argued that all the circumstances in the present case stood proved link by link by the prosecution and the disclosure statement of accused/convict inspired confidence, as the same was duly proved by the prosecution to the hilt and which disclosure statement actually resulted in the body of the deceased being recovered. According to him, the order of conviction and the sentence imposed by the learned Trial Court warranted no interference and he argued that the appeal being merit-less deserved dismissal.

8. We have heard learned counsel for the parties and gone through the records of the case.

9. Admittedly in the present case, there is no eye witness.

10. At this stage, it is relevant to take note of the judgment of Hon'ble 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.*
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> *19. In Mani v. State of Tamil Nadu, (2008) 1 SCR 228, this Court made following pertinent observation on this very aspect:-*
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> > *"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...."*
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> *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:-*
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> > *"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."*
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> *21. Likewise, in Mustkeem alias Sirajudeen v. State of Rajasthan, (2011) 11 SCC 724, this Court observed as under:-*
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> > *"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."

25. 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. 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."

It is settled position of law that suspicion, however strong, cannot take the character of proof.

22. We, therefore, have no hesitation in allowing these appeals and setting aside the conviction and sentence of the two appellants under Section 302 read with Section 34 of the Penal Code. We order accordingly. The appellants are directed to be released from jail forthwith, if not required in any other case."

11. 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."

> *25. 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. 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."(emphasis supplied)*

18. 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. In our opinion, it is not safe to record a finding of guilt of the appellant and the appellant is entitled to get the benefit of doubt. We, therefore, allow the appeal and set-aside the conviction and sentence of the appellant. The appellant be set at liberty unless required in any other case."

12. 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;***
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> ***(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."

13. 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.

14. 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.

15. Neither there is any direct evidence nor there is any eye witness who allegedly has seen the accused committing the crime. Thus, the case of the prosecution is solely based on circumstantial evidence.

16. In our considered view, 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. The circumstances which have been relied upon by the prosecution to connect the accused with the charged offences are as under:-

1. *relation of the deceased becoming strained with her husband soon after the marriage and the deceased leaving for Dera Saucha Sauda, Sirsa;*
2. *accused Kalyan Singh contracting second marriage;*
3. *accused Kalyan Singh not paying any maintenance allowance to the deceased and her child despite counseling done by the NGO at Rajgarh;*
4. *deceased moving the court at Shimla against accused Kalyan Singh under Domestic Violence Act and amicable settlement reached at between the parties in the court;*
5. *apprehensions of threat to her life expressed by the deceased soon before her disappearance;*
6. *deceased last seen alive with her husband accused Kalyan Singh;*
7. *false explanation given by accused Kalyan Singh regarding disappearance of the deceased;*
8. *demarcation of place in Panjab Khad by both of the accused from where human skeleton was recovered;*
9. *identification of the skeleton to be that of deceased Satya Devi by her brother and also by DNA report;*
10. *cause of death of Satya was homicidal; and*
11. *recovery of weapon of offence at the instance of accused Kalyan Singh.*

Circumstance No.1.

16. The first circumstance which was relied upon by the prosecution was that the relationship between deceased and accused had become strained after marriage and due to this reason deceased left for Dera Saucha Sauda, Sirsa. To prove this circumstance, Guman Singh brother of deceased appeared in the witness-box as PW-1.

17. PW1 has deposed that after the marriage of deceased with accused, she was kept well for two months by accused and thereafter accused started quarreling with deceased on the ground that deceased belongs to a poor family. Accused used to maltreat his sister under the influence of liquor and deceased had disclosed these facts to them. He has also deposed that after

two months of her marriage, deceased had left for Dera Sacha Sauda at Sirsa because deceased was fed up with the maltreatment meted out to her by the accused.

18. PW2-Inder Singh, who is also brother of deceased, has also deposed that when deceased visited them 1½ month after marriage, she complained that accused was maltreating her, under the influence of liquor. He has also deposed the factum of his sister leaving for Sirsa on account of maltreatment being meted out to her by the accused.

19. PW20-Tulsi Ram, God brother of deceased deposed that he was disciple of Dera Sacha Sauda, Sirsa and deceased was also disciple of said Dera at Sirsa. He has stated that deceased disclosed to him that her husband (accused) maltreated her under the influence of liquor and due to this reason deceased had left for Dera Sacha Sauda, Sirsa.

20. The credibility of the deposition of these witnesses has not been impinged by the defence. Further learned counsel for the appellant could not impress upon us, as to why this Court should disbelieve the testimony of these witnesses which was trustworthy and which inspired confidence. Thus, this circumstance duly stood proved on record beyond reasonable doubt by the prosecution.

Circumstance No.2.

21. The factum of accused having contracted second marriage with Ms. Kusum Lata when deceased left for Sirsa is proved on the basis of Pariwar Register, Ext.PW16/A, maintained by Gram Panchayat, Gawahi. This register has been proved on record by Secretary of the Gram Panchayat and a perusal of the same revealed that deceased-Satya Devi and Kusum Lata are recorded as wives of accused-Kalyan Singh. PW1-Guman Singh has also stated that accused has contracted second marriage. These facts are duly established on record having not been rebutted by any cogent evidence by accused and therefore, it stood proved on record that accused had married again when deceased had left for Dera Sacha Sauda, Sirsa.

Circumstance Nos. 3 & 4.

22. On the basis of deposition of PW3-Vijay Kumar Bhangalia, who runs NGO called ARTI at Rajgarh, PW19-Meera Tomer, who is working as Community Organizer in Nagar Panchayat, Rajgarh, PW20-Tulsi Ram and PW21-Bhagat Ram, who was the Record Keeper of General Record Room, Shimla, these two circumstances have also been duly proved by the prosecution. It has been proved on record that counseling was conducted between deceased and accused by NGO, AARTI. After the said counseling, accused agreed to have the name of his wife and child entered in the Panchayat record but he failed to fulfill his promise, as a result of which, deceased was sent to Totu Shimla under the supervison of Protection Officer, ICDS, Shimla, from where proceedings were filed in the Court at Shimla against accused by the deceased. The factum of the Court proceedings and the orders passed by various court and the parties entering into compromise in the Court of law have remained unrebutted and accordingly these two circumstances were also established on the basis of material produced on record by the prosecution.

Circumstance No. 5.

23. The factum of deceased having expressed apprehension of danger to her life from her husband has been proved by the statements of PW1 and PW3. PW1 stated that when accused took deceased back to his house after the compromise was arrived at in the Court at Shimla, he had also accompanied her to the house of accused and he came back on third day. When he was coming back from the house of accused, his sister told him that she was apprehending danger to her life from the accused person. PW3-Vijay Kumar Bhangalia has also deposed that after deceased and accused entered into compromise at Shimla Court and visited their NGO along with copy of judgment on 9.7.2009 after 3-4 days, he received a telephonic call from deceased, wherein she told him that accused had kept her in a 'Dogri' and he was not talking to her and deceased apprehended danger to her life from the accused person. Incidentally, these statements of the witnesses have gone unrebutted in the cross-examination. Thus, this particular circumstance also stands established on record, especially in view of the fact that it

stands proved that pursuant to the compromise entered into between accused and deceased in the Court at Shimla, accused took her to her matrimonial house, whereafter she expressed her apprehension to PW1 and PW3 about danger to her life from the accused.

Circumstance Nos. 6 and 7.

24. As far as these two circumstances are concerned, PW1 to PW3 and PW14 to PW20 have proved these two circumstances beyond any reasonable doubt. Brother of deceased PW1 had left deceased in the house of accused on 9.7.2009 and returned back to his home on 11.7.2009 and thereafter deceased was not seen dead or alive by any person till her body was exhumed from Panjah Khad. This witness has deposed that accused had made a call to her elder brother and informed him that deceased had gone to Sirsa but when inquiry was made at Sirsa, it was revealed that the deceased was not present there. Thereafter, their sister was not traceable for one year and in these circumstances when they sent Inder Singh to the house of accused, he told him that deceased had left his house the very next day, when he had dropped her at his house. Similarly, PW2-Inder Singh stated that 10-15 days after his sister was dropped at the house of accused, they came to know that their sister had gone missing. In between accused informed brother of deceased Bhim Singh that deceased had gone to Sirsa. After 1-2 years when they visited the house of accused, he told them that deceased had gone to Renuka in connection with some religious affair. PW3-Vijay Kumar Bhangalia has stated that about three months after the deceased had gone along with the accused, when he contacted the accused and made an inquiry about the deceased, accused told him that deceased had gone to Bhagwat, from where she had fled away with some 'Sadhu' and when he asked accused about lodging of report with the police, the response of the accused was in negative and he immediately disconnected the phone.

25. PW14-Shakuntla Chauhan, who runs NGO and is former Pradhan of Gram Panchayat, Devna has stated that Mohinder Bhangalia had telephonically told her that deceased was missing. She further deposed that accused met him at Nohradhar and when she enquired from accused about deceased, accused told her that deceased had gone to Dera at Sirsa. Similarly, PW20-Tulsi Ram has stated that 3-4 days after the deceased came back from Shimla, her mobile was found to be switched off and when he made inquiry from accused, he told him that deceased had left for Sirsa leaving the child with him. On this, inquiries were made at Sirsa and it was found that deceased was not present there.

26. In our considered view, it is evident from the statements of these witnesses which have gone unrebutted that deceased was last seen with accused when they came back from Shimla to the house of accused after compromise was entered into between the parties in the Court at Shimla. Further, she was last seen alive with accused on 11.7.2009 and thereafter deceased went missing till her dead body was exhumed from Panjah Khad. From the above, it stands proved on record that accused had given different explanations to different persons regarding the missing of deceased and all explanations given by him in this regard were misleading and false. Therefore, both the above circumstances also stood duly established on record by the prosecution.

Circumstance No.8.

27. As per the prosecution, accused made a disclosure statement, Ext. PW5/A, before SI Harpal Singh, PW27, in the presence of PW5-Randhir Chauhan and PW14-Shakuntla Chauhan that he could demarcate the place at Panjah Khad, where the dead body of deceased was buried and it was on the basis of this disclosure statement, that accused demarcated the place in Panjah Khad in presence of PW1-Guman Singh, PW6-Kuldeep Singh, PW7-Vijinder Dutt and PW-8-Devinder Singh Kalta, from where the skeleton of deceased was recovered. The disclosure statement has been recorded in the presence of PW5-Randhir Chauhan and PW14-Shakuntla Chauhan. PW5-Randhir Chauhan is an independent witness and he has mentioned in his statement that on 8.1.2012 he was present in Police Post, Nohradhar in connection with his personal work when accused was in police custody and accused made disclosure statement, Ext.PW5/A, that he could demarcate the place where the dead body of deceased was buried. He further deposed that accused made this statement in the presence of Smt. Shakuntla Chauhan.

The veracity of his deposition was not impinged by the defence in the cross-examination and his statement inspires confidence and is trustworthy. Similarly, PW14-Shakuntla Chauhan has stated that she is Secretary of NGO, Surya and is also former Pradhan of Gram Panchayat, Devna. In her statement, she has stated that in the year 2008 persons of Aarti Organization, Rajgarh had asked her to find out about the report of missing of deceased, on which she visited PP, Nohra from where she came to know that report regarding missing of deceased had been lodged. She further deposed that earlier message was sent to accused, on which accused along with Mohan Lal came to her and she took them to Aarti NGO. On the next day, deceased did not visit as she had gone to Shimla and when she contacted deceased on phone, deceased told her that she did not go to her matrimonial house, as accused had married again and was not treating her well and she wanted maintenance from accused for herself and for her child. She further deposed that after many days Mahinder Bhangalia rang up her and told her that deceased was missing. Thereafter, accused met her at Nohradhar and when she inquired about deceased, accused told her that deceased had gone to Dera at Sirsa. She has further deposed that on 8.1.2012, she and Randhir Chauhan were joined by police in the investigation when accused was in police custody and he made disclosure statement in their presence, which was signed by her as well as Randhir Chauhan. She has also deposed that accused had stated that he could get the dead body recovered from Panjah Khad and demarcate the place. The statement of this witness is also trustworthy and inspires confidence, as in the cross-examination, the defence has not impinged the credibility of this witness.

28. PW27-Harpal Singh has stated that on the basis of said disclosure statement, he led police party to Panjah Khad on 11.1.2012, where accused demarcated the place, where the dead body of deceased was buried. The version as put-forth by PW7 regarding disclosure statement, has been fully corroborated by both PW5 and PW14, who were the marginal witnesses of said disclosure statement. Both these witnesses have categorically testified that accused had made disclosure statement in their presence. The version of PW7 with regard to demarcation of the place at Panjah Khad from where the skeleton of deceased was found, is duly corroborated in all its material particulars by the testimony of PW1, Guman Singh, PW6, Kuldeep Singh, PW7, Vijender Dutt and PW8, Devinder Kalta. A perusal of statements of these witnesses demonstrates that all have deposed in unison that accused demarcated the place at Panjah Khad, where after digging, a human skeleton was recovered. The cross-examination of these witnesses has not been able to lay any foundation for discarding their testimony and thus the defence has not been able to impinge the credibility of the said witnesses. Incidentally, PW8, Devinder Kalta was posted as Executive-cum-Tehsildar in whose presence the dead body of deceased was exhumed. All these circumstances taken together proved beyond any reasonable doubt that the discovery of the skeleton was made in pursuance to the disclosure statement made by accused, thus this circumstance has also been fully proved by the prosecution.

Circumstance No.9.

29. The skeleton was identified by PW1, Guman Singh, to be that of his sister from clothes. He has mentioned that the clothes were the same, which the deceased was wearing on the day when he had dropped her at the house of accused. He has categorically denied in his cross-examination that the skeleton could not be identified. His statement also finds corroborations from the recovery memo of the skeleton, which is Ext.PW6/B, which also reflects the clothes which were present on the skeleton on the day when the same was exhumed. The testimony of PW1 is also corroborated by DNA report, vide Ext.PW28/N. During the course of investigation, blood samples of the brother of deceased, PW1-Guman Singh and Master Krish son of the deceased and accused were obtained on FTA cards, Ext. P48 and Ext.P49 by PW24, Dr. Pankaj Chandel. These samples were sent to FSL, Junga which was preserved by PW30, Dr. Sangeet Dhillon, who conducted the post-mortem examination of the said skeleton. Report of the Assistant Director, DNA Division, FSL, Junga demonstrate that DNA profile obtained from the molar teeth of the skeleton was matched with the blood sample of Master Krish and it was found that the same belongs to biological mother of Master Krish. Thus, from the testimony of PW1 and report of DNA, Ext. PW28/N, the prosecution has categorically established on record that the

human skeleton, which was recovered at the instance of the accused, belongs to his wife i.e. deceased. Thus, this circumstance has also been duly proved by the prosecution.

Circumstance No. 10.

30. PW30, Dr. Sangeet Dhillon, Assistant Professor in IGMC, Shimla had conducted the post-mortem examination of the skeleton of deceased, which was recovered from the Panjah Khad. She has given the opinion that in the absence of soft tissues, it was not possible to ascertain the exact cause of death, however, the post-mortem findings as evident from head (skull) were consistent with those found in a case of head injury. She has also opined that the injuries described in the post- mortem report were possible with weapon of offence, Ext. P13, which was shown to her or similar weapon and the injuries sustained by such weapon could result in death. Therefore, this circumstance also stood duly proved beyond reasonable doubt that the death of the deceased was homicidal.

Circumstance No.11.

31. On 13.1.2012, accused while in police custody made a disclosure statement, Ext. PW9/A, before PW28, ASI Dula Ram and on the basis of this disclosure statement, he got iron pipe, Ext. P13, recovered from the house of accused at village Jhalari, vide memo Ext.PW10/A. PW28, ASI Dula Ram has further testified that on 13.1.2012, accused made disclosure statement before him in the presence of Sunder Singh and Mohan Lal that he could get the iron pipe recovered from his house. The statement of this witness has been duly corroborated in material particular by Mohan Lal, who has deposed as PW9 and was one of the marginal witnesses. PW10 has also corroborated the case of prosecution, who was witness to recovery memo, Ext.PW10/A. Incidentally, all these witnesses have been subjected to meticulous and lengthy cross-examination on behalf of the accused, but their testimonies has remained unshattered on record. Not only this, the testimony of the said witnesses is otherwise trustworthy and inspires confidence. Therefore, this circumstance has also been established by the prosecution beyond any reasonable doubt.

32. Keeping all the above factors in view, we are of the considered view that in the present case, all the circumstances were duly proved by the prosecution beyond any reasonable doubt connecting the accused with the commission of offence, for which he has been convicted by the learned Trial Court. Besides this, the learned Trial Court has also meticulously and in a reasoned manner dealt with all issues including all the circumstances and after careful consideration and appreciation of all the material placed on record, it has come to the conclusion that the accused was guilty of offence alleged against him. Therefore, according to us, there is neither any perversity nor any infirmity with the judgment which has been passed by the learned Trial Court convicting the accused of the offences with which he was charged, as well as with the sentences which has been imposed by the learned Trial Court upon him. The prosecution has brought home the guilt of the accused beyond reasonable doubt and the chain of circumstance has been completed linking the accused with crime beyond all reasonable doubt.

33. As far as the aspect of one of the co-accused having been acquitted by the learned Trial Court, it is settled law that if one co-accused is acquitted and the Court finds that the prosecution has been able to bring home the factum of the guilt of other accused beyond reasonable doubt then the said accused can be duly convicted of the offences alleged against him. Even the factum of the State not having filed appeal against the acquittal of co-accused is no ground to give benefit to the other convict, if cogent evidence is there connecting the other co-accused with the offence.

34. It is relevant to quote para 23 of the judgment of Hon'ble Supreme Court in **Vutukuru Lakshmaiah** Vs. **State of Andhra Pradesh** (2015) 11 Supreme Court Cases 102:-

> "*23. At this juncture, it is worthy to note that the High Court has acquitted A-4, A-8 and A-9 on the foundation that they have been falsely implicated. The learned Senior Counsel for the appellants has contended that when the appellate court had acquitted the said accused persons, there was no warrant to sustain the conviction*

of the other accused persons. On a perusal of the judgment of the appellate court, we find that the judgment of acquittal has been recorded on the score that the names of A-8 and A-9 do not find mention in the evidence of PWs 1 to 3. On a similar basis, A-4 has been acquitted. Suffice it to mention here because the High Court has acquitted A-4, A-8 and A-9, that would not be a ground to discard the otherwise reliable dying declaration, for the evidence in entirety vividly show the involvement of the appellant-accused."

35. The Hon'ble Supreme Court in **Jagtar Singh** Vs. **State of Haryana,** (2015) 7 Supreme Court Cases 675 held as under:-

"21. We are not impressed by the submission of the learned counsel for the appellant when he urged that since the co-accused was acquitted of the charges, hence the benefit of the same be also extended to the appellant.

22. As held above, the evidence on record in no uncertain terms proves that it was the appellant who was the aggressor and hit the deceased. This evidence was rightly made basis by the two courts to hold the appellant guilty for committing the offence in question. When the evidence directly attributes the appellant for commission of the act then we fail to appreciate as to how and on what basis we can ignore this material evidence duly proved by the eyewitnesses. Such was not the case so far as the co-accused is concerned. The prosecution witnesses too did not speak against the co-accused and hence he was given the benefit of doubt. It is pertinent to mention that the State did not file any appeal against his acquittal and hence that part of the order has attained finality."

Therefore, in view of the above discussion, we uphold the judgment of conviction passed by the learned Trial Court against the appellant as well as the sentence which has been imposed upon the appellant by the learned Trial Court and the present appeal is accordingly dismissed.

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

Bahadur Singh ....Appellant-Plaintiff

Versus

Vinod Kumar & Others ....Respondents-Defendants

Regular Second Appeal No.584 of 2006.
Judgment Reserved on: 17.05.2016.
Date of decision: 14.06.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff was a tenant under the land owner and acquired the proprietary rights- the defendants started interfering in the land on the basis of purchase - plaintiff challenged the sale deed on the ground of fraud taking the advantage of his illiteracy-the defendants supported the sale deed and contended that it was genuine-the trial court held the sale deed to be genuine and dismissed the suit- first appeal was also dismissed - held in second appeal that, conferment of the proprietary rights is not automatic but is subject to the right of resumption in favour of widow, minor and handicapped person- as per section 113 of H.P Tenancy and Land Reforms Act, the property acquired under section 104(3) of the H.P Tenancy and Land Reforms Act cannot be alienated for a period of ten years- since the plaintiff had acquired the land in the year 1998, he could not have disposed of the same by sale deed within 10 years of the acquisition-the courts below had fallen in error in upholding the sale deed -

suit of the plaintiff decreed and the judgments of the courts quashed and set aside. (Para-33 to 51)

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

For the Appellant: Ms.Jyotsna Rewal Dua, Senior Advocate with Ms.Shalini, Advocate.
For Respondents: Mr.Ramakant Sharma, Senior Advocate with Mr.Basant, 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 30.09.2006, passed by the learned District Judge, Sirmaur District at Nahan, H.P., affirming the judgment and decree dated 24.11.2005, passed by the learned Civil Judge(Senior Division), Sirmaur District at Nahan, 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'),* claims that he has been coming as a tenant in respect of the land bearing Khata Khatauni No.9 min/20, Khasra Nos.115, 118, 179, 183 min, 184, 186, 187 and 188, measuring 70-17 bighas, situate in village Sharu Mailia, Tehsil Nahan, District Sirmaur, H.P. as per Jamabandi for the year 1997-98. It is submitted by the plaintiff that vide order dated 13.7.1998 he was conferred proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 *(hereinafter referred to as the `Act')* on land of Khata No.9/20 to the extent of 6-4 bighas and mutation No.217 was accordingly attested. It is alleged by the plaintiff that on 10.10.2000, defendants No.1 to 4 and their father defendant No.5 tried to cause interference in the suit land and allegedly proclaimed that their father defendant No.5 Satya Nana purchased the said land through sale deed from the plaintiff. The plaintiff claimed and alleged that he never executed any sale deed in favour of defendant No.5 and to his utter surprise, on enquiry from the Patwari Halqua, he came to know that the sale deed was executed on 18.12.1999 in relation to the land in question. It is alleged by the plaintiff that in this regard he had also lodged complaint with the Deputy Commissioner and Tehsildar, Nahan, claiming that sale deed dated 18.12.1999 is the result of fraud committed by defendants No.1 to 4 in collusion with their father defendant No.5 and marginal witnesses, but all in vain. It is further submitted by the plaintiff that he is an illiterate person and affixes his thumb impression and defendant No.5, being influential person and Pradhan of the Panchayat manipulated and procured forged sale deed. It is averred by the plaintiff that on 18.12.1999, defendant No.5 had taken him to the Tehsil Office on the pretext to appear as a witness and thus his thumb impression was procured on the document, which was purportedly made a document subsequently. It is also alleged that a conspiracy was hatched qua attestation of mutation No.217. In the said premise, the plaintiff claimed that the sale deed in question is null and void being in violation of the provisions of the Act and thus, craves for the relief of declaration by declaring the sale deed along with the mutation so attested qua the suit land in favour of the defendants, as null and void and also for the relief of permanent prohibitory injunction, thereby restraining the defendants from causing any interference in any manner in the suit land.

3. Defendants, by way of filing joint written statement, raised preliminary objections on the ground of maintainability, non-joinder of necessary parties, cause of action, valuation and estoppel. On merits, a plea has been taken by the defendants that the plaintiff was inadvertently conferred proprietary rights on land of Khata No.9/20 min to the extent of 6-4 bighas vide mutation No.217, but subsequently when the mistake was noticed, the same was got rectified and earlier order was reviewed suo moto by the authorities concerned. The defendants also submitted that the land was rightly purchased from the plaintiff vide registered sale deed

and the question of so called fraud, as alleged, thus, does not arise as the sale deed was executed as per the directions of the plaintiff and it was registered by the Sub Registrar after explaining the contents thereof to the vendor and the sale consideration amounting to Rs.16,000/- had also been paid to the plaintiff before affecting the sale. The defendants also denied that the plaintiff was brought to the Tehsil by misrepresenting the fact or to become a witness to some document. The plaintiff, who is stated to be a worldly wise person, as such, could not have been misled simply on the ground of illiteracy and thereby to get the sale deed executed and in the said premise the question of undue influence or fraud so alleged, thus, does not arise. In respect of so called contravention of the provisions of the Act, the defendants submitted that since the plaintiff was recorded as tenant long back, therefore, the question of contravention of the provisions as alleged by the plaintiff by executing the sale deed in question on 18.12.1999 does not arise. The defendants therefore, claimed to have acquired title to the suit land on account of its purchase and the allegations to the contra, thus, have been completely negated with the prayer to dismiss the suit.

4. In his replication filed by the plaintiff, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint.

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

"1. Whether the sale-deed dated 18.12.1999 executed and registered by plaintiff Bahadur Singh in favour of defendants, is illegal, null and void? If so, its effect? OPP.

2. If issue No.1 is proved in affirmative, whether the plaintiff is entitled to decree of declaration and injunction, as prayed? OPP.

3. Whether the aforesaid sale-deed dated 18.12.1999 is otherwise, illegal, being breach of provision of Section 113 of H.P. Tenancy and Land Reforms Act, 1972, as alleged? OPP.

4. Whether the suit of the plaintiff in the present form is not maintainable? OPD.

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

6. Whether no enforceable cause of action accrued to the plaintiff to file the present suit? OPD.

7. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as such, liable to be rejected under Order 7 Rule 11, CPC? OPD.

8. Whether the plaintiff is estopped to file the present suit by his act, conduct and acquiescence? OPD.

9. Relief."

6. The learned trial Court, except issue Nos.5 & 7, decided all the aforesaid issues in favour of the defendants and accordingly dismissed the suit of the plaintiff. The appeal preferred by the plaintiff before the learned Appellate Court was also dismissed.

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

"(1) Whether the dubious role played by revenue officers in illegally and irregularly seeking the permission to review the order dated 13.7.1998 on the mutation and then actually reviewing it illegally on 9.11.2001, without following the prescribed procedure has resulted in gross failure of justice?

(2) Whether the sale deed of land in question was hit by provisions of Ss.113 of the HP Tenancy and Land Reforms Act and was therefore void. And whether in the facts and circumstances of the case, ld.Courts below

fell into error in presuming that proprietary rights stand conferred on non occupancy tenants suo motto w.e.f. 4.10.1975 as per rule 27 of the HP Tenancy and Land Reforms Act, ignoring the due meaning of word `the date' occurring in the section 113 of the Act, especially when the proprietary rights of minor landowners could not vest in the tenant during their minority. Date of conferment of proprietary rights on tenant shall vary and is not automatic as presumed by ld.Courts below?

8. In nutshell facts of the case are that the plaintiff, who claimed himself to be a tenant of one Shri Dharambir and others on the land, description whereof has already been given above, to the extent of 70-17 bighas, as per Jamabandi for the year 1997-98. Since there was no dispute interse the plaintiff-tenant and other owners of the land, owners were not impleaded as party respondents in the suit.

9. It emerges from the record that the plaintiff, being the tenant *(Gair Mouroosi)* under the owners, was entitled to be conferred proprietary rights under Section 104 of the Act. Accordingly, after commencement of the Act, revenue officer, who is also land revenue officer, entered mutation No.217 for conferment of proprietary rights on the plaintiff qua the tenanted land vide order dated 13.7.1998 under Section 104(3) of the Act on the land of Khata Khatauni No.9/20 to the extent of 6-4 bighas. Plaintiff further set up a case that defendants No.1 to 4 and their father defendant No.5 started interfering in the land of the plaintiff and, on being questioned, plaintiff was informed that they have already purchased 18-2 bighas of land through sale deed from him (the plaintiff). Plaintiff inquired the matter from Patwari Halqua and approached him for obtaining the revenue papers, who supplied him copy of the Jamabandi. After obtaining the copy of Jamabandi, the plaintiff was surprised to know that the defendants have procured the sale deed on 18.12.1999 from plaintiff in relation to his tenancy land. Plaintiff made complaint to the Hon'ble Revenue Minister, Himachal Pradesh, Shimla, copies whereof were also sent to Deputy Commissioner and Tehsildar, Nahan, but all in vain. He specifically alleged that sale deed dated 18.12.1999 is the result of fraud committed by the defendants No.1 to 4 in collusion with their father defendant No.5 as well as marginal witnesses, revenue officer and officials. Since the plaintiff was illiterate and only use to put thumb impression, defendants took undue benefit of the same and got the aforesaid sale deed executed in their favour. As per averments contained in the plaint, father of defendants No.1 to 4; namely; Satya Nand, defendant No.5, who is a an influential person of the area, using undue influence on the plaintiff and taking advantage of his being illiterate, made plaintiff to affix thumb impression on certain blank documents, which were lateron used for preparing the sale deed. Plaintiff also denied that he ever executed any sale deed for a sum of Rs.16,000/- nor he received any consideration at any time. It is also averred that the sale deed does not confer any right, title or interest upon the defendants because plaintiff had never become the owner of 38-2 bighas of land of Khasra Nos.179 and 188 at the time of alleged sale. The revenue officers illegally and un-authorisedly entered in the revenue record that the plaintiff has become owner of the 33-13 bighas of land. To the contrary, at the time of alleged sale, the plaintiff was the owner to the extent of 6-4 bighas of land. It is also the case of the plaintiff that alleged sale deed is in contravention of sub-section (1) of Section 113 of the H.P. Tenancy and Land Reforms Act, as such, the same deserves to be declared void and cannot be acted upon.

10. Defendants, by way of written statement, resisted the claim of the plaintiff and specifically stated that plaintiff was inadvertently conferred the proprietary rights of the land of Khata No.9/20 min to the extent of 6-4 bighas vide mutation No.217, which was subsequently corrected by Assistant Collector taking suo moto action and plaintiff was granted proprietary rights qua 33-13 bighas of land and, as such, sale deed executed in their favour by the plaintiff is valid and on the strength of same defendant No.1 to 4 became owners in possession of the suit land which was purchased by them for the consideration of Rs.16,000/-.

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

12. Ms.Jyotsna Rewal Dua, learned Senior Counsel, representing the appellant, vehemently contended that the judgments and decrees, as passed by both the Courts below, deserve to be quashed and set aside as the same are not based upon the correct appreciation of the evidence available on record. She forcefully contended that both the Courts below have miserably failed to appreciate the evidence available on record in its right prospective. Rather, both the Courts below have fallen in grave error while interpreting Section 104(4) as well as Section 113 of the Act.

13. Ms.Jyotsna Rewal Dua forcefully submitted that there is ample evidence on record to suggest that at the time of execution of alleged sale deed dated 18.12.1999 in favour of defendants No.1 to 4, plaintiff was owner of the suit land to the extent of 6-4 bighas and as such defendants, in collusion with the revenue authorities, committed fraud and vide sale deed dated 18.12.1999 sold 38-2 bighas of land of Khasra Nos.179 and 188 in favour of the defendants. It is also contended on behalf of the appellant that the sale deed pertaining to sale of 38/80th share of Khasra Nos.179 and 188, measuring 38-2 bighas is in complete violation of sub-sections (1)(i) and (8) of Section 104 of the Act because as per Section 104(1)(i), land owners whose entire land is under non-occupancy tenant has been held entitled to resume tenancy of land up to one and half acres of irrigated land and/or three acres of un-irrigated land. In case the land owners owns less than one and a half-acres of irrigated land or three acres of un-irrigated land, landowner can resume land to make deficiency.

14. It is also contended on behalf of the plaintiff that both the Courts below have committed grave irregularities while concluding that there is no violation of Section 113 of the Act and the plaintiff was a tenant in Khata No.9/20, land measuring 70-17 bighas and conferment of proprietary rights to the extent of 33-13 bighas was automatic by the operation of law. She also contended that both the Courts below also misconstrued the provisions of Section 113 of Act, which specifically provides that:

> ***"No land in respect of which proprietary rights have been acquired under this chapter shall be transferred by sale, mortgage, gift or otherwise during a period of ten years by a person from the date he acquires proprietary rights".***

She forcefully contended that while interpreting the provisions of Section 113, both the Courts below have failed to acknowledge the import of the sentence "from the date". As per Ms.Dua, on 18.12.1999, plaintiff was owner of the land to the extent of 6-4 bighas and as such any transaction beyond 6-4 bighas, as has been claimed in the present case by the defendant, is null and void and cannot be looked into. During arguments, she also invited the attention of this Court on various documents available on record to substantiate her plea that on 18.12.1999, when alleged sale deed was registered, plaintiff was only owner to the extent of 6-4 bighas and subsequent mutation entered by the revenue authorities depicting him the owners to the extent of 38-2 bighas of land of Khata Nos.179 and 188, was the result of fraud committed by the defendants as well as revenue authorities. It is also contended that once it stands proved on record that at the time of sale, which is allegedly took place on 18.12.1999, plaintiff was owner to the extent of 6-4 bighas, any sale deed, whereby allegedly 33-13 bighas of land has been sold to the defendants for the consideration of Rs.16,000/-, is null and void and cannot be given effect to. Lastly, she prayed that judgments passed by both the Courts below deserve to be quashed and set aside.

15. Per contra, Shri Ramakant Sharma, learned Senior Counsel appearing for the respondents, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have very meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC**

264. He also submitted that it stands proved on record that the plaintiff was granted proprietary rights qua 33-13 bighas of land after commencement of the Act and, as such, he was entitled to sell the aforesaid land to the defendants, which he actually sold to them for a consideration of Rs.16,000/-. He forcefully contended that the provisions, as contained in Section 104 of the Act, itself provide that conferment of proprietary rights is automatic after the commencement of the Act and the provisions of Section 113 of the Act is not applicable in the present facts and circumstances of the case where admittedly the plaintiff, who was the owner of the land measuring 33-13 bighas, was competent to sell the land and as such, prayed for dismissal of the appeal.

16. This Court while admitting the instant appeal, framed two substantial questions of law, which have been reproduced above.

17. First question deals with the mischief played by revenue officer while seeking permission to review the order dated 13.7.1998 and then illegally reviewed the mutation on 9.11.2001 that too at the back of the owners as well as tenant of the land in question. Second question relates to the interpretation and violation of the provisions of Section 113 as well as Rule 27 of the Act. Accordingly, this Court, solely with a view to answer the aforesaid questions, undertook exercise to critically examine the evidence, be it ocular or documentary, on the record to reach just and fair decision.

18. Before adverting to the merits of the case, it would be appropriate to deal with the specific objection raised by the learned counsel representing the respondents with regard to maintainability and jurisdiction of this Court, while examining the concurrent findings returned by both the Courts below, Shri Ramakant Sharma had invited the attention of this Court to the judgment referred above**,** wherein the Hon'ble Supreme Court has held:

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)***

19. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

20. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in ***Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161*** wherein the Court held:

> ***"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the***

principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)

"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." (pp.174-175)

21. In the aforesaid case, Hon'ble Apex Court has interpreted the principles relating to Section 100 CPC, wherein it has been concluded that general rule is that the High Court will not interfere with the concurrent findings of the Courts below. But it is not absolute rule. If it appears to the Court that Courts below have ignored material evidence and have drawn wrong inference on the proved fact by applying the law erroneously, Court, exercising powers under Section 100 CPC, can certainly re-appreciate the evidence and as such, it cannot be concluded that the power of re-appreciation of evidence available on record under Section 100 CPC is totally barred, if there is a concurrent finding from both the Courts below.

22. In the present case, during arguments, learned counsel representing the appellant, has been successful in persuading this Court to look into the evidence which *prima-facie* suggested that while passing judgments and decrees, both the Courts below failed to appreciate evidence on record. Apart from above, it also appears that both the Courts below, while recording findings failed to interpret the provisions of law applicable in the present case in its right perspective. Hence, this Court was compelled, in the peculiar facts and circumstances, to re-examine/re-appreciate the evidence available on record despite there being concurrent findings on the fact as well as law by both the Courts below.

23. Before adverting to the merits of the case, it would be apt and in the interest of justice to reproduce provisions of Section 104 of the Act:

> ***"104. Right of tenant other than occupancy tenant to acquire interests of landowner-***
>
> ***(1) Notwithstandng anything to the contrary contained in any law, contract, custom or usage for the time being in force, on and from the commencement of this Act, if the whole of the land of the landowner is under non-occupancy tenants, and if such a landowner has not exercised the right of resumption of tenancy land at any time since January 26, 1955, under any law as in force:-***
>
> *(i) such a landowner shall be entitled to resume before the date to be notified by the State Government in the official Gazette and in the manner prescribed, either one and a half acres of irrigated land or three acres of unirrigated land under tenancy from one or more than one tenants for his personal cultivation and the right, title and interest (including contingent interest, if any) of the tenant or tenants, as the case may be, therefrom shall stand extinguished free from all encumbrances created by the tenant or tenants to that extent:*
>
> *Provided that is the tenant has taken loan from the State Government, a co-operative society or a bank for the improvement of tenancy land which the landowner has resumed under clause(i) or clause(ii) and has used such loan for the improvement of such land, then the landowner, shall be liable to repay the outstanding amount of such loan and to the extent actually used for the said purpose and interest thereon to the State Government or to the Co-operative Society or a bank, as the case may be, proportionate to the improved land resumed by him:*
>
> *Provided further that the landowner shall not be entitled to resume from a tenant more than one half of the tenancy land;*
>
> *(ii) … … … … … … … … … … … … … … …*
>
> *(iii) … … … … … … … … … … … … … … …*
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> *(iv) … … … … … … … … … … … … … … …*
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> *(v) … … … … … … … … … … … … … … …*
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> *(vi) … … … … … … … … … … … … … … …*
>
> ***(2) … … … … … … … … … … … … … … … … …***
>
> ***(3) All rights, title and interest (including a contingent interest, if any) of a landowner other than a landowner entitled to resume land under sub-section (1), shall be extinguished and all such rights, title and interest shall with effect from the date to be notified by the State Government in the Official Gazette vest in the tenant free from all encumbrances:***
>
> ***Provided that if a tenancy is created after the commencement of this Act, the provision of this sub-section shall apply immediately after the creation of such tenancy.***

(4) ... ...

(5) ... ...

(6) ... ...

(7) ... ...

(8) Save as otherwise provided in sub-section (9) nothing contained in sub-section (1) to (6) shall apply to a tenancy of a landowner during the period mentioned for each category of such landowners in sub-section (9) who,-

(a) is a minor or unmarried woman, or if married, divorced or separated from husband or widow; or

(b) is permanently incapable of cultivating land by reason of any physical or mental infirmity; or

(c) is a serving member of the Armed Forces; or

(d) is the father of the person who is serving in the Armed Forces, upto the extent of inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces, to be declared by his father in the prescribed manner.

(9) In the case of landowners mentioned in clauses (a) to (d) of sub-section (8), the provisions of sub-sections (l) to (6) shall not apply,-

(a) in case of a minor during his minority and in case of other persons mentioned in clauses (a) and (b) of sub-section (8) during their life time;

(b) in case of persons mentioned in clauses (c) and (d) of sub-sector (8), during the period of their service in the Armed Forces subject to resumption of land by such persons to the extent mentioned in first proviso to clauses (d) and (dd) of sub-section (1) of section 34.

Provided that nothing contained in this section shall apply to such land which is either owned by or is vested in the Government under any law, whether before or after the commencement of this Act, and is leased out to any person."

24. Plain reading of Section 104(3) suggests that after the commencement of the Act, all rights, title and interest (including a contingent interest, if any) of a landowner other than a landowner entitled to resume land under sub-section (1), shall be extinguished and all such rights, title and interest shall with effect from the date to be notified by the State Government in the Official Gazette vest in the tenant free from all encumbrances, provided that if a tenancy is created after the commencement of this Act, the provision of this sub-section shall apply immediately after the creation of such tenancy.

25. But under Section 104(8), interest of minor, unmarried woman, divorcee and widow, person permanently incapable of cultivating land by reason of any physical or mental infirmity, serving member of the Armed Forces and father of the person who is serving in the Armed Forces, up to the extent of inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces, to be declared by his father in the prescribed manner, have been precluded.

26. A plain reading of Section 104(8) suggests that, "Save as otherwise provided in sub-section (9), nothing contained in sub-section (1) to (6) shall apply to a tenancy of landowner during the period mentioned for each category of such landowners in sub-section (9)", as has been described hereinabove.

27. Sub-section 9 of Section 104 provides that "landowners mentioned in clauses (a) to (d) of sub-section (8), the provisions of sub-sections (1) to (6) shall not apply".

28. Section 113 of the Act provides that "no land in respect of which proprietary rights have been acquired under this Chapter shall be transferred by sale, mortgage, gift or otherwise during a period of ten years by a person from the date he acquires proprietary rights".

29. While interpreting giving effect to the provisions of Section 113, last expression used i.e. "the date he acquires property" "is of great significance" because persons on whom the proprietary rights are conferred cannot sell/mortgage, gift or otherwise for a period of ten years from the date he acquired the proprietary rights. In simple words, it is understood that person who became owner by virtue of the Act, cannot further sale, mortgage, gift the land in question for ten years from the date of conferment of proprietary rights.

30. In the present case, moot question, which requires consideration/decision of this Court, is that, "whether the plaintiff, who became owner of the land by virtue of conferment of proprietary rights qua the tenancy land to the extent of 6-4 bighas on 13.7.1998, could make sale of that land before expiry of period of ten years as has been specifically provided under Section 113 of the Act. Another question, which requires consideration, is that, "when on 13.7.1998 plaintiff was conferred proprietary rights qua the tenancy land to the extent of 6-4 bighas, could he sell land to the extent of 38-2 bighas of Khasra Nos.179 and 188, which was subsequently on 2.5.2001 recorded in his name by the Assistant Collector 2nd Grade, taking suo moto action, reviewing mutation No.217 holding the plaintiff entitled to land measuring 38.2 bighas.

31. In the present case, plaintiff, undisputedly, is the tenant of one Shri Dharambir and others on the suit land as per Ex.P-1, Jamabandi for the year 1997-98, as *"Gair Mouroosi"* under the original owner and he was granted proprietary rights under Section 104 of the Act. Accordingly, after the commencement of the Act, revenue authorities vide mutation No.217 held plaintiff entitled for conferment of proprietary rights qua the tenancy land and vide order dated 13.7.1998 conferred proprietary rights under Section 104(3) of the Act of the land of Khata No.9/20 to the extent of 6-4 bighas, meaning thereby that on 13.7.1998 plaintiff had become absolute owner of the land of Khata No.9/20 to the extent of 6-4 bighas.

32. Perusal of the evidence available on record reveals that though total land in Khasra Nos.179, 188 has been shown as 38-2 bighas but plaintiff sold his share 19/40th share, measuring 18-2 bighas to the defendants.

33. Plaintiff, by way of suit for declaration and prohibitory injunction, prayed that vide order dated 13.7.1998, he was conferred proprietary rights under Section 104 of the Act on the land of Khata No.9/20 to the extent of 6-4 bighas, meaning thereby that on 13.7.1998, he had become owner of the suit land to the extent of 6-4 bighas of the land, description whereof, has been given above, by virtue of the Act. But defendants in written statement stated that vide sale deed dated 18.12.1999, plaintiff sold them 18-2 bighas of land for a consideration of Rs.16,000/-. During the proceedings of the case, while examining the evidence available on record, this Court could lay hand to the document i.e. Ex.P-2 whereby mutation No.217 has been attested and plaintiff has been shown to be the owner of the land to the extent of 6-4 bighas. There is one document annexed with the aforesaid Ex.P-2, available on record, reading whereof suggests that original owners filed their objections on behalf of minors and widows, who had their shares in the estate, which was lateron conferred upon the plaintiff and the Assistant Collector 2nd Grade, while dismissing their objections, held that interest of minors as well as widows has been protected while conferring proprietary rights on the plaintiff to the extent of 6-4 bighas. Careful reading of the aforesaid document clearly suggests that on 13.5.1998, when this mutation No.217 was attested, plaintiff was held to be owner to the extent of 6-4 bighas. It can be safely inferred, after perusing the aforesaid documents, that on 13.5.1998, plaintiff had become owner of the land to the extent of 6-4 bighas by virtue of the Act.

34. In the present case, as emerges from the record as well as case set up by defendants that they purchased the land measuring 18-2 bighas of Khasra Nos.179 and 188 from the plaintiff vide sale deed Ex.P-4 for the consideration of Rs.16,000/-. At this stage, it is not understood that how the revenue authorities registered sale deed in favour of the defendants depicting therein sale of 18-2 bighas of land out of total 38-2 bighas of land of Khasra Nos.179 and 188 by the plaintiff in favour of defendants because as per record Ex.P-2, whereby mutation No.217 has been attested, plaintiff was only owner of the land to the extent of 6-4 bighas. Record nowhere suggests that on the date of sale i.e. 18.12.1999, plaintiff had become the owner of 38-2 bighas of land of Khasra Nos.179 and 188. Though attempt has been made by the defendants to justify the aforesaid sale by contending that plaintiff was inadvertently conferred the proprietary rights of the land of Khata No.9/20 min to the extent of 6-4 bighas vide mutation No.217, which was subsequently got corrected by the Assistant Collector taking suo moto action and plaintiff was granted proprietary rights qua 33-13 bighas of land. As per defendants, plaintiff was owner of the suit land to the extent of 33-13 bighas of land at the time of registration of sale deed on 18.12.1999 but aforesaid submission/contention of defendants is not substantiated by any evidence available on record. To the contrary, record suggests that on 18.12.1999, plaintiff was owner to the extent of 6-4 bighas of land. If, for the sake of discussion/arguments at this stage, the aforesaid contention of defendants is accepted that inadvertently revenue authorities conferred proprietary rights on the land of Khata No.9/20 min to the extent of 6-4 bighas vide mutation No.217, which was subsequently corrected by the revenue authorities, taking suo moto action and plaintiff was granted proprietary rights qua 33-13 bighas of land, it is not understood that how sale deed could be registered for the land measuring 18-2 bighas, when admittedly on 18.12.1999 plaintiff was owner to the extent of 6-4 bighas of tenancy land. Even, as per the case set up by defendants, mutation No.217 was later reviewed by the revenue authorities and proprietary rights qua 33-13 bighas of land was granted in favour of the plaintiff on 2.5.2001. But record reveals that even aforesaid correction, as is being relied heavily by the defendants, was carried out on 2.5.2001 i.e. Ex.P-1 (at pages 74-75 on the record of the trial Court). If aforesaid contention of the defendants that the plaintiff had become owner of 33-13 bighas of land after correction of mutation No.217 by the revenue authorities, sale deed dated 18.12.1999 cannot be held to be genuine/valid because correction, if any, was also carried out on 2.5.2001 which clearly suggests that on 18.12.1999 plaintiff was only owner of the land to the extent of 6-4 bighas and any sale beyond 6-4 bighas of land by the plaintiff on 18.12.1999 cannot be held to be legal.

35. Before concluding that on 18.12.1999, when alleged sale took place, plaintiff was only competent to sell the land, if any, to the extent of 6-4 bighas, it would be apt to examine the contention put forth by Shri Ramakant Sharma, learned Senior counsel, as well as conclusion drawn by both the courts below that plaintiff had become the owner of the entire land in question immediately after commencement of Act in terms of Section 104 of the Act.

36. It is also contended by Mr.Sharma as has also been held by both the Courts below that conferment of proprietary rights was automatic after commencement of the Act. Since plaintiff was non-occupancy tenant over Khata No.9/20, land measuring 70-17 bighas, he had immediately become the owner of the land to the extent of 33-13 bighas and as such plaintiff being owner of the complete land was competent/entitled to execute a sale deed dated 18.12.1999. At this stage, it would be profitable to refer to Section 104(3) of the Act, which has been reproduced hereinabove, which provides that all right, title or interest of land owner other than land owner entitled to resume land under sub section (1) shall be extinguished and all such right, title and interest shall be with effect from the date to be notified by the State Government in the official gazette vest in the tenant free from all encumbrances.

37. Reading of the aforesaid provisions suggests that immediately after commencement of this Act all rights, title and interest of the original owner would be extinguished and all rights, title and interest would vest in the tenant free from all encumbrances. But careful reading of the same suggests that distinction has been carved out in

the aforesaid Section 104(3) which specifically states that "other than the land owner entitled to resume land", meaning thereby that conferment of proprietary rights would not be automatic in the case of land owners, who are entitled to resume land under sub-section (1). Section 104(8) specifically provides that nothing contained in sub-section (1) to (6) would apply to the tenancy of land owners during the period mentioned for each category of such land owners in sub-section (9), who is a minor, unmarried woman or after marriage divorced or separated from husband or widow, person permanently incapable of cultivating land, person serving member of the Armed Forces and father of person who is serving in the Armed Forces up to the extent of inheritable share in the said property. Section 104(9) further provides that in case land owners mentioned in clause (a) to (d) of sub-section (8), the provisions of sub section (1) to (6) shall not apply in the case of minor during his minority and in case of other persons mentioned in clauses (a) and (b) of sub section 8 during their life time.

38. Conjoint reading of aforesaid provisions makes one thing clear that conferment of proprietary rights would not be automatically conferred upon tenant in the case of land owners, who are entitled to resume land under sub-section (1) of Section 104. Plain reading of aforesaid section suggests that in case there is minor, unmarried woman, divorcee woman or widow, conferment of proprietary rights would not be conferred automatically and these people will have right to resume land to the extent prescribed under the provisions.

39. In the present case, scrutiny of the record suggests, as has been discussed above, perusal of Ex.P-2 clearly suggests that while conferring proprietary rights to the extent of 6-4 bighas in favour of plaintiff, revenue authorities took note of the objections filed on behalf of minors, widows, who have/had share in the suit land before conferment of proprietary rights. At this stage, it can be safely presumed after perusing this Ex.P-2 that revenue authorities before holding plaintiff owner to the extent of 6-4 bighas recorded objections of the minors/widows in terms of Section 104(8) and (9) of the Act.

40. In view of the aforesaid discussion, this Court does not find much force in the contention raised by Mr.Ramakant Sharma as well as findings returned by both the Courts below that conferment of proprietary rights are conferred automatically after commencement of the Act. To the contrary, as has been discussed above, in the case of minor, widow, divorcee and physically handicapped person, conferment of proprietary rights is not automatic but same is subject to right of resumption in favour of these persons.

41. Now, coming to another question with regard to the violation of Section 113 of the Act, wherein it has been urged by the counsel representing the respondents-defendants and also concluded by the Courts below that there was no bar, as such, under Section 113 of the Act for selling the property acquired under the Act. Provisions of Section 113 of the Act have already been reproduced above. Careful reading of the aforesaid provisions suggests that specific bar has been created for the transfer of ownership rights by the person who acquires these proprietary rights with the commencement of Act, for a period of ten years from the date he acquired proprietary rights. Last sentence used in the definition of Section 113 is very important/crucial in ascertaining the effect as well as import of Section 113 which provides "from the date he acquires proprietary rights", meaning thereby person, on whom proprietary rights have been conferred under the Act, is not entitled to transfer the same by sale, mortgage, gift for a period of ten years from the date when he acquired the proprietary rights.

42. In the instant case, as has emerged from the record plaintiff had actually become the owner by virtue of proprietary rights conferred upon him of the land of Khata No.9/20 min to the extent of 6-4 bighas vide mutation No.217 on 13.7.1998, meaning thereby he had no right, whatsoever, to sale the land conferred upon him by virtue of proprietary rights for ten years from the date of acquirement i.e. 13.7.1998. He could not sell land measuring 6-4 bighas till July, 2008. Hence, sale deed registered on 18.12.1999 was certainly in complete violation of provisions of Section 113 of the Act and hence could not be given effect to.

43. Now, if aforesaid proposition is viewed from the angle of the defendants, who have stated/claimed that the plaintiff was inadvertently conferred proprietary rights of the Khata No.9/20 min measuring 6-4 bighas vide mutation No.217, which was subsequently considered by revenue authorities taking suo moto action and proprietary rights qua 33-13 bighas of land was conferred upon the plaintiff. But in that case also, if it is presumed that plaintiff had become owner of the complete land measuring 33-13 bighas after necessary correction by revenue authorities, in that eventuality also if version of the defendant is taken to be correct that "entire land measuring 18-2 bighas out of 33-13 bighas of land was purchased by them on 18.12.1999", transaction, if any, would also be hit by Section 113 of the Act.

44. In view of the detailed discussion as well as categorical examination of the evidence, be it ocular or documentary evidence, on record, this Court has no hesitation to conclude that on 18.12.1999 plaintiff was only competent to make sale, if any, to the extent of land measuring 6-4 bighas because by that time he had only become owner to the extent of 6-4 bighas in terms of mutation No.217 entered on 13.7.1998. It is also held that any sale made by plaintiff beyond 6-4 bighas on 18.12.1999 was illegal and could not be given effect to by the revenue authorities because admittedly on the given date he had become owner of 6-4 bighas by virtue of conferment of proprietary rights under Section 104(3). In the present case proprietary rights could not be conferred automatically in terms of Section 104(3) of the Act because admittedly as per mutation Ex.P-2 minors, widows, being original owners had also right in the land which was to be conferred on the plaintiff and they had right in terms of Section 104(8) and (9) to resume the land. Hence in view of the aforesaid discussion question No.2 is answered accordingly.

45. Though, while exploring answer of substantial question No.2, many things have emerged which certainly points towards the dubious role played by revenue officers in the registration of sale deed i.e. Ex.P-4 dated 18.12.1999. To specifically answer the question No.2, it would be apt and in the interest of justice to refer to the documents available on the record to conclude whether revenue officers committed illegality and irregularity while reviewing the order dated 13.7.1998 whereby mutation No.217 was modified and the plaintiff was held to be the owner of the land measuring 33-13 bighas instead of 6-4 bighas.

46. In the present case, perusal of Ex.P-1 i.e. Jamabandi for the year 1997-98 clearly suggests that plaintiff has been shown as a tenant in possession over the suit land Khata No.9/20 min and in the column of owner one Shri Dharambir alongwith other persons has been recorded as owner, but careful reading of the same suggests that there are some minors and widows, meaning thereby that minors and widows have/had also share in the land bearing Khata No.9/20. Further perusal of Ex.P-2 i.e. mutation carried out on 13.5.1998/15.5.1998 whereby revenue authorities i.e. Assistant Collector 2nd Grade after recording objections of the original owners i.e. minor as well as widow, who had share in the property bearing Khata No.9/20, conferred proprietary rights in favour of the plaintiff to the extent of land measuring 6-4 bighas. Careful perusal of these documents suggests that at the back of this Jamabandi even the tatima has been prepared showing the plaintiff as owner to the extent of 6-4 bighas of land.

47. In the present case on 18.12.1999 alleged sale took place, whereby plaintiff allegedly sold his share to the extent of 18-2 bighas out of 38-2 bighas of land of Khasra Nos. 179 and 188. At this stage, it is not understood that how the revenue authorities allowed the sale deed to be registered specifically knowing that plaintiff is the owner of land to the extent of 6-4 bighas only because at the time of registration of sale deed of land, it was/is the duty of the land revenue authorities to verify from the records, "whether person who intends to sell some piece of land is the actual owner of that land or not. In this case plaintiff has specifically alleged that sale deed dated 18.12.1999 was registered in connivance with the revenue officials, which allegation appears to be correct and genuine in the given facts and circumstances. There can be two things; either revenue authorities, at the time of registration of sale deed dated 18.12.1999, failed to notice that plaintiff is only owner to the extent of 6-4 bighas or they colluded with the defendants and solely for some extraneous considerations registered sale deed dated 18.12.1999 showing

therein sale of 18-2 bighas of land. In both the aforesaid situations, action/inaction of the revenue authorities at that relevant time in registering sale deed dated 18.12.1999 deserves to be highly deprecated and condemned.

48. It also emerges from the record that vide Ex.P-3 plaintiff filed a complaint to the then Revenue Minister specifically alleging therein that revenue authorities colluded with the defendants and got the sale deed dated 18.12.1999 executed fraudulently. It appears that after lodging of aforesaid complaint, which was received by the authorities on 3.11.2000, revenue authorities, just to hush up and justify their illegal action, decided to review the mutation No.217, whereby proprietary rights to the extent of 6-4 bighas were conferred upon the plaintiff. Ex.P-1 (at pages 74-75 on record of the trial Court) suggests that suo moto action was taken by the Assistant Collector 2nd Grade, Dadahu, by procuring permission from Sub Divisional Magistrate, Nahan for review of mutation No.217. Perusal of Ex.P-1 shows that on the side of that page, it has been written "review allowed. Both the parties be heard and compare the entries with revenue record. Form L.R.-VIII be corrected as per law". As per aforesaid review order issued by Sub Divisional Magistrate, Sub Division, Nahan, Assistant Collector 2nd Grade was supposed to call both the parties before effecting any change in mutation No.217 but this Court has not been able to find out any document on record which could suggest that before carrying out review of mutation No.217, Assistant Collector 2nd Grade, Dadahu, called the parties and recorded their statements before correcting the mutation No.217. Rather, Assistant Collector 2nd Grade, himself, without associating any party i.e. original owner and tenant (plaintiff), suo moto corrected mutation No.217 and held the plaintiff entitled to land measuring 33-13 bighas instead of 6-4 bighas in terms of Land Revenue Act. Aforesaid exercise was carried out on 2.5.2001 i.e. after three years of 13.7.1998 when initially mutation No.217 was carried out. Even on the back of this Ex.P-1, note has been recorded by the Assistant Collector 2nd Grade, whereby objections filed on behalf of minor and widows, being original owners and share holders in the land in question have been taken note of, has recorded that proprietary rights to the extent of 6-4 bighas have been conferred upon the plaintiff after protecting rights of aforesaid persons. Though it is not understood that where/what was the occasion for the Assistant Collector 2nd Grade, Dadahu to record aforesaid objection of the minor/widows, who were original owners before conferment of proprietary rights because on the front side of the paper while reviewing the mutation No.217 on 2.5.2001 plaintiff was held to be owner of 33-13 bighas of land in terms of the Act.

49. While examining the aforesaid issues, this Court examined each and every document available on record as well as submissions made by the witnesses adduced by the parties. But in view of the overwhelming documentary evidence available on record, this Court did not find it necessary to refer to the witnesses adduced by the parties who have only deposed with regard to the registration of the sale deed i.e. Ex.P-4 by the plaintiff in favour of the defendants. Since this Court came to the conclusion that the sale deed, dated 18.12.1999, Ex.P-4, was sham transaction and could not be given effect to, deemed it not necessary at all to refer to the witnesses' produced by both the parties solely to prove that sale deed Ex.P-4 was validly executed. However, to specifically answer the substantial question No.1, this Court solely with a view to examine role of revenue authorities, deemed it fit to refer to the statement of DW-3 i.e. the Sub Registrar, revenue officer. Close reading/analysis of the statement given by this witness leaves no doubt in the mind of the Court that he has gone above the board to prove the case of the defendants. Rather, it would be appropriate to say that he left no stone unturned to prove the sale deed Ex.P-4 as well as justify action of the revenue authorities in reviewing the mutation No.217 taking suo moto action that too in the absence of the parties.

50. In the totality of facts and circumstances as discussed hereinabove as well as documentary evidence available on record, this Court has no hesitation to conclude that the revenue authorities played dubious role at the time of execution of the sale deed Ex.P-4 and flouted all rules and said go-bye to the well laid down procedure for the registration of the sale deed, if any, further action of the revenue authorities in correcting mutation No.217 after

registration of sale deed Ex.P-4 in the year 2001 itself suggests that revenue authorities actually colluded with the defendants for some extraneous considerations.

51. In view of the detailed discussion made hereinabove, this appeal is allowed. The judgments passed by both the Courts below are quashed and set aside and suit filed by the plaintiff is decreed. There shall be no order as to costs.

52. Interim order, if any, is vacated. All miscellaneous applications are disposed of.

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

Deen Chand ...Petitioner.

Versus

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

CWP No.65 of 2009.
Reserved on: 31st May, 2016
Pronounced on: June 14, 2016.

Constitution of India, 1950- Article 226- Petitioner was found to have made encroachment upon the forest land after demarcation - challan was sent to DFO, Kullu exercising the power of Collector in H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- collector issued the notice- petitioner filed reply- fresh demarcation was ordered – demarcation was conducted in the absence of the petitioner- petitioner was found to be in unauthorized possession- Collector ordered the eviction of the petitioner – an appeal was preferred before the Divisional Commissioner, which was dismissed- a writ petition was filed against the order – held, that demarcation was conducted at the instance of the petitioner but he had not remained present during the demarcation- petitioner was provided many opportunity to produce the evidence but he failed to do so- petitioner had taken contrary pleas- petitioner had abused proceedings of the Courts – hence, petition dismissed with cost of Rs. 50,000/-. (Para-9 to 14)

For the petitioner: Mr.Sanjeev Kuthiala, 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.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

The petitioner, by the medium of instant writ petition, has prayed for the following reliefs:

"i) That this Hon'ble Court may be pleased to call for the records of the case and after examining the legality and proprietary of the notice Annexure P-1 and the impugned orders Annexure P-6 and Annexure P-9, this Hon'ble Court may be pleased to quash the impugned Notice Annexure P-1, impugned orders Annexure P6 and Annexure P-9 and direct that the petitioner be given due opportunity and the matter be heard afresh.

ii) To quash the impugned orders Annexure P-6 and P-9 and direct the respondents to associate the petitioner in fresh demarcation in accordance the law for

establishing whether the land and property of the petitioner comes within the portion of the UPF 3rd class or whether it falls within the abadi area of the village Telang Kothi Choparsa."

2. Brief facts, as are emerging from the pleadings of the parties, are that during the demarcation conducted by the revenue authorities, the petitioner was found to have made encroachment over the forest land. On noticing the encroachment, the Patwari of the concerned Circle submitted a Tatima, duly verified by the Kanungo concerned, to the Forest Department, where after, challan was sent by respondent No.1 i.e. Range Officer, Bhuthi, District Kullu to respondent No.2, Divisional Forest Officer, Kullu Forest Division, exercising the powers of Collector under the H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, for initiating proceedings against the petitioner for eviction. The Collector issued a show cause notice, dated 12th February, 1998, (Annexure P-1), to the petitioner in terms of Section 4(i) of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, (for short, the Act), whereby the petitioner was asked to show cause why action be not drawn against him in accordance with law, for his being in unauthorized occupation of the forest land.

3. The petitioner, vide Annexure P-2, filed reply to the said show cause notice. During the pendency of the proceedings, on the request of the petitioner, the Collector ordered fresh demarcation of the property in dispute by the Tehsildar. The Tehsildar deputed the Field Kanungo alongwith Patwari Halqua to demarcate the same. The said Field Agency, after issuing notice to all concerned, demarcated the land in dispute. The petitioner did not remain present, but his son, namely, Dile Ram was present on the spot during the demarcation. The Field Kanungo found the petitioner to be in unauthorized possession, prepared the report and submitted the same to the Tehsildar, who, in turn, forwarded the same to the Collector.

4. The petitioner chose to contest the proceedings before the Collector on the plea that he was not in unauthorized possession. It was also pleaded that the demarcation conducted was not as per law. In the alternative, it was also pleaded that his continued adverse possession has ripened into ownership.

5. The Collector, on the basis of the reports submitted by the Patwari and the Field Kanungo, referred to above, and the material placed on record, ordered the eviction of the petitioner from the land in question being in unauthorized possession.

6. The petitioner, feeling aggrieved, challenged the said order passed by the Collector before the Divisional Commissioner, by way of filing appeal, which was also dismissed. While dismissing the appeal, the Divisional Commissioner observed that the Field Kanungo had properly conducted the demarcation and that the Collector had afforded sufficient opportunity to the petitioner to adduce evidence, in which the petitioner had failed. It is apt to reproduce the relevant paragraph of the order passed by the Divisional Commissioner (Annexure P-9), hereunder:

"I have considered the arguments put forth by the present parties, gone through the record of the lower court and law. It transpires from the record that the proper demarcation of the disputed land has been carried out by the Field Kanungo on 21.04.2006 which has been submitted by him through Tehsildar Kullu to the Collector, Forest Division, Kullu. Secondly, it is also on the record that the lower court has provided an opportunity to the appellant to adduce his evidence by issuance of summons on 31.07.2002, 02.09.2002, 05.12.2002, 21.03.2003, 10.03.2003, 17.04.2003 and 04.12.2003 which were received by him but he did not produce any evidence before the lower court and the lower court was forced to close his evidence under such situations. Hence, the contentions of the appellant that he has not been provided any opportunity to adduce his evidence and also that the demarcation of the disputed land has not been carried out by any revenue authority, are not tenable. Therefore, there is no force in the present appeal."

7. The petitioner has impugned both the orders of the Collector and of the Divisional Commissioner by the medium of this writ petition.

8. Respondents No.1 and 2, alongwith the reply filed to the writ petition, have annexed Annexure R-4, copy of order passed by the Collector for re-demarcation of the land in dispute, wherein it has been categorically recorded that in case, on re-demarcation, any encroachment is found to have been made by the petitioner, he was willing to vacate the same in favour of the Forest Department. In rejoinder, the petitioner has neither denied the contents of Annexure R-4 nor has challenged the same.

9. What transpires from the above discussion is that the petitioner, while praying for the re-demarcation of the land, had shown willingness to surrender the possession of the land in question, in case, on re-demarcation, he was found in unauthorized possession. The Collector, during the pendency of proceedings before him, acceded to the request of the petitioner and ordered the Tehsildar to re-demarcate the land in dispute. The Tehsildar further ordered the Field Kanungo and the Patwari Halqua, who demarcated the land in question after issuing notice. During the course of demarcation, the petitioner chose not come to the spot, but his son Dile Ram remained present. In addition, official from the Forest Department and the Ward Panch were also present on the spot. After demarcation, the report was submitted by the Field Kanungo in which it was clearly mentioned that the petitioner was in unauthorized possession of the land in question. The petitioner has not questioned the said demarcation report, which was conducted by the Field Kanungo and the Halqua Patwari, duly authorized in that behalf by the Tehsildar concerned. Therefore, it does not lie in the mouth of the petitioner to argue at this stage that the said demarcation was not conducted in accordance with law or was conducted by an official who was not competent to do so.

10. The Collector, while coming to the conclusion that the petitioner was in unauthorized occupation, has referred to the evidence and the demarcation reports made by the Kanungo and the Patwari Halqua. The Appellate Authority i.e. the Divisional Commissioner also recorded that the petitioner was provided many opportunities by the Collector to adduce evidence, but he has failed to produce any witness, is suggestive of the fact that the petitioner was in unauthorized possession. It was for the petitioner to carve out a prima facie case that the Collector and the Appellate Authority have passed the orders without competence or jurisdiction or the orders so passed are not legally correct, in which also the petitioner has failed. Moreover, the writ petition, as discussed hereinabove, involves disputed question of fact, which cannot be gone into by the writ Court.

11. Apart from the above, there is another aspect of the case. The conduct of the petitioner is not reliable, since he has taken contradictory pleas. In one breath, the petitioner has claimed that his possession was not unauthorized and in the second breath, it has been claimed that the possession of the petitioner was adverse and has ripened into ownership. Therefore, it can also be inferred that the petitioner knew that he was in possession of the parcel of land of which he was not the owner.

12. It appears that the petitioner invoked the jurisdiction of this Court on the basis of equity. It is well settled principle of law that a person who seeks equity must do equity. In the instant case, the petitioner has not approached this Court with clean hands, therefore, cannot claim relief on the basis of equity.

13. The proceedings were initiated against the petitioner by the Collector in the year 1998 and the instant writ petition is on the docket of this Court for the last more than seven years, despite willingness given before the Collector, referred to hereinabove, has not surrendered the unauthorized possession, is suggestive of the fact that the petitioner has misused the process of Revenue Courts and of this Court also.

14. Having glance of the above discussion, there is no merit in the writ petition filed by the petitioner and the same is dismissed with costs to the tune of Rs.50,000/-, payable by the petitioner to the H.P. State Legal Services Authority, Shimla.

15. Pending CMPs, if any, also stand disposed of.

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

Mulakh Raj Mehta son of Shri Manohar Lal Mehta ....Appellant/Complainant
Versus
Mehar Chand son of Shri D.S. Sharma ....Respondent/Accused

Cr. Appeal No. 301 of 2006
Judgment Reserved on 11th May 2016
Date of Order 14th June 2016

Negotiable Instruments Act, 1881- Section 138- Complaint was filed pleading that complainant had supplied the building material to the accused worth Rs. 75,000/- for construction of the house- cheque was issued, which was dishonoured with an endorsement 'account closed'- accused was tried and acquitted by the trial Court- case remanded to trial Court with the direction to conduct further inquiry regarding the cheque from the official of the bank and thereafter to dispose of the complaint in accordance with the law. (Para-9 to 13)

Cases referred:
NEPC Micon Ltd. and others vs. Magma Leasing Limited AIR 1999 SC
Mallavarapu Kasivisweswara Rao vs. Thadikonda Ramulu Firm and others (2008)7 SCC 655

For the Appellant: Mr. Sunil Mohan Goel Advocate.
For the Respondent: Mr. Rajnish Maniktala, Advocate

The following order of the Court was delivered:

P.S. Rana, Judge

Order of limited remand

Present appeal is filed against the judgment dated 20.6.2006 passed by learned Additional Chief Judicial Magistrate Baijnath District Kangra in Criminal complaint No. 67-III/2004 title Mulakh Raj Mehta vs. M.C. Sharma.

Brief facts of the case

2. Mulakh Raj complainant filed complaint under Section 138 of Negotiable Instrument Act 1881 pleaded therein that complainant is dealing with supply of building material for construction of houses at Baijnath Tehsil Baijnath District Kangra H.P. It is pleaded that complainant supplied building material to accused worth Rs.75000/- (Rupees seventy five thousand only) for construction of a house situated at Sungal Tehsil Baijnath District Kangra H.P. It is pleaded that accused issued cheque No. 988346 dated 25.5.2001 in favour of complainant. It is pleaded that complainant presented the above said cheque and said cheque was dishonoured on account of "Account closed". It is pleaded that thereafter complainant issued a demand notice through Advocate and demand notice was received by accused. It is pleaded that accused did not pay the amount despite demand notice. It is pleaded that accused be punished under Nagotiable Instrument Act 1881.

3. Notice of Accusation was put to accused by learned Judicial Magistrate Baijnath under Section 138 of Negotiable Instrument Act 1881. Accused did not plead guilty and claimed trial.

4. Complainant examined two witnesses in support of his case and also tendered documentaries evidence. Accused did not lead any defence evidence. Learned Trial Court dismissed the complaint and acquitted the accused.

5. Feeling aggrieved against the judgment passed by learned Trial Court complainant Mulakh Raj filed present criminal appeal.

6. Court heard learned Advocate appearing on behalf of the appellant and learned Advocate appearing on behalf of the respondent/accused and also perused the entire record carefully.

7. Following points arise for determination in present appeal:-

Point No.1

Whether appeal filed by appellant is liable to be accepted as mentioned in memorandum of grounds of appeal?

Point No.2

Final Order.

8.Findings upon Point No.1 with reasons

8.1. CW1 Mulakh Raj has stated that he used to supply building material for construction and he is running shop at Baijnath District Kangra (H.P.). He has stated that he has supplied building construction material to the tune of Rs.75000/- (Rupees seventy five thousand) to accused. He has stated that accused issued cheque to him in consideration amount of Rs.25000/- (Rupees twenty five thousand). He has stated that cheque was presented for encashment and same returned with remarks "Account closed". He has stated that demand notice was also given to accused but despite demand notice accused did not pay the amount. He has denied suggestion that he has filed the present complaint just to harass the accused. He has denied suggestion that complainant has himself admitted balance of Rs.3845/- (Rupees three thousand eight hundred forty five).

8.2 CW2 Ashok Kumar posted as Clerk in Bank has stated that he has brought the summoned record. He has stated that cheque was presented before bank for encashment and same was sent to Bank of Baroda New Delhi for collection. He has stated that memo Ext.CW2/C was received with report that accused has closed the account. He has stated that record relating to bank account of accused is available in Bank of Baroda New Delhi.

9. Following documentaries evidence adduced by complainant. (1) Ext.CW2/A is cheque issued to the tune of Rs.25000/- (Rupees twenty five thousand) issued in favour of Mulakh Raj on 25.5.2001 by accused. (2) Ext.CW1/A is postal receipt. (3) Ext.CW1/B is legal notice issued to accused under Section 138 of Negotiable Instrument Act 1881. (4) Ext.CW2/C is memorandum issued by Bank of Baroda New Delhi with remarks 'Account closed'.

10. Statement of accused recorded under Section 313 of Code of Criminal Procedure by learned Trial Court. Accused has stated that he has paid Rs.75000/- (Rupees seventy five thousand) by way of cash and only balance of Rs.3845/- (Rupees three thousand eight hundred forty five) was found.

11. Submission of learned Advocate appearing on behalf of appellant that learned Trial Court did not properly appreciate the oral as well as documentaries evidence placed on record and judgment of learned Trial Court warrants interference is accepted for the reasons hereinafter mentioned. It is well settled law that to complete offence under Section 138 of Negotiable Instrument Act 1881 following facts should be established. (1) Issuance of cheque. (2)

Presentation of cheque to Bank. (3) Return of cheque unpaid. (4) Issuing notice in writing to accused demanding payment of cheque amount. (5) Failure of accused to make payment within 15 days after demand notice. Above said facts are *sine-qua-non* for completion of offence under Section 138 of Negotiable Instrument Act 1881.

12. In present case cheque was returned on account of "Account closed" by accused. CW2 Ashok Kumar posted in KCC Bank has stated in positive manner that cheque was returned with memo that accused has closed the account. It was held in case reported in ***AIR 1999 SC 1952 title NEPC Micon Ltd. and others vs. Magma Leasing Limited*** that if the cheque is returned with endorsement 'Account closed' the same is offence under Section 138 of Negotiable Instrument Act. It was held that reading Section 138 and Section 140 together it would be clear that dishonour of cheque by a bank on ground that account was closed would be covered by phrase amount of money standing to the credit of that account is insufficient to honour the cheque. It was held that expression amount of money standing to the credit of that account is insufficient to honour the cheque is genus and expression that account being closed is specie. It was held that Section 138 of Negotiable Instrument Act 1881 is a penal statute and it is duty of Court to interpret it consistent with legislative intent. It is well settled law that ruling given by Hon'ble Apex Court of India is binding on all Courts throughout India as per Article 141 of Constitution of India.

13. As per testimonies of CWs 1 and 2 it is proved on record that cheque issued by accused was dishonoured. Testimonies of CWs 1 and 2 remain unrebutted on record. Testimonies of CWs 1 and 2 are also corroborated by documentaries evidence i.e. cheque Ext.CW2/A dated 25.5.2001 placed on record and postal receipt Ext.CW1/A placed on record and legal notice Ext.CW1/B placed on record and memo issued by Bank of Baroda Ext.CW2/C relating to account closed.

14. As per Section 118 of Negotiable Instrument Act 1881 there is presumption relating to (1) Consideration, (2) Date (3) Time of acceptance, (4) Time of transfer, (5) Order of endorsement (6) That holder is holder in due course. ***See (2008)7 SCC 655 title Mallavarapu Kasiviswesware Rao vs. Thadikonda Ramulu Firm and others.*** Even as per Section 139 of Negotiable Instrument Act 1881 there is presumption in favour of holder of cheque unless contrary is proved.

15. Submission of learned Advocate appearing on behalf of accused that complainant has given the bill to the tune of Rs.78845/- (Rupees seventy eight thousand eight hundred forty five) and complainant received Rs.75000/- (Rupees seventy five thousand) and there was balance of Rs.3845/- (Rupees three thousand eight hundred forty five) and on this ground appeal be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Plea of respondent/accused that there was balance of Rs.3845/- (Rupees three thousand eight hundred forty five) is defeated on the concept of *ipse dixit* (An assertion made without proof). Respondent/accused did not adduce any evidence on record in order to prove that he had paid Rs.75000/- (Rupees seventy five thousand) to complainant by way of cash. There is no oral or documentary evidence on record in order to prove the version of respondent/accused. In view of above stated facts point No.1 is answered accordingly.

Point No. 2(Final Order)

16. In view of findings upon point No.1 above appeal is accepted. Judgment of learned Trial Court is set aside and case is remitted back to learned Trial Court for limited purpose only with direction to conduct further inquiry in present case in accordance with law relating to cheque No. 988346 dated 25.5.2001 from officials of Bank of Baroda 13 District Centre Janakpuri New Delhi. Further inquiry is essential in present case in order to decide case properly and effectively and in order to impart substantial justice to parties. Learned Trial Court thereafter will pass judgment in accordance with law afresh. Learned Trial Court will dispose of complaint within three months because present complaint was filed in the year 2004 and require expeditious disposal. Evidence already recorded will remain part and parcel of case. Parties are

directed to appear before learned Trial Court on ***20.7.2016.*** Learned Registrar Judicial is directed to send file of learned Trial Court along with certified copy of order forthwith. Criminal appeal is disposed of. All pending miscellaneous application(s) also stands disposed of.

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

Naresh Kumar s/o Sh. Munshi Ram & Anr. ...Petitioners/Defendants

Versus

Tej Ram s/o Sh. Gawainu Ram ..Non-petitioner/Plaintiff

CMPMO No.30 of 2016
Reserved on: 16th May, 2016
Date of Order: 14th June, 2016

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff filed a civil suit for injunction pleading that land is not partitioned- defendants started raising construction over the valuable portion of the land without getting it partitioned- application for interim injunction was also filed, which was dismissed by the trial Court- an appeal was preferred, which was allowed- CMPMO was filed, which was disposed of with a direction that defendants will not remove the construction found in excess of their shares- application for appointment of Local Commissioner was filed, which was allowed- aggrieved from the order, present petition was filed- held, that the fact whether defendants have raised construction exceeding their shares or not can only be determined by the demarcation of the land- appointment of Local Commissioner is within the discretion of the Court- co-owner is not entitled to raise construction in excess of his share- trial Court had rightly appointed the local Commissioner to determine the shares of the defendants- petition dismissed.

(Para-10 to 15)

Cases referred:

John vs. Kamarunnissa, AIR 1989 Kerala 78
Sanku Ranga Rao vs. Devi Prasad Sahu and another, AIR 1989 Orissa 21
Rajinder and Company vs. Union of India & others, 2000(6) SCC 506
Sant Ram Nagina Ram vs. Daya Ram Nagina Ram, AIR 1961 Punjab 528

For petitioners : Mr. G. R. Palsara, Advocate
For Non-petitioner : Mr. H. S. Rangra, Advocate

The following order of the Court was delivered:

P.S. Rana, Judge (oral)

Present petition is filed under Article 227 of Constitution of India against the order dated 30.11.2015 passed by learned Civil Judge (Senior Division) Mandi (H.P.) in CMA No.264-VI/15 in Civil Suit No.129 of 2012 title Tej Ram vs. Naresh Kumar & another.

Brief facts of the case:

2. Plaintiff Tej Ram filed civil suit for permanent prohibitory and mandatory injunction pleaded therein that land comprised in Khata No. 426 Khatoni No.493 Khasra No.1130 measuring 01-10-01 situated in Mohal Nagchalla/219 Tehsil Sadar Mandi Distt. Mandi (H.P.) is jointly owned and possessed by plaintiff, defendants and other co-sharers as per jamabandi for the year 2009-2010. It is pleaded that suit land is joint un-partitioned property inter se parties. It is pleaded that defendants without consent of plaintiff started construction work over valuable portion of the suit land. It is pleaded that defendants have no right, title and interest to raise any construction over suit land till suit land is partitioned by metes and bounds. It is pleaded that

decree for permanent prohibitory injunction be passed against the defendants not to raise any type of construction till suit land is not partitioned in accordance with law. Additional relief also sought that if during pendency of civil suit defendants would succeed in raising construction then decree of mandatory injunction of demolition of structure be also passed.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit is not maintainable and plaintiff has no cause of action against the defendants. It is pleaded that plaintiff has no locus standi to file the present suit. It is pleaded that present suit is not valued properly for the purpose of Court fee and jurisdiction. It is pleaded that suit is bad for non-joinder of necessary parties. It is denied that defendants are threatening to raise construction over best portion of the suit land. Prayer for dismissal of suit sought. Plaintiff filed replication and re-asserted the allegations mentioned in plaint.

4. Learned Trial Court framed following issues on dated 22.08.2014:

1) Whether plaintiff is entitled for the relief of permanent prohibitory and mandatory injunction, as prayed? ....OPP.

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

3) Whether the suit of the plaintiff is not maintainable as alleged? ....OPD.

4) Whether plaintiff has no cause of action against the defendants to file the present suit as alleged? .....OPD

5) Whether suit of the plaintiff is bad for non-joinder of necessary parties as alleged? .....OPD

6) Whether suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction as alleged? ...OPD

7) Relief.

5. During pendency of the suit plaintiff Tej Ram filed application under Order XXXIX Rules 1 & 2 CPC for grant of ad-interim injunction. Learned Trial Court dismissed the application filed by plaintiff Tej Ram under Order XXXIX Rules 1 & 2 CPC. Thereafter plaintiff Tej Ram filed appeal under Order XLIII before learned District Judge Mandi (H.P.). Learned District Judge Mandi (H.P.) allowed the appeal filed by plaintiff Tej Ram and set-aside the impugned order passed by learned Trial Court. Learned first Appellate Court restrained the defendants from raising further construction over the suit land in any manner whatsoever till disposal of civil suit.

6. Feeling aggrieved against the order passed by learned District Judge Mandi (H.P.) Sh. Naresh Kumar and other defendants filed CMPMO No.4075 of 2013 before Hon'ble High Court of Himachal Pradesh. Hon'ble High Court of Himachal Pradesh decided CMPMO No.4075 of 2013 title Naresh Kumar and another vs. Tej Ram on 03.09.2013 with the directions that defendants would remove construction found in excess of their shares at their own costs from suit land. Thereafter plaintiff Tej Ram filed CMA No.264-VI/15 under Order XXVI Rule 9 CPC for appointment of some senior revenue officer or retired Tehsildar as Local Commissioner to determine whether construction raised by defendants is within their shares or in excess of their shares. Defendants filed response to application filed under Order XXVI Rule 9 CPC for appointment of Local Commissioner pleaded therein that appointment of Local Commissioner is not essential in the present case and prayer for dismissal of application filed under Order XXVI Rule 9 CPC sought.

7. Learned Trial Court appointed Tehsildar Balh Distt. Mandi as Local Commissioner to determine the fact whether defendants have made encroachment on the share of plaintiff and other co-sharers. Learned Trial Court assessed the fee of Local Commissioner as Rs.5000/- (Rupee five thousand). Feeling aggrieved against the order of learned Trial Court defendants filed present petition under Article 227 of Constitution of India.

8. Court heard learned Advocates appearing on behalf of petitioners and non-petitioner and Court also perused the entire record carefully.

9. Following points arise for determination in the present petition :

(1) Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

(2) Final Order.

Findings upon Point No.1 with reasons.

10. Submission of learned Advocate appearing on behalf of petitioners that learned Trial Court has committed illegality by way of appointing Local Commissioner in present civil suit in view of decision of CMPMO No.4075 of 2013 passed by Hon'ble High Court of Himachal Pradesh is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the order of Hon'ble High Court of Himachal Pradesh passed in CMPMO No.4075 of 2013 title Naresh Kumar and another vs. Tej Ram. Hon'ble High Court of Himachal Pradesh has directed in positive manner in CMPMO No.4075 of 2013 that if any construction would found in excess of share of defendants then same would be removed by defendants at their own cost. Fact whether defendants have raised construction exceeding their shares cannot be adjudicated properly and effectively unless revenue expert is appointed as Local Commissioner in the present case. It is held that appointment of revenue expert as Local Commissioner in the present case is essential for the purpose of elucidating matter in dispute inter se parties and in order to impart substantial justice inter se parties. It is held that appointment of Local Commissioner is essential in the present case in the ends of justice.

11. Submission of learned Advocate appearing on behalf of petitioners that learned Trial Court has created evidence in favour of the plaintiff which is not permissible under Order XXVI Rule 9 CPC and on this ground petition be accepted is also rejected being devoid of any force for reasons hereinafter mentioned. It is held that appointment of Local Commissioner is discretion of the Court. It is well settled law that where local inspection under Order XXVI Rule 9 CPC is requisite and proper for elucidating matter in dispute in civil suit then Court can appoint Local Commissioner. In the present case fact whether defendants have raised construction over joint immovable land exceeding their shares or not cannot be decided by way of oral evidence and appointment of revenue expert as Local Commissioner is essential in the present case in order to elucidate matter in dispute properly and effectively. It is held that defendants would get opportunity to file objections over Local Commissioner report and defendants would get opportunity to rebut Local Commissioner report in accordance with law. It is held that no miscarriage of justice will be caused to petitioners by way of appointment of revenue expert as Local Commissioner in the present case.

12. Submission of learned Advocate appearing on behalf of petitioners that plaintiff intends to fill-up lacuna in the present case and on this ground petition be accepted is also rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that in joint property no co-owner can be allowed to raise any fresh construction exceeding his share without consent of other co-owners. In the present case Hon'ble High Court of Himachal Pradesh in CMPMO No.4075 of 2013 title Naresh Kumar and another vs. Tej Ram decided on 03.09.2013 has specifically directed in positive manner that defendants would demolish the construction if raised exceeding to the share of defendants in suit property. Admittedly the suit property is valuable suit land situated adjoining to National Highway. See AIR 1989 Kerala 78 title **John vs. Kamarunnissa.** Also see AIR 1989 Orissa 21 title **Sanku Ranga Rao vs. Devi Prasad Sahu and another.**

13. Submission of learned Advocate appearing on behalf of petitioners that non-petitioner cannot take benefit of his own wrong because non-petitioner has already raised construction more than his share over suit land in front portion of suit land and on this ground petition be accepted is also rejected being devoid of any force for reasons hereinafter mentioned. Fact whether plaintiff himself has raised construction exceeding his share over suit land cannot

be decided in present CMPMO No.30 of 2016 because the same is complicated issue of fact. There is no evidence on record in order to prove that defendants have filed counter claim in civil suit. It is well settled law that unless counter claim is not filed by defendants in civil suit no effective relief can be granted to defendants relating to counter claim. It was held by Hon'ble Apex Court of India in case reported in 2000(6) SCC 506 title **Rajinder and Company vs. Union of India & others** that High Court should not interfere in the discretion of learned Trial Court appointing Local Commissioner.

14. Court has also carefully perused the copy of jamabandi for the year 2009-2010 placed on record prepared under H. P. Land Revenue Act. Jamabandi for the year 2009-2010 has been prepared by public official in discharge of official duties and is relevant fact under Section 35 of Indian Evidence Act 1872. As per jamabandi for the year 2009-2010 Balbir Singh s/o Sh. Devi Singh is owner of 5/30 shares, Bhoop Singh, Tej Ram, Munshi Ram, Krishna Devi, Parwati Devi and Mathura Devi are owners of 6/30 shares, Gurdas and Prem Dass are owners of 6/30 shares, Saran Dass is owner of 6/30 shares, Bhola and Ram Dass are owners of 1/30 share and Baishakhu s/o Sh. Thallu is owner of 6/30 shares in the suit land situated in Khasra No.1130. Total area of suit land is 01-10-01 out of which area measuring 00-15-01 is Dhani Abbal and over area measuring 00-15-00 house is constructed. It is proved on record that Munshi Ram was one of co-owners of suit land and he died and thereafter Naresh Kumar and Deepa Devi have inherited the share of Munshi Ram in suit land. As per jamabandi for the year 2009-2010 suit land is joint inter se parties and has not been partitioned in accordance with law. Rights and liabilities of joint owner in joint suit property are defined in ruling reported in AIR 1961 Punjab 528 title **Sant Ram Nagina Ram vs. Daya Ram Nagina Ram** operative part is quoted in toto: (1) A co-owner has an interest in the whole property and also in every parcel of it. (2) Possession in joint property by one co-owner is in the eye of law possession of all. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all. (4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all on the ground of ouster the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other co-owner. (5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment. (6) Every co-owner has a right to use the joint property in a husband like manner. (7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition. (8) The remedy of a co-owner not in possession is by way of partition. (9) Where a portion of the joint property is by common consent of the co-owners reserved for a particular common purpose it cannot be diverted to an inconsistent user by a co-owner if he does so he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order).

15. In view of findings on point No.1 above present petition filed under Article 227 of Constitution of India is dismissed. Order of learned Trial Court appointing Local Commissioner is affirmed. No order as to costs. Parties are directed to appear before learned Trial Court on **11.07.2016**. File of learned Trial Court alongwith certified copy of order be sent back forthwith. Observations made hereinabove will not effect merits of civil suit in any manner. CMPMO No.30/2016 is disposed of. Pending application(s) if any also disposed of.

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

State of H.P. ..Appellant-Defendant
Versus
Hari Ram & Ors. ..Respondents-Plaintiffs

Regular Second Appeal No.332 of 2004.
Judgment Reserved on: 23.05.2016.
Date of decision: 14.06.2016

Code of Civil Procedure, 1908- Order 22 Rule 4 & Order 1 Rule 10- Appeal filed by one of the defendants was dismissed on the ground to have been abated for not bringing on record the legal heirs of some of the deceased defendants-in second appeal held that, when the deceased respondents died long back in the years 1996, 1998 and 2002 respectively and applications were filed in the year 2004, the same should have been accompanied by the applications under Section 5 of the Limitation Act- even no evidence worth name was led in support of the contents/averments of the application- the first appellate court has rightly dismissed the application for bringing the legal heir of the deceased on the record- appeal dismissed.

(Para-30 to 40)

Cases referred:

Mangluram Dewangan vs. Surendra Singh and Others, (2011)12 SCC 773
Madan Naik (dead by LRs) and Others vs. Mst.Hansubala Devi and Others, AIR 1983 SC 676
Lanka Venkateswarlu (Dead) By LRs vs. State of Andhra Pradesh and Others, (2011)4 SCC 363
Balwant Singh (Dead) vs. Jagdish Singh and others, (2010)8 SCC 685
Katari Suryanarayana and Others vs. Koppisetti Subba Rao and Others, (2009)11 SCC 183
Ram Nath Sao alias Ram Nath Sahu and Others vs. Gobardhan Sao and Others, (2002)3 SCC 195
Badni (Dead) By LRs and Others vs. Siri Chand (Dead) by LRs and Others, (1999)2 SCC 448
M.Veerappa vs. Evelyn Sequeira and Others, (1988)1 SCC 556
Daya Ram and others vs. Shyam Sundari and others, AIR 1965 SC 1049
Union of India vs. Ram Charan (Deceased) through his Legal Representatives, AIR 1964 SC 215
Budh Ram and Others vs. Bansi and Others, (2010)11 SCC 476

For the Appellant: Mr.Rupinder Singh Thakur, Additional Advocate General.
For Respondents 1 to 3: Mr.K.D. Sood, Senior Advocate with Mr.Rajnish K. Lall, Advocate.
For Respondents 4, 6 to 9: Mr.Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellant-defendant No.5, against the judgment and decree dated 27.4.2004 passed by the learned District Judge, Bilaspur, District Bilaspur, H.P., whereby the applications, being ***CMP No.127 of 2004,*** under Order 1 Rule 10(2) and Order 22 Rule 4 CPC, for deletion of name of respondent No.6 Shri Bohru, who expired on 29.11.1998, and for bringing on record the legal representatives of respondent No.1 namely; Shri Ram Dass, who expired on 2.12.1998 and ***CMP Nos.156 of 2004 & 128 of 2004*** under Order 22 Rule 4 CPC for bringing on record the legal representativecs of proforma respondents No.7 and 8, namely; S/Shri Chandu and Lachhaman, who expired on 16.7.1996 and 13.4.2002 respectively, moved by appellant-defendant No.5, have been dismissed, as a result of which appeal stood dismissed as having abated.

2. The brief facts emerge from the record are that the plaintiffs-respondents *(hereinafter referred to as `plaintiffs'),* filed a suit for declaration and permanent prohibitory injunction wherein it was pleaded that the suit land measuring 4-9 bighas comprised of Khewat No.9, Khatauni No.11, Khasra Nos.26,29,100,133 and 140, situated at village Kathpur, Pargana and Tehsil Sadar, District Bilaspur, H.P. was mortgaged with possession in favour of predecessor-in-interest of plaintiffs and defendants No.6 and 7 by the predecessors-in-interest of defendants No. 1 to 4, regarding which mutation was attested. But neither predecessors-in-interest of defendants nor defendants No.1 to 4 redeemed the suit land and took back possession from the plaintiffs within statutory period of limitation for redumption. Since, said statutory period had expired, therefore, plaintiffs pleaded that they have become owners in possession of the suit land. The plaintiffs further stated that defendant No.5 had no right title or interest over the suit land and revenue entries in favour of defendant No.5 in respect of suit land were specifically challenged. Hence, the suit for permanent prohibitory injunction against defendants.

3. Defendants Nos.1 to 4, by way of filing joint written statement wherein, took preliminary objections regarding maintainability of the suit, cause of action, estoppel, notice under section 80 CPC and jurisdiction of the Court. On merits, it is alleged by the defendants that in the year 2004 they returned the mortgage amount to the mortgagees i.e. plaintiffs and entered into possession of the suit land. It is alleged that since defendants redeemed the suit land from the plaintiffs on the same day, when plaintiffs redeedmed it from one Dhani Ram, therefore, the entries in the name of defendant No.5 were wrong. Consequently, defendants prayed for the dismissal of the suit.

4. Defendant No.5, by way of filing separate written statement, took preliminary objections regarding limitation, mis-joinder of necessary parties, notice under Section 80 CPC, estoppel and locus standi. On merits, it is alleged that the plaintiffs had further mortgaged the suit land in favour of Shri Dhani Ram who died issueless. Therefore, the suit land was inherited by State of H.P. and mutation thereof was attested in its favour and in subsequent revenue record the possession of State of H.P. was rightly recorded. Consequently, defendant No.5 prayed for the dismissal of the suit.

5. Defendants No.6 and 7 also filed separate written statement wherein the preliminary objections already taken by the defendants No.1 to 4 were re-asserted and further it was stated that in the year 2004 defendants No.1 to 4 had taken the possession of the suit land after redumption. Consequently, defendants No.s 6 and 7 prayed for the dismissal of the suit.

6. Replication was filed by the plaintiffs wherein averments already made in the plaint were reasserted.

7. The learned trial Court, on the basis of pleadings, settled inasmuch as 9 issues and except first fives issues, which were not pressed, decided all the issues in favour of the plaintiffs and accordingly decreed the suit of the plaintiffs. The appeal, preferred before the learned Appellate Court, was dismissed having abated.

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

"(1) Whether the suit of the plaintiff was bad in law in the absence of necessary parties?

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

10. In the present case, plaintiff had instituted a suit for possession on the ground that neither predecessors-in-interest of defendants nor defendants No.1 to 4 redeemed the suit land and took back possession from the plaintiffs within statutory period of limitation for redumption. Since said statutory period had expired, therefore, plaintiffs pleaded that they have become owners in possession of the suit land. Learned trial Court below decreed the suit of the plaintiffs and they were declared joint owners in possession of the suit land alongwith defendants

No.6 and 7 and defendants No.1 to 4 were restrained by way of permanent prohibitory injunction not to interfere in possession of the plaintiff in any manner over the suit land.

11. Defendant-State of Himachal Pradesh feeling aggrieved and dissatisfied with the judgment and decree dated 6.1.1996 filed an appeal under Section 96 of the Code of Civil Procedure *(in short `CPC')* against the judgment and decree dated 6.1.1996 passed by learned Sub Judge Ist Class, Bilaspur, in CS No.75/1 of 95/91 in the Court of District Judge, BIaspur by way of appeal No.15 of 1996.

12. Perusal of the impugned judgment as well as documents available on record suggests that during the pendency of appeal No.15 of 1996, present appellant-defendant No.5 moved one application bearing ***CMP No.127 of 2004 in CA No.15/1996,*** under Order 1 Rule 10(2) and Order 22 Rule 4 CPC, for deletion of name of respondent No.6 Bohru, who expired on 29.11.1998 and for bringing on record the legal representatives *(in short `LRs')* of respondent No.1, Ram Dass, who expired on 2.12.1998.

13. Apart from above, appellant-defendant No.5 filed another two applications being ***CMP Nos.156 of 2004 and 128 of 2004 in Civil Appeal No.15 of 1996*** under Order 22 Rule 4 CPC for bringing on record the LRs of proforma respondents No.7 and 8, namely; S/Shri Chandu and Lachhaman, which were also taken up by the Court of learned District Judge, Bilasur alongwith main appeal for hearing on 27.4.2004.

14. It emerges from bare reading of the impugned order dated 27.4.2004 passed by learned District Judge, Bilaspur that all the aforesaid applications filed by appellant-defendant No.5 were dismissed, as a result whereof appeal was abated, meaning thereby no findings on merits of the appeal were returned by the Court of learned District Judge, Bilaspur and the judgment and decree passed by learned trial Court below attained finality.

15. By way of present appeal appellant-defendant No.5 assailed the impugned order dated 27.4.2004, whereby applications filed for deletion of name of respondent No.6 as well as for bringing on record LRs respondent No.1 and proforma respondents No.7 and 8 were also rejected. This Court, while admitting the present appeal for hearing, on the basis of pleadings, formulated substantial question of law that, ***"Whether the suit of the plaintiff was bad in law in the absence of necessary parties?"***.

16. Since the appeal has abated on account of failure on the part of the appellant-defendant No.5 to bring LRs of respondent No.1 and proforma respondents No.7 & 8 on record as well as substitution of respondent No.6, namely; Bohru, who allegedly expired on 29.11.1998, it would be appropriate for this Court to examine whether applications filed by the appellants-defendant No.5 for bringing on record LRs of respondent No.1 and proforma respondents No.7 and 8 as well as for deletion of name of respondent No.6 Bohru were rightly decided by the first appellate Court or not?

17. Accordingly, this Court before adverting to the merit of the case would critically examine the evidence available on record to explore, whether the findings returned by the first appellate Court that the applications filed by the appellant-defendant No.5 for bringing on record the LRs of respondent No.1, proforma respondents No.7 and 8 and for deletion of respondent No.6 cannot be accepted at this belated stage, is correct or not, so that impact of not bringing the LRs of aforesaid deceased respondents is ascertained vis-à-vis the merit of the case is concerned.

18. Shri Rupinder Singh Thakur, learned Additional Advocate General, appearing for the appellant-defendant No.5-State, vehemently argued that the judgment and decree passed by the first appellate Court is against the facts and law and as such the same deserves to be quashed and set aside. He forcefully contended that the conclusion drawn by the first appellate Court cannot be accepted, in view of the evidence available on record. Rather, finding returned by the first appellate court, while rejecting the applications filed by the appellant-defendant No.5 for

bringing on record the LRs of respondent No.1, proforma respondents No.7 and 8 as well as deletion of the name of respondent No.6, is perverse and the same cannot be allowed to stand.

19. Mr.Thakur also contended that while dismissing the applications, referred hereinabove, first appellate Court has taken very hyper-technical view with regard to maintainability of the applications at the belated stage. He contended that there is ample evidence on record to suggest that the factum with regard to death of deceased respondents never came into the notice of the appellant and as such delay, if any, cannot be taken into consideration by first appellate Court while deciding the applications.

20. Mr.Thakur strenuously argued that the case law relied upon by first appellate court, while rejecting the applications, itself suggest that the same was not applicable in the present case because as per those judgments Hon'ble Apex Court has repeatedly held that while dealing with the applications moved under Order 22 Rule 4 read with Rule 9 CPC, Courts are expected to adopt a liberal approach because parties gain nothing by not bringing on record the LRs of the deceased persons in any legal proceedings. Mr.Thakur, also invited the attention of this Court to the fact that respondent No.6 had actually died on 29.11.1998 i.e. during the pendency of the suit before the trial Court and as such decree obtained by the plaintiffs against a dead person is a nullity and as such, that could not be upheld by the Court below. He stated that since respondent No.6 died during the pendency of the proceedings before the trial Court, proper course for first appellate Court was to set aside the decree and remand the case to the trial Court. He also forcefully contended that the respondents No.1, 6, 7 and 8 were dead even before passing of the impugned order by the first appellate Court and as such rejection of the aforesaid applications moved by the appellant-defendant No.5 by the first appellate Court being time barred is totally unsustainable in the eye of law. In the aforesaid background, Mr.Thakur strenuously argued that order passed by the learned first appellate Court deserves to be quashed and set aside. However, at this stage, it is clarified that aforesaid contention put forth by Mr.Thakur that respondents No.1, 6, 7 and 8 died during the pendency of the suit appears to be incorrect especially after perusing the death certificates made available on record of the ***FAO No.205 of 2004, titled: Bardu & Another vs. Brij Lal & Others***, where dates of death of respondents No.1, 6, 7 and 8 have been shown as 2.12.1998, 29.11.1998, 10.7.1996 and 13.4.2002.

21. Per-contra Shri K.D. Sood, learned Senior Counsel, appearing for respondents No.1 to 3, supported the impugned order passed by the learned first appellate Court. It was forcefully contended on the part of the defendants that no interference of this Court whatsoever is called for in the present facts and circumstances of the case because impugned order has been passed on the basis of proper appreciation of the material evidence available on record. Mr.Sood forcefully contended that bare perusal of the pleadings as well as documents available on record itself demonstrate that applications filed by the appellant-defendant No.5 were time barred and no explanation worth the name was given in the applications explaining the delay and circumstances for not brining on record the LRs of deceased respondent No.1, proforma respondents No.7 and 8. He also contended that even bare perusal of the applications moved by the appellant-defendant No.5 suggests that same have been filed under Order 22 Rule 4 but there is no specific mention with regard to Rule 9 of Order 22 of the CPC, meaning thereby that there is no specific prayer for setting aside the abatement, if any. It is also brought to the notice of this Court by referring to the applications which are available on record that no independent application for condonation of delay, was ever filed by the appellant alongwith the applications moved for bringing on record LRs explaining therein cause/reason for condonation of delay in moving applications.

22. A specific objection with regard to maintainability of present appeal has been taken by Mr. Sood, learned Senior Counsel. He forcefully argued that the present RSA filed by State of Himachal Pradesh is/was not maintainable at all because order rejecting the applications for bringing on record the LRs of the deceased respondents, proforma respondents as well as deletion of name of respondent No.6 is an appealable order which was required to be assailed by

way of FAO under Order 43 Rule 1(k) CPC. In the aforesaid background prayer was made to dismiss the present appeal filed by the appellant-defendant No.5-State.

23. Since specific objection with regard to maintainability of present RSA has been taken by the defendants, this Court deems it proper to deal with the question of maintainability at first instance before adverting to the merits and de-merits of the impugned order, which is the subject matter of the present case.

24. Admittedly, vide order dated 27.4.2004 Court of learned District Judge, Bilaspur, dismissed the applications moved by the present appellant-defendant No.5-State for bringing on record the LRs of respondent No.1, proforma respondents No.7 and 8 as well as deletion of name of respondent No.6 and it also remains fact that learned District Judge, Bilaspur, has not returned any finding on the merits of the case and in view of the dismissal of the applications, referred hereinabove, appeal stand automatically abated, meaning thereby that by way of order dated 27.4.2004 learned District Judge has decided the application filed by the appellant-defendant No.5 for brining on record the legal representatives of deceased respondent No.1, proforma respondents No.7 and 8 as well as deletion of name of one of the defendants-respondents. As a consequent whereof appeal stood abated. At this stage, it would be apt to refer to the provisions of Order 43 Rule 1 CPC:

> ***"O.43. 1. Appeal from orders.- An appeal shall be from the following orders under the provisions of section 104, namely:-***
>
> ***(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit."***

It is ample clear from the perusal of the Order 43 Rule 1(k) CPC that any order refusing to set aside the abatement or dismissal of a suit under Order 22 Rule 9 is an appealable order and cannot be assailed by way of RSA under Section 100 CPC.

25. In the present case also where admittedly respondent No.1 and proforma respondents No.6, 7 and 8 had died during the pendency of the appeal and no steps whatsoever were taken well within stipulated time by the appellant-defendant No.5, as a result thereof, appeal pending before the learned District Judge, Bilaspur, had abated. During the pendency of the appeal, appellant-State moved applications, as have been referred above, for bringing on record the LRs of respondent No.1 ,proforma respondents No.7 and 8 and for deletion of name of respondent No.6, which were ultimately dismissed by the learned District Judge, BIlaspur vide impugned order. Perusal of the applications referred above suggests that neither specific provisions i.e. under Order 22 Rule 4 read with Rule 9 have been mentioned nor any specific prayer in the applications with regard to setting aside abatement, if any, has been made. Hence, it can be concluded that applications, referred above, were moved by the appellant-State for bringing on record the LRs of deceased respondent No.1 and proforma respondents No.7 and 8 without any prayer of setting aside of the abatement, if any. Now, once the aforesaid applications were rejected by the first appellate Court, definitely appropriate remedy for the present appellant was to assail the impugned order dated 27.4.2004 by way of filing appeal in terms of Order 43 Rule 1(k) CPC. In this regard reliance is placed on the following judgments:

26. In ***Mangluram Dewangan vs. Surendra Singh and Others, (2011)12 SCC 773,*** the Hon'ble Supreme Court has held:-

> ***"8. The following questions arise for consideration on the contentions urged :***
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> ***(i) Whether an order of the trial court rejecting an application filed under Order 22 Rule 3 of the Code, by a person claiming to be the legatee under the will of the plaintiff and consequently dismissing the suit in the absence of any legal heir, is an appealable decree?***

(ii) Whether the High Court was justified in upholding the decision of the trial court that the will was not proved and rejecting the application under Order 22 Rule 3 of the Code?

Re : Question (i)

9. Order 22 deals with death of parties. Rules 1, 3, 5 and 9 of order 22 of the Code have a bearing on the issue and relevant portions thereof are extracted below :

*"**1. No abatement by party's death if right to sue survives.**- The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.*

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

(2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

***5. Determination of question as to legal representative.**-Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:*

* * *

***9. Effect of abatement or dismissal.**- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*

*(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit". **(emphasis supplied)***

10. A combined reading of the several provisions of Order 22 of the Code makes the following position clear:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependant upon any formal order of the court that the suit has abated.

(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9 (2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative.

11. We may next consider the remedies available to an applicant whose application under Order 22 Rule 3 of the Code, for being added as a party to the suit as legal representative of the deceased plaintiff, has been rejected. The normal remedies available under the Code whenever a civil court makes an order under the Code are as under:

(i) Where the order is a `decree' as defined under section 2(2) of the Code, an appeal would lie under section 96 of the Code (with a provision for a second appeal under section 100 of the Code).

(ii) When the order is not a `decree', but is an order which is one among those enumerated in section 104 or Rule 1 of Order 43, an appeal would lie under section 104 or under section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal).

(iii) If the order is neither a `decree', nor an appealable `order' enumerated in section 104 or Order 43 Rule 1, a revision would lie under section 115 of the Code, if it satisfies the requirements of that section.

12. When a party is aggrieved by any decree or order, he can also seek review as provided in Section 114 subject to fulfillment of the conditions contained in that section and Order 47 Rule 1 of the Code. Be that as it may. The difference between a `decree' appealable under section 96 and an `order' appealable under section 104 is that a second appeal is available in respect of decrees in first appeals under section 96, whereas no further appeal lies from an order in an appeal under section 104 and Order 43, Rule 1 of the Code. The question for consideration in this case is whether the order dated 31.8.1996 of the trial court dismissing an application under Order 22 Rule 3 and consequently dismissing the suit is an order amenable to the remedy of appeal or revision. If the remedy is by way of appeal, the incidental question would be whether it is under section 96, or under section 104 read with Order 43, Rule 1 of the Code.

13. Section 96 of the Code provides that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. The word `decree' is defined under section 2(2) of the Code thus:

> ***"2. (2)*** *"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -*
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> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
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> *(b) any order of dismissal for default.*
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> *Explanation.--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"*

14. A reading of the definition of decree in Section 2(2) shows that the following essential requirements should be fulfilled if an order should be treated as a `decree' :

> *(i) there should be an adjudication in a suit;*
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> *(ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it;*
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> *(iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and*
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> *(iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default.*
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> **(emphasis supplied)** ***(pp.777-780)***

27. In ***Madan Naik (dead by LRs) and Others vs. Mst.Hansubala Devi and Others, AIR 1983 SC 676,*** the Hon'ble Supreme Court held:

> ***"8. Section 2 sub-sec.(2) of the Civil P.C. defines `decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Sec.144 but shall not include any adjudication from which an appeal lies as an appeal from an order". When an appeal abates for want of substitution as envisaged by sub-rule (1) of R.9 of O.22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Sec. 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22 Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore, when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22, Rule 9(2) C.P.C. refusing to set aside abatement is specifically appealable under***

Order 43, Rule 1k). Such a adjudication if it can be so styled would not be a decree as defined in Sec.2(2) C.P.C. Sec.100 provides for second appeal to the High Court from every decree passed in appeal by any Curt subordinate to the High Court on the grounds therein set out. What is worthy of notice is that second appeal lies against a decree passed in appeal. An order under Order 22, Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent." (pp.679-680)

28. In view of the facts and circumstances, narrated hereinabove, it can be safely concluded that present appeal is not maintainable in the present form and the same deserves to be dismissed solely on this ground. However, with a view to answer the substantial question of law framed at the time of admission, which has been reproduced hereinabove, this Court also examined the evidence available on record which persuaded the first appellate Court to reject the applications filed by the appellant-State. There is no doubt that appeal, if any, could not be decided by the Courts below in the absence of LRs of respondent No.1 as well as proforma respondents No.6, 7 and 8 as all of them were necessary parties for the adjudication of the dispute. But fact remains, as emerges from the record that appellant-defendant No.5 remained quite negligent and callous while taking steps for bringing on record LRs of aforesaid deceased respondents. Since respondent No.1 and proforma respondents No.7 and 8 had died during the pendency of the present appeal before the first appellate Court, it was incumbent upon the appellant therein to move an application for bringing on record LRs of deceased respondents well within stipulated time, but in the present case, there is overwhelming evidence to suggest that no steps whatsoever, were taken for years together.

29. In the present case, respondent No.6 had expired on 29.11.1998, whereas respondents No.1, 7 and 8 expired on 2.12.1998, 10.7.1996 and 13.4.2002 respectively. Applications for bringing on record LRs of aforesaid respondents and deletion of name of respondent No.6 were moved in the year 2004 i.e. after a lapse of 8, 6, 2 years respectively, as emerges from the record. Moreover, during proceedings of the case, this Court had an occasion to peruse the evidence adduced by the parties for just and proper decision of the applications moved by the appellant-State for bringing on record LRs of deceased respondents and for deletion of name of respondent No.6.

30. In the present case, record suggests that appellant-defendant No.5 led no evidence, whatsoever in support of contentions raised in the applications. It appears that learned first appellate Court on 7.5.2002 framed specific issues for deciding these applications but appellant-defendant No.5 did not lead any evidence to prove the contents of these applications. However, respondents tendered documentary evidence Exs.R-1 to R-4 to prove their case. It also emerges from the record that the appellant-defendant No.5 while moving the aforesaid applications under reference for bringing on record the LRs even did not move an application under Section 5 of the Limitation Act explaining therein the delay in filing the application under Order 22 Rule 4. Since there was substantial delay in filing the application, it was incumbent upon the appellant-defendant to move an application under Section 5 of the Limitation Act specifically detailing therein the reasons for delay in moving the application for bringing on record the LRs of deceased respondents. Moreover, none of the appellants was examined to prove the contents of the applications or otherwise, who could come in witness box and state that there was sufficient cause which prevented the appellant-State from filing the applications well in time. But, as is observed earlier also, no witness of the appellant had appeared in the witness box to state and explain the circumstances which prevented the appellant from filing the applications well within time. In the present case, where the deceased respondents died long back in the years 1996, 1998 and 2002 respectively and applications were filed in the year 2004, delay, if any, certainly could not be condoned by the Courts below without there being any application under Section 5 of the Limitation Act.

31. In ***Lanka Venkateswarlu (Dead) By LRs vs. State of Andhra Pradesh and Others, (2011)4 SCC 363,*** the Hon'ble Supreme Court held:-

> ***"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 (L.A.) v. Katiji , (1987)2 SCC 107.***
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> ***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, (2010)8 SCC 685, as follows: (SCC p.696, paras 25-26)***
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> *"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.*
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> *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."*
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> ***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.***
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> ***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.***
>
> ***(pp.370-373)***

32. True, it is, as held by the Hon'ble Apex Court that the Court should be liberal in condoning the delay in such like matters but as has been observed above, there is no iota of evidence available on record to suggest that any explanation worth name was ever offered by appellant-defendant No.5 to explain the delay. Especially in case like present one where there was delay of more than 8, 6 and 2 years, applicants are/were expected to move separate application for condonation of delay explaining therein the reasons which could be sufficient to condone the delay. What to talk about the separate application under Section 5 of the Limitation Act which should have been moved by the appellant, there is no whisper with regard to reasons for delay in the so called composite applications preferred by the applicants under Order 22 Rule 4 CPC for bringing on record the LRs of deceased respondents.

33. Apart from this, one more glaring discrepancy which has been noticed by this Court is that in the aforesaid application there is no mention with regard to the provisions of Rule 9 of Order 22 CPC, which specifically talks about setting aside the abatement, if any. Hence, any application moved under Order 22 Rule 4 CPC without there being mention of Rule 9 and specifically not praying therein for setting aside abatement cannot be held maintainable at all and abatement, which had occurred long time back prior to filing of the applications, could not be set aside by the Court. The learned first appellate Court while rejecting the applications, referred hereinabove, has rightly relied upon the judgments passed by this Court as well as Hon'ble Apex Court, perusal whereof itself suggests that Court can certainly set aside the abatement or can pass order for bringing on record the LRs of the deceased persons after prescribed period of limitation, if it is proved that the party was prevented by any sufficient cause and onus to prove the absence of equity, lack and negligence definitely lies on the applicant. It has also been held in the aforesaid judgment that the application cannot be allowed or dismissed by taking recourse to discretionary powers because under Article 121 of the Act an application to set aside abatement has to be filed within a specific period of 60 days from the date of abatement. Though, Court has discretion to allow applicant to file application under Order 22 Rule 9 but only in that circumstance where applicant has satisfied that he or she was prevented and had sufficient cause of not making the application within said period. But in the present case, as has been discussed in detail, the applicant at the first instance did not move application under Order 22 Rule 4 CPC in time and moreover no application under Section 5 of the Limitation Act for condonation of delay, if any, was moved alongwith application for bringing on record LRs of the deceased respondents. Even no evidence worth name was led in support of the contents/averments of the application. Hence, this Court does not see any infirmity and illegality in the order passed by learned first appellate Court inasmuch as it has returned finding that the application is hopelessly time barred and cannot be accepted at this belated stage. ***(See: Balwant Singh (Dead) vs. Jagdish Singh and others, (2010)8 SCC 685; Katari Suryanarayana and Others vs. Koppisetti Subba Rao and Others, (2009)11 SCC 183; Ram Nath Sao alias Ram Nath Sahu and Others vs. Gobardhan Sao and Others, (2002)3 SCC 195; Badni (Dead) By LRs and Others vs. Siri Chand (Dead) by LRs and Others, (1999)2 SCC 448; M.Veerappa vs. Evelyn Sequeira and Others, (1988)1 SCC 556; Daya Ram and others vs. Shyam Sundari and others, AIR 1965 SC 1049 and Union of India vs. Ram Charan (Deceased) through his Legal Representatives, AIR 1964 SC 215.).***

34. In ***Budh Ram and Others vs. Bansi and Others, (2010)11 SCC 476,*** it has been held:

> ***"10. Abatement takes place automatically by application of law without any order of the court. Setting aside of abatement can be sought once the suit stands abated. Abatement in fact results in denial to hearing of the case on merits. Order XXII Rule 1 CPC deals with the question of abatement on the death of the plaintiff or of the defendant in a Civil Suit. Order XXII Rule 2 relates to procedure where one of the several plaintiffs or the defendants die and the right to sue survives. Order XXII Rule 3 CPC deals with procedure in case of death of one of the several plaintiffs or of the sole plaintiff. Order XXII Rule 4 CPC, however, deals with procedure in***

case of death of one of the several defendants or of the sole defendants. Sub-clause (3) of Rule 4 makes it crystal clear that:

> *"4.(3) Where within the time limited by law, no application is made under sub-Rule 1, the suit shall abate as against the deceased defendant."*
>
> *(emphasis supplied)*

17. Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the respondents-defendants would abate the appeal in toto or only qua the deceased respondents-defendants, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.

18. The instant case requires to be examined in view of the aforesaid settled legal propositions. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of other co-owners. Therefore, in theory, every co-owner has an interest in every infinitesimal portion of the subject matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly with others. A co-owner of a property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place.

19. In the instant case a declaratory decree was passed in favour of respondents-plaintiffs and Smt. Parwatu to the effect that they were co-owners, though, they had specific shares but were held entitled to be in "joint possession". The appellants-applicants had sought relief against Smt. Parwatu before the 1st Appellate court as there was a decree in her favour, passed by the Trial Court where Smt. Parwatu had been impleaded by the appellants-applicants as proforma respondent. In such a fact-situation, she had a right to contest the appeal. Once a decree had been passed in her favour, a right had vested in her favour. On her death on 19.11.2000, the said vested right devolved upon her heirs. Thus, appeal against Smt. Parwatu stood abated. In the instant case, the 1st Appellate Court rejected the application for condonation of delay as well as the substitution of LRs of Smt. Parwatu, respondent No. 4 therein.

20. The only question remains as to whether the appeal is abated in toto or only in respect of the share of Smt. Parwatu. The High Court has rightly reached the conclusion that there was a possibility for the Appellate Court to reverse the Judgment of the Trial Court and in such an eventuality, there could have been two contradictory decrees, one in favour of Smt. Parwatu and the other, in favour of the present appellants. The view taken by the High Court is in consonance with the law laid down by this Court consistently. The facts of the case do not warrant any further examination of the matter." (pp.479, 482-483)

35. However, at this stage, this Court intends to differ with the findings returned by the first appellate Court, wherein, while dismissing the applications moved by the appellant-defendant No.5 for bringing on record the LRs of respondent No.1, proforma respondents No.7 and 8 and for deletion of the name of respondent No.6, on the ground of limitation, learned Court below also took into consideration the fact that at the time of death of respondent No.6, he was succeeded by the LRs on the basis of his Will. Learned Court below concluded that the perusal of Ex.R-2, copy of mutation, shows that the same was attested on 23.12.1998, hence it cannot be said that since respondent No.6 has not left behind any legal heirs, his name is liable to be deleted, rather, his LRs are liable to be brought on record on the basis of Will. Similarly, in the case of respondent No.1, namlely; Ram Dass, Court below returned the finding that names of his son and other legal representatives were mentioned in para-7 of the application, whereas, mutation in regard to his death was attested only in favour of two persons namely; Hari Ram and Brij Lal on the basis of a Will and as such persons named in para-7 of the application cannot be said to be his legal heirs.

36. Similarly, first appellate Court below while deciding the application for bringing on record the LRs of respondent No.4 observed that contention put forth in para-4 of the application that he is survived by his widow and sons/daughters cannot be accepted since mutation is accepted in the names of three sons only.

37. The aforesaid findings of the first appellate Court cannot be accepted at all because after death of any of the party to lis, his/their legal representatives being natural heirs have an absolute right to be substituted/impleaded as a party in the pending case and their rights being LRs cannot be allowed to be taken away by any person who may have got some rights by way of will, if any, executed by the deceased person.

38. This Court has no hesitation to conclude that aforesaid findings/observations of the first appellate Court are totally against the spirit of principles of sufficient representation of estate. Once application is moved for bringing on record the LRs of deceased party, Court is bound to implead him/her as a party plaintiff/respondent subject to fulfillment of other conditions prescribed for bringing on record the LRs of deceased party.

39. But in the present case, where this Court, in view of the detailed discussion made hereinabove, has come to the conclusion that the applications filed by the appellant-defendant No.5 have been rightly dismissed by the Court below being hopelessly time barred, this Court is restraining itself from making any observations and findings on the merits/demerits of other reasons cited/given by Court below for dismissing applications. Apart from the above, in view of the specific provisions laid down by Order 43 Rule 1(k) CPC as well as law discussed hereinabove, this Court is of the view that present appeal is not maintainable in the present form and the same deserves to be quashed and set aside.

40. In the totality of the facts and circumstances of the case, the impugned order passed by the first appellate Court is upheld and the present appeal is dismissed.

41. Interim order, if any, is 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 H.P. ... Appellant

Versus

Jasbir Singh and others ... Respondents

Cr. Appeal No. 583 of 2008
Reserved on: 16.05.2016
Date of decision: 14.06.2016

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused- she told her father that accused was demanding dowry- subsequently deceased died- accused was tried and acquitted by the trial Court- held, in appeal that there are contradictions in the testimonies of the parents of the deceased- allegations which are general in nature have been levelled- no specific instance was given- PW-3 admitted that accused had never tortured the deceased nor any complaint was made by the deceased- the harassment on account of dowry was not proved- it was not proved that accused had abetted the deceased to commit suicide – trial Court had taken a reasonable view- appeal dismissed. (Para-18 to 28)

For the appellant: Mr. V. S. Chauhan, Addl. Advocate General, Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

For the respondents: Mr. Dheeraj K. Vashista, Advocate.

The following judgment of the court was delivered:

Ajay Mohan Goel, J.:

The present appeal has been filed against judgment dated 31.03.2008 passed by the Court of learned Additional Sessions Judge, Ghumarwin, Camp at Bilaspur, in Sessions Trial No. 19/7 of 2006/05, vide which, learned trial Court has acquitted the accused for offences under Section 498-A, 306 read with Section 34 I.P.C.

2. The case of the prosecution was that on 25.03.2004 a telephonic message was received from Kanshi Ram, Ex-Pradhan of village Slapper at Police Station Bilaspur at around 11.10., A.M. to the effect that one Pushpa wife of Jasbir Singh resident of village Nagraon had died in suspicious circumstances. On the said basis, Investigating Officer PW-15 Duglu Ram accompanied by other police officials reached village Nagraon, where complainant Bhagat Ram PW-1 recorded his statement Ext.PW1/A under Section154 Cr.P.C., in which, he stated that he was a resident of village Phufali Julana and had three sons and one daughter. His daughter Pushpa was married on 17.02.2003 with accused Jasbir Singh and she gave birth to a girl child aged four months. One month back Pushpa had visited his house and alleged that her father and mother-in-law as well as husband were making certain demands on account of dowry on the ground that ornaments and television had not been given at the time of 'Milni'. On this, he told his daughter that he had given everything that was to be given but in future other things shall also be given by him. On 25.03.2004 one Sunder Singh gave a telephonic message at 8.00 A.M. that his daughter was suffering from giddiness and was being taken in a van to Jhandutta and while he was getting ready to come to Jhandutta another telephone came there that his daughter has expired. In these circumstances, he alongwith his wife and Pradhan Kanshi Ram went to village Nagraon. The complainant expressed that his daughter has died due to harassment meted out to her by the accused on account of dowry and previously also she was being tortured by them.

3. On the basis of said report, FIR Ext. PW14/A was registered. Postmortem of the dead body of Pushpa was conducted and as per the postmortem report, the opinion of the Doctor was that cause of the death was asphyxia probably due to chocking.

4. An application Ext. PW12/B was moved by the police seeking opinion as to how the death of Pushpa Devi had occurred whether due to asphyxia or due to some disease or giddiness and whether the injuries on her face and nose were the outcome offal , on which application PW-12 Dr. N.K. Sankhyan has given his reply Ext.PW12/C with regard to the said queries. The final opinion after going through the report of Chemical Examiner was given by Dr. N.K. Sankhyan PW-12 highlighting that deceased died due to asphyxia after consuming phenyl poison but possibility of asphyxia due to chocking after bleeding from nose due to accidental fall could not be ruled out during epileptic fit.

5. The police carried out investigation and challan was presented in the Court. As a prima facie case was found against the accused, accordingly they were charged for the offences punishable under Sections 498-A and 306 read with Section 34 I.P.C., to which they pleaded not guilty and claimed trial.

6. The learned trial Court on the basis of the material placed on record by the prosecution came to the conclusion that the prosecution could not prove its case beyond reasonable doubt that the accused in furtherance of their common intention had subjected the deceased to cruelty and further the prosecution failed to prove beyond reasonable doubt that the accused in furtherance of their common intention had abetted the commission of suicide by Pushpa Devi.

7. Mr. V.S. Chauhan, learned Additional Advocate General has argued that the judgment of acquittal returned by the learned trial Court is based on flimsy grounds and is a result of mis-appreciation of evidence produced on record by the prosecution. According to him, the prosecution had proved beyond reasonable doubt that the accused were guilty of offences alleged against them and that they had subjected the deceased to cruelty and also abetted the commission of suicide by her. However, all the cogent evidence led in this regard by the prosecution had been overlooked and rejected by the learned trial Court without giving any plausible explanation as to why the case of the prosecution was disbelieved. Learned Additional Advocate General has argued that the learned trial Court has wrongly discarded the testimony of the prosecution witnesses because in the absence of any proof of enmity there was no occasion before the learned trial Court to discard the version of the official witnesses, who on all counts had proved the case of the prosecution. He has further argued that PW-1, PW-2, PW-4 and PW-6 had supported the case of the prosecution on all the material facts and their statements were trustworthy and inspired confidence to have had convicted the accused for the charges leveled against them. He has further argued that the learned trial Court has not appreciated the provisions of Section 113-A of Evidence Act in view of the fact that the deceased had died just within 13 months of her marriage. On these counts, he submitted that the judgment passed by the learned trial Court was perverse and was liable to be set aside and the accused were liable to be convicted for the offences for which they were charged.

8. On the other hand, Mr. Dheeraj K. Vashista, learned counsel for the respondents has argued that the appeal filed by the State was meritless and the same deserves out rightly dismissal. He has submitted that a perusal of the judgment passed by the learned trial Court in fact demonstrates that the said Court had taken into consideration the entire evidence of the prosecution and after a minute deliberation of all the aspects of the matter, it had come to the conclusion that the prosecution had failed to prove its case against the accused. Therefore, according to him, the judgment passed by the learned trial Court was the only view possible on the basis of material produced on record by the prosecution and the said judgment calls for no interference.

9. We have heard learned counsel for the parties and have also gone through the records of the case as well as the judgment passed by the learned trial Court.

10. In order to substantiate its case, the prosecution in all examined 15 witnesses.

11. PW-1 Bhagat Ram, father of the deceased, deposed that Pushpa was married to accused Jasbir Singh. His daughter came 2-3 times to him during the period of one year and whenever she came she complained that her in-laws were torturing her for dowry etc. She disclosed that they were demanding a television and gold ornaments and that if such articles are not supplied, she will be eliminated. As per him, last time she disclosed all such facts to them was one month before her death when she had come to them. He also stated that he had given some dowry. He further stated that he was a poor man and was not having much income. He was informed about the death of his daughter by the accused. In his cross-examination, he has admitted that the accused did not demand dowry at the time of marriage. He further stated that

his daughter disclosed about the demand of dowry by the accused for the first time after about 15 days of her marriage and thereafter, after two months and third time when she came to the house to deliver her child. He also admitted that he was disclosing about such demands of dowry for the first time in the Court and self stated that he did not disclose it earlier as he thought that the disclosure of the same will spoil the relations. He was confronted with his statement Ext. PW1/A under Section 154 Cr.P.C. wherein it was not recorded that the accused tortured his daughter for demand of dowry and that in case dowry was not given to her then she will be eliminated.

12. PW-2 Rakesh Kumar, brother of deceased Pushpa, stated that Pushpa was married on 16.02.2002 and she used to tell them about her being tortured by her in-laws whenever she used to come. He also deposed that all the accused used to demand dowry and did not allow her to ring her parental family. Her sister used to tell that her mother-in-law demanded golden rings and a neckless of gold, whereas the other accused demanded colour television and washing machine. He stated that his sister disclosed all such things in his presence when he had come to his house as he resides at the house of his aunt at Swarghat. He further stated that he was told about these facts by his sister when she first visited their house. He also stated that his sister had told his aunt Rattani Devi that the accused used to tell her that the child begotten by her was not of her husband and he was told this fact by his aunt Rattani. He also deposed that on 22.03.2003 he received a telephonic message from the house of his aunt that his sister had fell down. There was no telephone in his house, he contacted a boy named Vijay Kumar through mobile who told that his sister has expired. He has further stated that when he was going back to his house then his parents met him at Jhandutta with the dead body of his sister. He was confronted with his statement made before the police, wherein this fact was not recorded that the accused used to torture his sister for dowry and they did not allow her to ring her parental family. He was further confronted with the statement in which it was not recorded that the accused used to demand colour television, washing machine etc. He was also confronted with his statement in which it was not recorded that his sister had mentioned this fact before him when she had come to their house.

13. PW-3 Madan Singh has deposed that Sunder Singh, his brother-in-law on 25.04.2004 asked for a vehicle saying that Pushpa had fallen down. Thereafter, he sent his vehicle. He has also stated that he has a cloth shop at Jhandutta Bus Stand and when he reached there he noticed that Pushpa was being taken in a vehicle and froth was coming out from her mouth. She was taken to Jhandutta hospital and after some time the Doctor declared her dead. In his cross-examination, he has admitted that Sunder Singh told him that the lady is suffering from epileptic fits. He has also admitted the suggestion that Pushpa was taken to hospital one month back in connection with epileptic fit. He also admitted that the accused never tortured Pushpa for dowry and that during her life time Pushpa never told them about she being tortured on account of dowry. Wife of the said witness Madan Singh was the Bua of the deceased.

14. PW-4 Persino Devi is the mother of the deceased and has supported the case of the prosecution. She also deposed that after marriage the deceased gave birth to a daughter. She has stated that the accused used to torture her daughter and some times they used to demand chains, ornaments and television. She stated that he daughter had disclosed all such facts weepingly before them and the accused did not demand anything from them directly. She also stated that the accused did not allow their daughter to talk with them and that her daughter was not allowed to live with them during 'Kala Mahina'. In her cross-examination, she has mentioned that her daughter has disclosed about the demands of dowry when she had come to them for the third or fourth time. She admitted the suggestion that on the day of death of her daughter they received a telephonic call from Sunder Singh that their daughter had been fallen down in the courtyard and had been taken to hospital at Jhandutta. She was confronted with her statement recorded with the police, wherein this fact was not mentioned that her daughter weepingly told them that the accused demanded gold ornaments and chains and used to torture

her. She was also confronted with her statement wherein it was not recorded that her daughter was not allowed to live with them during 'Kala Mahina'.

15. PW-5 Ram Lal has stated that he visited the house of in-laws of Pushpa on the day of the death of Pushpa and the police was already present there.

16. PW-6 Blabir Singh is the brother of the deceased. He has deposed that he had gone to her sister 7-8 days before her death at her in-laws house. At that time, his sister told him that his brother-in-law asked her to consume poison, otherwise he shall kill her. He further stated that he tried to pacify his sister that many things are uttered during anger. He also stated that his sister had also shown him a letter which she disclosed to have been written to her husband by a girl named Sapna Chandel. He also stated that his sister told him that her husband used to say to her that what had her father given to him and that they had plenty of money and they can do anything. He further stated that her sister told him that her father-in-law and mother-in-law also used to say the same thing. This witness was also confronted with his statement given under Section 161 Cr.P.C., wherein the averments made by him in the Court were not so recorded, which clearly suggested that the said witness has now improved his statement, compared to what was earlier recorded by him in the police.

17. The next relevant witness is PW-12 Dr. N.K. Sankhyan. The said witness conducted the postmortem examination of deceased Pushpa Devi. He has also given list of ante-mortem injuries and he has stated that in his opinion, the deceased died due to asphyxia probably due to chocking. He has further deposed that the cause of asphyxia most probably was due to Phenol poisoning, but possibility of asphyxia due to chocking after bleeding from nose due to accidental fall during epileptic fit or vasovagal fit or syncope or shock cannot be ruled out. He has also mentioned that the injuries mentioned in the postmortem report may be sustained due to accidental fall.

18. Before proceeding further, it is pertinent to take note of the fact that in the present case, the accused were charged for the offences under Sections 498-A and 306 read with Section 34 I.P.C.

19. It has been held by the Hon'ble Supreme Court in Sangara Bonia Sreen Vs. State of Andhra Pradesh, 1997 (5) Supreme Court Cases, 348 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.

20. 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.

21. Section 498A reads as under:-

> "**498A. Husband or relative of husband of a woman subjecting her to cruelty**. – 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.
>
> Explanation. – For the purpose of this section, "cruelty" means –
>
> (a) 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; or

(b) 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. Now in the said background, we have to test the veracity of the prosecution witnesses and conclude as to whether it can be satisfactorily that the prosecution has been able to establish beyond any reasonable doubt that the accused are guilty of offences under Sections 498-A and 306 I.P.C.

23. The allegations of the family of the deceased are that Pushpa was harassed by the accused on demand of dowry and this harassment caused to her by the accused intimated her to resort to take extreme step like that of suicide. In other words, the accused abetted the deceased to commit suicide. Both the parents of the deceased have said that the deceased personally told them that the accused were harassing her on account of dowry. PW-1 in his statement in the Court has stated that during the period of one year, his daughter visited them on 2-3 times and whenever she came, she complained that the in-laws were torturing her for dowry etc. However, mother of the deceased PW-4 has stated that her disclosed about the demands of ornaments etc. when she came to them for the third or fourth time. This is a major contradictions in the statements of these two witnesses, who happen to be close relatives of the deceased. Further, a perusal of the statements of these two witnesses as well as the statement of brother will demonstrate that they have not pointed any specific incidence as intimated to them by the deceased with regard to harassment inflicted upon her by the accused on the demand of dowry. The allegations which have been levelled are general in nature and no specific incident of any physical torture etc. has been proved on record by the prosecution. Further, when the statements given by these witnesses are seen viz-a-viz their statements recorded by the police there are major contradictions and improvements in the same. These witnesses have not reconciled as to why there are contradictions in their statements which were earlier recorded by the police and in those which they gave in the Court of law. Brother of the deceased has tried to introduce totally a different story of infidelity. While on one hand it is stated that aunty told him that the husband of the deceased used to say that child born by the deceased was not his child, whereas on the other hand, the story introduced by another brother is that the deceased told him that the accused/husband was having some affair with some other lady.

24. PW-3 who otherwise is related to the deceased has deposed in the Court that on the asking of his brother-in-law Sunder Singh (Jeeja), he sent the vehicle on the fateful day in which the deceased was taken to Jhandutta hospital. In his cross-examination, he has admitted that Sunder Singh had told him that the lady was suffering from epileptic fits and that one month back also Pushpa was taken to hospital in connection with epileptic fit. He has also stated in his cross-examination that accused never tortured Pushpa for dowry nor Pushpa told them about she was being tortured on account of dowry. There is no reason to disbelieve the version of this witness and he cannot be termed as an interested witness.

25. The statement of the Doctor who conducted the postmortem of the deceased also does not help the case of the prosecution because the said Doctor has also stated that the cause of death was asphyxia most probably due to Phenol poisoning, but possibility of asphyxia due to chocking after bleeding from nose due to accidental fall during epileptic fit or syncope or shock cannot be ruled out. He has also stated that the injuries mentioned in the postmortem may be sustained due to accidental fall.

26. In our considered view, said evidentiary material placed on record by the prosecution at the most raises a suspicion that the accused may have harassed the deceased on account of dowry but the prosecution has not been able to prove beyond reasonable doubt that in fact the deceased was actually harassed by the accused who used to demand dowry from her and they further abetted the deceased to commit suicide.

27. 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.

28. Even the learned trial Court has in detail gone into these aspects of the matter and after detailed appreciation of the material placed on record by the prosecution, it has come to the conclusion that the prosecution has not been able to proved beyond reasonable doubt that Pushpa Devi was in deed subjected to cruelty and harassment by the accused. We see no reason to differ with the findings of the learned trial Court.

29. In view of the discussion made above, therefore, the judgment passed by the learned trial Court is upheld and the present appeal is accordingly dismissed. Bail bonds, if any, furnished by the accused are discharged.

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

Tulsi Ram son of late Shri Kharku Ram ....Petitioner/Co-defendant No.1

Versus

Narain Dass son of Shri Banshi Ram ....Non-petitioner/Plaintiff

CMPMO No. 204 of 2015
Order Reserved on 13th May 2016
Date of Order 14th June 2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendants from interfering in the suit land- it was pleaded that plaintiff is owner in possession of the suit land- defendants are interfering with the same without any right to do so- application for ad-interim injunction was filed- application for amendment was also filed pleading that the signatures were obtained on the written statement earlier without explaining the same- defendants are in settled possession of the suit land- held that suit land was recorded in joint possession earlier but now it is recorded in separate possession- suit land is shown to be owned by N and M to the extent of 1/3rd and 2/3rd shares respectively- both the parties have claimed the settled possession over the suit land- therefore, it is expedient that parties be directed to maintain status quo- petition disposed of. (Para-8 and 9)

Cases referred:

M/s Paradip Port Trust vs. Managing Director IDCO Bhubaneswar, AIR 2001 Orissa 146
M/s Transport Corporation of India Ltd. vs. M/s Ganesh Polytex Ltd., AIR 2015 SC 826
Satyavrata Biswas vs. Kalyan Kumar Kisth, AIR 1994 SC 1837
Maharwall Khewaji Trust Faridkot vs. Baldev Dass, AIR 2005 SC 104

For the Petitioner: Mr. Vijay Bhatia, Advocate.
For the Non-petitioner: Mr.T.S. Chauhan Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Article 227 of Constitution of India against order dated 20.11.2014 passed in CMA No. 19/14 of 2014 whereby learned Additional District Judge Ghumarwin District Bilaspur affirmed order passed by learned Trial Court on dated 2.3.2013 in CMA No. 430/6 of 2012 title Narain Dass vs. Tulsi Ram and another.

Brief facts of the case

2. Narain Dass plaintiff filed suit for permanent injunction restraining the defendants namely Tulsi Ram and Punnu Ram from interfering in any manner whatsoever over suit land comprised in Khata No. 90 min Khatauni No. 99 Khasra No. 328 measuring 00-13-00 bighas situated in village Bala, Pargana Gehrwin Tehsil Jhandutta District Bilaspur H.P. In alternative decree for possession by way of demolition of construction if raised during pendency of civil suit also sought. It is pleaded that defendants are strangers to suit land and they have no right title or interest in suit land in any manner. It is pleaded that on 23.9.2014 defendants entered into the suit land and dig out some portion of suit land. It is pleaded that plaintiff objected but defendants threatened that they would raise construction forcibly over suit land and would occupy portion of suit land. It is pleaded that defendants also threatened that they would dispossess the plaintiff from suit land and also threatened the plaintiff with dire consequences. During pendency of suit plaintiff also filed application under Order 39 Rules 1 and 2 CPC for grant of ad-interim injunction till disposal of civil suit.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit is not maintainable in present form and plaintiff has no cause of action to file present suit. It is pleaded that suit has not been valued properly for purpose of Court fee and jurisdiction and further pleaded that suit is bad for non-joinder and misjoinder of necessary parties. It is pleaded that without impleading other co-owners effective decree could not be passed. It is pleaded that plaintiff is estopped to file the present suit by his act, conduct, commissions and omissions. It is pleaded that plaintiff intends to grab the land of defendants which is adjacent to suit land under the garb of present civil suit. It is denied that defendants threatened to raise construction over suit land. It is pleaded that defendants are not raising any construction in any manner over suit land. It is pleaded that no cause of action accrued to plaintiff on 23.9.2012 and prayer for dismissal of suit sought.

4. Plaintiff filed replication and re-asserted the allegations mentioned in plaint. Defendants also filed response to application under Order 39 Rules 1 and 2 CPC and prayer for dismissal of application under Order 39 Rules 1 and 2 CPC sought.

5. During pendency of suit defendants also filed application under Order 6 Rule 17 CPC for amendment of written statement pleaded therein that defendants filed earlier written statement but learned Advocate engaged by them obtained their signatures in earlier written statement without explaining the contents of earlier written statement to defendants. It is pleaded in proposed amended written statement that defendants are in settled possession of suit land and their houses and cowsheds are also situated in suit land. It is pleaded that suit land was earlier recorded jointly since the time of ancestors of parties and now same has been recorded in separate possession of plaintiff illegally.

6. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and Court also perused the entire record carefully.

7. Following points arise for determination in this petition:-

1. Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?
2. Relief.

Findings upon point No.1 with reasons

8. Submission of learned Advocate appearing on behalf of the petitioner that as per demarcation report dated 11.6.2013 conducted by retired Naib Tehsildar Khasra No. 328 is in settled possession of Tulsi Ram son of Kharku by way of cattle shed and sehan and impugned orders of learned Trial Court and learned first Appellate Court warrant modification is accepted for the reasons hereinafter mentioned. Court has carefully perused jamabandi for the year 2007-08 placed on record relating to suit land. As per jamabandi for the year 2007-2008 Khasra No. 328 is owned by Narain Dass, Raghu Ram, Nikku Ram sons of Bassi son of Fhihju to the extent of 1/3rd share and owned by Mahanta, Longu sons of Fhihju son of Makodu to the extent of 2/3rd shares. Nature of suit land has been shown as Banjar Kadeem (Barren land) to the extent of 00-08-00 and shown as cattle shed to the extent of 00-05-00. It is prima facie proved on record that defendants have also filed application under Order 6 Rule 17 CPC for proposed amendment in written statement. In proposed amendment defendants have pleaded in positive manner their settled possession over suit land. Defendants have also placed on record demarcation report dated 11.6.2013 conducted by retired Naib Tehsildar Sunder Lal and there is recital in demarcation report placed on record that cattle shed and Sehan of Tulsi son of Kharkoo are situated in suit land i.e. Khasra No. 328.

9. It is proved on record that application filed under Order 6 Rule 17 CPC is listed for consideration before learned Trial Court and learned Trial Court has not disposed of application filed under Order 6 Rule 17 CPC in civil suit. In present case both parties have claimed settled possession over suit land comprised in Khasra No. 328. It is well settled law that when both parties claim possession in suit land then order of status quo relating to possession should be passed during pendency of civil suit. In view of the fact that both parties are claiming settled possession over suit land it is expedient in the ends of justice to direct both the parties to maintain status quo as of today qua possession and nature over suit land till disposal of civil suit. Issue of possession is complicated issue of fact and complicated issue of fact will be decided by learned Trial Court after giving due opportunities to both parties to lead evidence in support of their case during trial of case. It is well settled law that at the time of disposal of application under Order 39 Rules 1 and 2 CPC Court has to observe triplicate test of prima facie case, balance of convenience and irreparable loss. Complicated questions of right, title, interest of parties are yet to be decided in civil suit after giving opportunities to both parties to lead evidence in support of their case.

10. Submission of learned Advocate appearing on behalf of non-petitioner that defendants have filed application under Order 6 Rule 17 CPC wherein defendants have pleaded possession over suit land comprised in Khasra No. 328 but application filed under Order 6 Rule 17 CPC is still pending before learned Trial Court and at this stage same cannot be looked into is rejected being devoid of any force for the reasons hereinafter mentioned. Co-defendant No.1 placed on record copy of demarcation dated 11.6.2013 conducted by retired Naib Tehsilder Sunder Lal and in demarcation report Naib Tehsildar has specifically mentioned that cattle shed and Sehan of Tulsi Ram son of Kharkoo Ram are situated in portion of Khasra No. 328. Demarcation report will be proved in due course of time after giving due opportunities to both parties to lead evidence in support of their case. ***See AIR 2001 Orissa 146 title M/s Paradip Port Trust vs. Managing Director IDCO Bhubaneswar. See AIR 2015 SC 826 title M/s Transport Corporation of India Ltd. vs. M/s Ganesh Polytex Ltd. See AIR 1994 SC 1837 title Satyavrata Biswas vs. Kalyan Kumar Kisth. See AIR 2005 SC 104 title Maharwall Khewaji Trust Faridkot vs. Baldev Dass.*** In view of above stated facts point No. 1 is answered in affirmative.

Point No.2 (Relief)

11. In view of findings on point No. 1 above petition filed under Article 227 of Constitution of India is allowed and orders of learned Trial Court and learned first Appellate Court are modified to the extent only that both parties will maintain status quo as of today qua nature and possession of suit land comprised in Khata No. 90 min, Khatauni No.99, Khasra Nos.

328 measuring 00-13-00 situated in village Bala Tehsil Jhandutta District Bilaspur H.P. till the disposal of civil suit. Parties are left to bear their own costs. Files of learned Trial Court and learned first Appellate Court be sent back forthwith along with certified copy of order. Parties are directed to appear before learned Trial Court on ***11.7.2016***. Observations will not effect merits of civil suit in any manner and will be strictly confined for disposal of present petition filed under Article 227 of Constitution of India. CMPMO No. 204 of 2015 stands disposed of. All pending miscellaneous 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 SANDEEP SHARMA, J.

Gulshan Kumar ....Petitioner

Versus

State of H.P. & Others. ....Respondents

CWP No.4308 of 2015
Judgment Reserved on: 25.05.2016
Date of decision: 15.06.2016

Constitution of India, 1950- Article 226- Petitioner applied for the allotment of fair price shop- resolution was passed by respondent No. 4, a co-operative Society that it was not in a position to run fair price shop – petitioner was appointed but respondent No. 4 withdrew the resolution- an appeal was preferred by the respondent No. 4 against the allotment of fair price shop to the petitioner- appeal was allowed as it was found that case of the petitioner was recommended to the Government without relaxation of norms – writ petition was filed against the order of the Appellate Authority- held, that respondent No. 4 had itself passed the resolution that it was unable to run a fair price shop- allotment was made thereafter in favour of the petitioner, he continued to run the fair price shop without any complaint- relaxation was granted in other cases but was not granted to the petitioner which is arbitrary and colourable exercise of power- writ petition allowed and respondents directed to allow the petitioner to run the fair price shop.

(Para-16 to 25)

Cases referred:

City Industrial Development Corporation through its Managing Director vs. Platinum Entertainment and Others, (2015)1 SCC 558

B.A. Linga Reddy and Others vs. Karnataka State Transport Authority and Others, (2015)4 SCC 515

For the Petitioner: Ms.Rita Goswami, Advocate.

For Respondents No.1 to 3.: Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan & Mr. M.A. Khan, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General.

For Respondent No.4: Mr.R.K. Bawa, Senior Advocate with Mr.Arun Kumar, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

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

"(1) It is most respectfully prayed that a writ of certiorari may kindly be issued to quash the impugned Annexure P-6 dated 22.09.2015 passed by the respondent-3.

1(a) That the operative part of the order dated 29.06.2015 Annexure P-5, P-7 & P-8 may kindly be set-aside in view of the submissions made in para 3 1(a) & 6of the petition.

(2) That a writ of mandamus may kindly be directed to the respondents to grant the relaxation in the same manner as has already been granted to all the three cases along with the case of the petitioner. The petitioner may kindly be allowed to run the fair price on the same analogy as in all the three cases fair price shops are allowed to run by the respondents.

(3) That the entire record pertaining to the case may kindly be summoned for the kind perusal fo this Hon'ble Court.

(4) Any other or further writ, order or direction may be made in the given premises."

2. This Court has taken on record the amended petition and aforesaid reliefs reproduced hereinabove have been claimed by the petitioner in the amended petition.

3. On 18th May, 2016, while hearing the case, respondents were directed to make available record pertaining to the decision taken by the competent authority with regard to the allotment of fare price shop *(in short `FPS').* Accordingly, the record was made available by the respondents on 25th May, 2016, when the matter was heard at length.

4. Briefly stated the facts necessary for adjudication of the present case are that pursuant to public notice dated 20.4.2011 issued by the respondent-Department for opening FPS, petitioner, being unemployed youth having no source of livelihood, applied for the FPS at Chammo, District Solan, well within stipulated time. It also emerges from the record that respondent No.4 i.e. Nali Dharti Agricultural Services Cooperative Society *(in short `Cooperative Society')* vide resolution dated 2.3.2012 resolved that since Secretary of the Society has been appointed in the Jogindera Central Cooperative Bank, therefore, the Cooperative Society is not in a position to run FPS at Chammo. Accordingly, on the basis of aforesaid resolution, the District Level Public Distribution Committee *(in short `Distribution Committee')* in its meeting held on 12.3.2012 approved the FPS in favour of the petitioner. However, further perusal of the record depicts that respondent No.4, subsequently passed another resolution dated 1.4.2012, wherein decision was taken to withdraw the resolution dated 2.3.2012. But fact remains that letter conveying the decision taken vide resolution dated 1.4.2012 was communicated to the respondent-authority after the approval made in favour of the present petitioner.

5. Perusal of Annexure P-1 annexed with the petition suggests that since the population as well as numbers of ration cards, registered in the area where FPS was to be opened, were less than the limit prescribed by the Department of Food and Civil Supplies, respondent No.3 vide communication dated 22.5.2012 sent the case of the petitioner as well as other three similarly situate persons for relaxation to respondent No.2. However, pending decision of relaxation, respondent No.3 vide communication dated 1.1.12014 (Annexure P-3) granted licence in favour of the petitioner authorizing him to run the FPS in the area. Since then the petitioner had been running the same without there being any complaint. It appears that the aforesaid allotment of FPS in favour of the petitioner was challenged by way of CWP No.5468 of 2012-G by respondent No.4. However, this Court vide order dated 3.12.2013 (Annexure P-2), while dismissing the writ petition, passed the following orders:-

> ***"Other than what is discussed hereinabove, nothing is pointed out, highlighting the manner in which directions issued by this Court stand violated by the respondents. It cannot be said that action of the respondents is arbitrary, illegal, capricious or unreasonable in any manner or in violation of directions issued by this Court. As such, present petition, devoid of any merit, is dismissed."***

6. Feeling aggrieved and dis-satisfied with the judgment dated 3.12.2013 passed by the Hon'ble Single Judge, respondent No.4 assailed the same by way of LPA bearing No.3 of 2014 before the Hon'ble Division Bench of this Court. The Hon'ble Division Bench of this Court, after hearing the parties as well as perusing the record, observed as under:-

> ***"2. While going through the impugned judgment and the averments contained in the writ petition, it transpires that disputed questions of fact are involved and the writ petitioners have alternate remedy available.***
>
> ***3. At this stage, learned counsel for the appellant stated at the Bar that he may be permitted to withdraw the Letters Patent Appeal alongwith the Writ Petition, with liberty to seek appropriate remedy available under the law. His statement is taken on record. Other side has no objection.***
>
> ***4. In view of the above, the Letters Patent Appeal and the Writ Petiton are dismissed as withdrawn, with liberty as prayed for.***
>
> ***5. In the given circumstances, the impugned judgment loses its efficacy."***

7. Further scrutiny of the record suggests that pursuant to passing of order dated 1.7.2014 (Annexure P-4) by the Division Bench of this Court, respondent No.4 filed an appeal under Clause-17 of the H.P. Specified Articles (Regulation of Distribution) Order, 2003, before the Appellate Authority-cum-Director, Food, Civil Supplies & Consumer Affairs, Himachal Pradesh, Shimla *(in short `Appellate Authority')* against the order dated 22.5.2012 issued by the respondent No.1, whereby the Distribution Committee recommended the FPS at Chammo in favour of the present petitioner. Perusal of the order dated 29.6.2015 passed by aforesaid Appellate Authority suggests that present petitioner was duly represented by his counsel at the time of passing of the aforesaid order (Annexure P-5).

8. It also emerges from the averments contained in the writ petition that petitioner was served with the notice dated 7.5.2015 intimating therein the filing of appeal, as stated above, before the Appellate authority, who vide order dated 29.6.2015 though concluded that any resolution passed by respondent No.4 received post facto could not possibly be considered by the Committee hence the recommendation of Committee as well the letter dated 22.5.2012 requesting relaxation of norms cannot be faulted with. However, learned Appellate Authority while upholding the decision of the Distribution Committee, whereby the case of the petitioner was recommended to the Government for relaxation of norms, held that the decision of the respondent No.3, allowing the petitioner to run FPS without there being approved relaxation from the Government, is illegal from its very inception and the same cannot be allowed to stand. Accordingly, direction was issued to close the FPS till the time relaxation is received from the Government. Operative part of the order passed by the Appellate Authority dated 29.6.2015 is reproduced herein below:-

> ***"..... I am convinced that the Public Distribution Committee did not fail in its due diligence and has gone as per the merits of the cases before it in its meeting dated 12.03.2012. Since the application of the appellant society stood withdrawn before this committee went to commiserate, the same could not be considered, and the committee recommended the best candidate for the FPS. Any resolution received post facto could not possibly be considered by the committee, as rightly pointed out by the Hon'ble Single Bench in the CWP No.5468/2012. Hence, the recommendation of the committee as well as the letter dated 22.05.12 requesting relaxation of norms from the Govt. being based on merit, is beyond reproach and hence allowed to stand."***
>
> ***However, this Court is pained and surprised to note that the Distt.Controller, FCS&CA, Solan has issued authorization to the respondent No.2 without any approved relaxation from the Govt. Thus,***

FPS was allowed to be created without any legal approval, and as such was illegal from its very inception. The FPS carried on its operation while this grave lacuna was not in the notice of the govt. or this Court. Now that such a lacuna has been brought before this Court, the same cannot be allowed to stand. The illegal FPs must be closed unless allowed to be run after relaxation from the Govt. Thus, the FPS shall cease to operate from the date of issue of this order. The authorization issued by the Distt. Controller, FCS&CA stands quashed immediately."

9. Pursuant to passing of aforesaid order dated 29.6.2015 by the Appellate Authority, respondent No.3 vide communication dated 22.9.2015 informed the petitioner that authorization granted vide communication dated 1.1.2014 to run FPS is cancelled in terms of decision taken by the competent Authority in order dated 25.7.2015 (Annexure P-6). However, perusal of this Annexure, nowhere discloses the reasons for cancelling the authorization/allotment made in favour of petitioner vide communication dated 1.1.2014.

10. Feeling aggrieved and dis-satisfied with the order dated 29.06.2015, passed by the Appellate Authority, order dated 25.7.2015 issued by Principal Secretary (Food and Civil Supply) to the Government of Himachal Pradesh, order dated 10.8.2015 issued by Director, Civil Supplies, State of Himachal Pradesh and 22.9.2015 issued by respondent No.3, whereby allotment/authorization made in favour of petitioner to run FPS at Chammoh was cancelled, filed present petition praying the relief(s) reproduced hereinabove.

11. Ms.Reeta Goswami, learned counsel representing the petitioner, vehemently argued that the impugned orders passed by the respondents deserves to be quashed and set aside being unsustainable in the eyes of law because perusal of the record clearly suggests that while passing aforesaid orders, principles of natural justice were not complied with at all by the respondents. She forcefully contended that orders passed by the Appellate Authority dated 29.6.2015 inasmuch as holding that the decision of respondent No.2, allowing the petitioner to run the FPS pending relaxation is illegal from its very inception, is totally contradictory to the findings returned by the Appellate Authority, wherein it has been specifically concluded by the Appellate Authority that "Distribution Committee did not fail in its due diligence and had gone as per the merits of the case before it in its meeting dated 12.3.2012," where admittedly decision was taken to allot FPS in question to the petitioner and case was sent to the Government for relaxation in the norms for the reasons stated in Annexure-P1. She contended that while passing order dated 29.6.2015, learned Appellate Authority failed to appreciate that there was no fault at all of the present petitioner who was authorized/granted permission to run FPS on the basis of application submitted by the petitioner in terms of advertisement issued by the respondent department. It is also contended that learned Appellate Authority failed to acknowledge that since petitioner was granted permission on 1.1.2014, to run the FPS and since then he has been continuously running the same to the utmost satisfaction of the public of the area and there was no complaint whatsoever against working of the petitioner. She forcefully contended that learned Appellate Authority while passing impugned order failed to take note of the fact that this Court vide judgment dated 3.12.2013, passed in CWP No. 5468 of 2012-G, had already upheld the decision of the respondent as far as grant of authorization in favour of petitioner to run the FPS is concerned. She invited the attention of this Court to para-7 of the judgment passed by the learned Single Judge, whereby while dismissing the petition of respondent No.4, it is held that "it cannot be said that "action of the respondent is arbitrary, illegal and unreasonable in any manner whatsoever or in violation of the direction issued by this Court." She also contended that even LPA filed by respondent No. 4 against the judgment dated 3.12.2013, was dismissed by this Court vide judgment dated 1.7.2014 and no opinion whatsoever qua the merits of the judgment passed by the Hon'ble Single Judge was expressed by the Division Bench while dismissing the appeal. She forcefully contended that since action of the respondent inasmuch as granting permission to the petitioner to run FPS was upheld by Hon'ble Single Judge as well as Division of this Court,

learned Appellate Authority, had no authority, whatsoever to direct the respondents to close the FPS till the time, relaxation is granted by the respondents-State.

12. On the other hand, Shri Shrawan Dogra, learned Advocate General, stated that there is no illegality and infirmity in the impugned order passed by the learned Appellate Authority dated 29.6.2015 and as such same deserves to be upheld and no interference of this Court whatsoever, is called for in the facts and circumstances of the case. Mr. Dogra, learned Advocate General, forcefully contended that the respondent-Department has rightly cancelled the permission of authorization/permission granted in favour of the petitioner to run the FPS after passing of the judgment by the Appellate Authority. He contended that admittedly petitioner was granted authorization/permission to run FPS pending relaxation from Government vide communication dated 1.1.2014 but since Government has declined to grant any relaxation in favour of the petitioner, he has no locus or indefeasible right to insist for grant of authorization/permission to run FPS at Chammo.

13. Mr. Dogra forcefully contended that since initial decision to authorize/ permit the present petitioner to run FPS was taken in the public interest especially when respondent No. 4 had refused to run the FPS now at this stage petitioner cannot claim it as a matter of right. Moreover, now Government has decided not to grant any relaxation in favour of the petitioner in public interest and, as such, present petition deserves to be dismissed being not maintainable.

14. Mr. R.K. Bawa, learned Senior Counsel representing respondent No.4 also supported the order dated 29.6.2015 passed by the Appellate Authority and contended that petitioner has no right, whatsoever to continue to run FPS which was admittedly granted to him in violation of the rules as has been specifically pointed by the learned Appellate Authority while passing order.

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

16. Careful perusal of the pleadings on the record as well as original record produced by the respondent at the time of hearing suggests that petitioner pursuant to the advertisement issued by the respondent applied for the authorization/permission to run the FPS at Chammo. Since respondent No.4 itself vide resolution dated 2.3.2012 had informed the concerned authority that in view of the appointment of the Secretary of Co-operative Society in Jogindra Cooperative Bank, it is not in a position to run FPS at Chammo, respondent N.3 in its meeting held on 12.3.2012 resolved to authorize/permit petitioner to run FPS. Though resolution dated 2.3.2012 passed by respondent No.4 was sought to be withdrawn by respondent No.4-Society by passing resolution dated 1.4.2012 but certainly same could not be taken into consideration by the competent authority at the time of authorizing/permitting petitioner to run FPS which was admittedly granted in favour of the petitioner on 1.1.2014 i.e. prior to passing of second resolution by respondent No.4. A perusal of annexure P-1 clearly suggest that decision to authorize/permit petitioner to run fair shop was taken in public interest but since petitioner as well as three other similar situate person were not fulfilling the norms laid down for this purpose, decision was taken to the send the case of the petitioner along with other three persons to the State of Himachal Pradesh for relaxation, if any, under the rules. But fact remains that during this period i.e. 1.1.2014 till passing of impugned order dated 22.9.2015 petitioner continued to run the FPS without there being any complaint to the satisfaction of the public of that area. This Court had occasion to sift entire record made available by the respondent and nothing adverse could be found suggesting anything adverse against the petitioner. Since decision to allot FPS in favour of the petitioner was taken by the respondent No. 3 keeping in view public interest and petitioner was admittedly allowed to run the FPS w.e.f. 1.1.2014, no fault whatsoever can be found with the petitioner, who admittedly under bona-fide belief that relaxation would be granted by the respondent-State to continue to run FPS. Similarly, resolution filed by respondent No.4 after allotment of FPS in favour of the petitioner could not be taken into consideration by respondent No.3. We have no hesitation to conclude that respondent No.4 has no right to assail

the decision of the respondent in as much as grant of FPS in favour of the petitioner is concerned, when it stand duly proved on record that respondent No.4 itself opted not to run the FPS when the allotment was being made by respondent-Department. Rather, it appears that decision to allot FPS in favour of petitioner was only taken when respondent No.4 refused to run the shop and as such action of respondent No.4 challenging the allotment in favour of the petitioner cannot be held tenable at all and justified in the given facts and circumstances. Moreover, this Court while passing judgment dated 3.12.2013 in CWP No.5468 OF 2012 filed by respondent No. 4 had already upheld the action of the respondent in as much as granting permission in favour of the petitioner to retain the FPS. Even, in the appeal filed by respondent No.4, Appellate Authority, upheld the decision of the respondent. Respondent No.4 never challenged aforesaid findings returned by learned Appellate Authority and as such Society (R-4) cannot be allowed to rake up that issue at this stage.

17. Now, adverting to the order dated 29.6.2015 whereby learned Appellate Authority though upheld the decision of the Committee, whereby vide letter dated 22.5.2012 case of the petitioner as well as the similarly situate person was sent for the relaxation, but direction was issued to close FPS till the time relaxation is granted by the government. This Court is of the view that the aforesaid findings returned by the appellate Authority in the appeal preferred by the respondent No. 4 is admittedly contradictory, wherein decision taken by Distribution Committee in its meeting dated 12.2.2012 has been upheld. It is pertinent to notice here that District Level Public Distribution Committee in its meeting held on 12.2.2012 as has been referred in the order passed by learned Appellate Authority had decided to allot the FPS in favour of the petitioner being more meritorious. Hence, in view of the aforesaid findings returned by the learned Appellate Authority, subsequent direction issued to close the FPS till the time case of relaxation is decided by the government cannot be allowed to sustain being totally contrary to its findings, whereby decision of the respondent authority to send the case of the petitioner for relaxation has been upheld.

18. Perusal of the pleadings on record as well as the arguments having been made by learned counsel representing the petitioner also suggest that State of Himachal Pradesh vide impugned order dated 25.7.2015 decided not to grant any relaxation in favour of the petitioner as a result of which, respondent No.3 vide communication dated 22.9.2015 intimated the present petitioner that allotment made in his favour to run FPS vide communication dated 1.1.2014 stands cancelled. Since specific allegations/averments have been made in the writ petition that respondent-state has granted relaxation in another three cases, which were forwarded to the State of Himachal Praedsh vide communication dated 22.5.2012(Annexure P-1) along with the case of the petitioner, this Court with a view to ascertain the genuineness/ correctness of the aforesaid averments as well as arguments advanced by the counsel representing the petitioner had summoned the complete record from the respondent –State. This Court before passing instant judgment carefully perused the entire record made available to this Court with regard to FPS as well as cases sent to the respondent-State for relaxation in norms in terms of Annexure P-1. Perusal of the record clearly suggest that the case of the petitioner was not dealt with at all prior to passing of order dated 25.7.2015 on the pretext of pendency of the cases with regard to allotment of FPS in question firstly before the Hon'ble Single Judge and thereafter before the Hon'ble Division Bench of this Court. This Court while sifting entire record, was enable to lay its hand to any document suggestive of the fact that the case with regard to relaxation in favour of petitioner was ever dealt with by the authorities rather all notings while dealing with the case of the petitioner suggests that the matter with regard to grant of relaxation was deferred on the pretext of the pendency of the litigation. However, perusal of one document suggest that after passing of the order dated 29.6.2015 by the Appellate Authority noting was made that since case stands decided, case with regard to relaxation in favour of the petitioner as prayed vide annexure P-1 may be decided. But we are pained to see that even after passing of the order dated 29.6.2015 there is no document which could demonstrate that any deliberation/discussion took place amongst the concerned officer with regard to relaxation, if any in the case of the petitioner for the grant of FPS in question. Court could only lay its hands to communication dated 25.7.2015

purportedly written at the behest of Principle Secretary Food and Civil Supply addressed to the Director, Food and Civil Supply, intimating therein that the case of the petitioner namely Gulshan Kumar stands rejected after examination. But admittedly, there is no document available on record from where it could be inferred that the matter was actually examined by the competent authority as far as relaxation is concerned.

19. Interestingly, as has been alleged by the petitioner in the petition other three cases which were recommended along with the case of the petitioner have been allowed by the respondent-State. Close perusal of the record disclosed that the competent authority vide separate communication allowed relaxation in favour of the other three persons named in Annexure P-1. But even in those cases, we are unable to find any discussion or deliberation held between the authorities, which compelled/persuaded the authority to grant relaxation in their favour for running FPS. After careful perusal of the record made available to this Court, this Court has no hesitation to conclude that principles of natural justice have not been complied with at all. Rather, competent authority while deciding the case of the petitioner as well as other similar situated persons have acted on its own whims and fences and has for the reasons best known to them singled out the petitioner while granting the relaxation in other three cases as mentioned in Annexure P-1. Perusal of communication dated 25.7.2015 available on record itself suggest that actually no deliberation /discussion took place while rejecting the case of the petitioner for grant of relaxation. Similarly, a perusal of letter conveying therein the approval in favour of the other similar situated person suggest that they were granted relaxation by the authority without their being any examination of the matter at hand.

20. In the aforesaid view of the matter, this Court is of the view that action of the respondent in not granting relaxation to the petitioner as has been done in the case of the other similarly situate person is discriminatory, arbitrary and certainly it can be termed as colourable exercise of powers and, as such, same cannot be allowed to sustain. After perusing order dated 25.7.2015, it cannot be said that authorities while rejecting the case of the petitioner actually passed any speaking order from where it could be inferred that all pros and corns were taken into consideration while considering the case of the petitioner for relaxation is concerned. Rather, documents available on the record suggest that matter as sent by Annexure P-1 was not at all discussed by the authorities and case of the petitioner was rejected without there having any discussion, whereas cases of other three similarly situate persons were allowed that too without examining the merits and demerits of their cases. Hence, action of respondent in not granting relaxation in favour of the petitioner deserves to be rejected out rightly, especially, when same appears to be not taken in consonance with the provisions of the natural justice.

21. In the present case, respondent being instrumentalities of the State was expected to act fairly without there being any bias and mala-fide, especially when it deals with public establishments or issuance of any grant of licence etc. In this regard the Hon'ble Apex Court in ***City Industrial Development Corporation through its Managing Director vs. Platinum Entertainment and Others, (2015)1 SCC 558,*** held:-

> *"37. It is well settled that whenever the Government dealt with the public establishment in entering into a contract or issuance of licence, the Government could not act arbitrarily on its sweet will but must act in accordance with law and the action of the Government should not give the smack of arbitrariness. In the case of Ramana Dayaram Shetty vs. International Airport Authority of India & Ors., (1979) 3 SCC 489, this Court observed as under: (SCC pp.504 & 506 paras 11 &12)-*
>
> > *"11. Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many*

kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure?"

"12. ……..It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

39. *In Kasturi Lal Lakshmi Reddy & Ors. vs. State of Jammu and Kashmir & Anr., (1980) 4 SCC 1, this Court observed as under: (SCC pp.13-14, paras 14-15).*

"14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which

may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or [pic]lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides.

15. The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in Ramana D. Shetty v. International Airport Authority of India that the Government is not free, like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the court as a rule of administrative law and it was also validated by the court as an emanation flowing directly from the doctrine of equality embodied in Article 14. The court referred to the activist magnitude of Article 14 as evolved in E.P. Royappa v. State of Tamil Nadu and Maneka Gandhi case, (1978) 1 SCC 248 and observed that it must follow

> *`as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with*

anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets that test of reasonableness and non- discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non- discriminatory ground'. (Ramana Dayaram Shetty case, SCC p.512.para 21)

This decision has reaffirmed the principle of reasonableness and non-arbitrariness in governmental action which lies at the core of our entire constitutional scheme and structure." (pp.576-580)

22. In *B.A. Linga Reddy and Others vs. Karnataka State Transport Authority and Others, (2015)4 SCC 515,* the Court held:

"16. The pari materia provisions contained in sections 99 and 102 of the Act of 1988 are reproduced hereunder:

"99. Preparation and publication of proposal regarding road transport service of a State transport undertaking.-[(1)] Where any State Government is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State transport undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State Government may formulate a proposal regarding a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and other relevant particulars respecting thereto and shall publish such proposal in the Official Gazette of the State formulating such proposal and in not less than one newspaper in the regional language circulating in the area or route proposed to be covered by such scheme and also in such other manner as the State Government formulating such proposal deem fit.

(2) Notwithstanding anything contained in sub-section (1), when a proposal is published under that sub-section, then from the date of publication of such proposal, no permit shall be granted to any person, except a temporary permit during the pendency of the proposal and such temporary permit shall be valid only for a period of one year from the date of its issue or till the date of final publication of the scheme under section 100, whichever is earlier.

102. Cancellation or modification of scheme.-

(1) The State Government may, at any time, if it considers necessary, in the public interest so to do, modify any approved scheme after giving-

(i) the State transport undertaking; and

(ii) any other person who, in the opinion of the State Government, is likely to be affected by the proposed modification, an opportunity of being heard in respect of the proposed modification.

(2) The State Government shall publish any modification proposed under sub-section (1) in the Official Gazette and in one of the newspapers in the regional languages circulating in the area in which it is proposed to be covered by such modification, together with the date, not being less than thirty days from such publication in the Official Gazette, and the time and place at which any representation received in this behalf will be heard by the State Government."

17. It is apparent from the provisions that the scheme is framed for providing efficient, adequate, economical and properly co-ordinated road transport service in public interest. Section 102 of the Act of 1988 does not lay down the requirement of

recording any express finding on any particular aspect; whereas the duty is to hear and consider the objections. It requires the State Government to act in public interest to cancel or modify a scheme after giving the State Transport Undertaking or any other affected person by the proposed modification an opportunity of hearing. The State is supposed to be acting in public interest while exercising the power under the provision. However, that does not dispense with the requirement to record reasons while dealing with objections. Modification of the scheme is a quasi-judicial function while modifying or cancelling a scheme. The State Government is duty-bound to consider the objections and to give reasons either to accept or reject them. The rule of reason is anti-thesis to arbitrariness in action and is a necessary concomitant of the principles of natural justice.

18. In Siemens Engineering & Manufacturing Co. of India Ltd. v. Union of India,[1976 (2) SCC 981, it was held : (SCC pp. 986-87, para 6)

> *"6. .....It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons. That has been laid down by a long line of decisions of this Court ending with N.M. Desai v. Testeels Ltd.. But, unfortunately, the Assistant Collector did not choose to give any reasons in support of the order made by him confirming the demand for differential duty. This was in plain disregard of the requirement of law. The Collector in revision did give some sort of reason but it was hardly satisfactory. He did not deal in his order with the arguments advanced by the appellants in their representation dated December 8, 1961 which were repeated in the subsequent representation dated June 4, 1965. It is not suggested that the Collector should have made an elaborate order discussing the arguments of the appellants in the manner of a Court of law. But the order of the Collector could have been a little more explicit and articulate so as to lend assurance that the case of the appellants had been properly considered by him. If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, [pic]with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi- judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."*

19. This Court in Rani Lakshmi Bai Kshetriya Gramin Bank's case while relying upon S.N. Mukherjee v. Union of India,1990 (4) SCC 594 case, SCCp.243, para 8):

> *"8. The purpose of disclosure of reasons, as held by a Constitution Bench of this Court in S.N. Mukherjee v. Union of India (1990 (4) SCC 594), is that people must have confidence in the judicial or quasi-judicial authorities. Unless reasons are disclosed, how can a person know whether the authority has applied its mind or not? Also, giving of reasons minimises the chances of arbitrariness. Hence, it is an essential requirement of the rule of law that some reasons, at least in brief, must be disclosed in a judicial or quasi-judicial order, even if it is an order of affirmation."*

20. A Constitution Bench of this Court has laid down in Krishna Swami v. Union of India & Ors. [1992 (4) SCC 605] that if a statutory or public authority/functionary

does not record the reasons, its decision would be rendered arbitrary, unfair, unjust and violating Articles 14 and 21 of the Constitution. This Court has laid down: (SCC p.637, para 47)

> *"47 .....Undoubtedly, in a parliamentary democracy governed by rule of law, any action, decision or order of any statutory/public authority/functionary must be founded upon reasons stated in the order or staring from the record. Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21. But exceptions are envisaged keeping institutional pragmatism into play, conscious as we are of each other's limitations.*

21. In Workmen of Meenakshi Mills Ltd. & Ors. v. Meenakshi Mills Ltd. & Anr. [1992 (3) SCC 336] while considering the principles of natural justice, it has been observed that it is the duty to give reasons and to pass a speaking order; that excludes arbitrariness in action as the same is necessary to exclude arbitrariness. This Court has observed thus : (SCC pp.374 & 378, paras 42 & 49)

> *"42. We have already dealt with the nature of the power that is exercised by the appropriate Government or the authority while refusing or granting permission under sub-section (2) and have found that the said power is not purely administrative in character but partakes of exercise of a function which is judicial in nature. The exercise of the said power envisages passing of a speaking order on an objective consideration of relevant facts after affording an opportunity to the concerned parties. Principles or guidelines are insisted on with a view to control the exercise of discretion conferred by the statute. There is need for such principles or guidelines when the discretionary power is purely administrative in character to be exercised on the subjective opinion of the authority. The same is, however, not true when the power is required to be exercised on objective considerations by a speaking order after affording the parties an opportunity to put forward their respective points of view.*
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> * * *
>
> *49. We are also unable to agree with the submission that the requirement of passing a speaking order containing reasons as laid down in sub-section (2) of Section 25-N does not provide sufficient safeguard against arbitrary action. In S.N. Mukherjee v. Union of India, 1990 (4) SCC 594, it has been held that irrespective of the fact whether the decision is subject to appeal, revision or judicial review, the recording of reasons by an administrative authority by itself serves a salutary purpose, viz., "it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making." (SCC p.612, para 36)" (pp.528-530)*

23. Consequently, in view of the aforesaid discussion as well as law referred hereinabove, this Court has no hesitation to conclude that the action of the respondent-State in cancelling the permission granted to the petitioner to run the FPS is unjust, discriminatory and in complete violation of principle of natural justice and as such same deserves to be quashed and set aside.

24. Admittedly, in the present case petitioner had applied for the FPS pursuant to the advertisement issued by the respondent and he was selected on merits by the respondent-State. Decision to send the case for relaxation was also taken by the respondent in public interest and it also stands proved after perusing of the record that the respondents acted arbitrarily and

despite there being any reasons, rejected the case of the petitioner for relaxation, whereas, three similarly situate persons were granted relaxation.

25. Hence, present petition is allowed and Annexures P-5, P-7 and P-8 are quashed and set-aside. Further direction contained in Annexure P-6, order dated 22.9.2015 to close the FPS being run by petitioner, is also quashed and set-aside. Respondents are directed to allow the present petitioner to run the FPS which was granted to him vide order dated 1.1.2014 after relaxing the norms, as has been done in the cases of all other similar situate persons mentioned in Annexure P-1, within fifteen days from the receipt of copy of the judgment.

26. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Jai Lal and another .....Petitioners/Accused.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Revision No.: 137 of 2008
Reserved on : 22.04.2016
Date of Decision: 15.06.2016

Punjab Excise Act, 1914- Section 61(1)(a)- Accused were found in possession of 360 bottles of IMFL- they were tried and convicted by the trial Court- an appeal was preferred which was dismissed- held, in revision that testimonies of prosecution witnesses clearly proved that accused were found in the truck which was carrying 360 bottles of IMFL- accused failed to prove any valid permit to transport the liquor- minor discrepancies are not fatal to the prosecution version- report of chemical Examiner proved that samples taken from the confiscated bottles were of IMFL- Courts had taken a reasonable view on the basis of material on record- revisional jurisdiction cannot be exercised to substitute the view of revisional Court- however, keeping in view that samples of only 30 bottles were sent for analysis, sentence modified. (Para-17 to 27)

Cases referred:

Janta Dal Vs. H.S. Chowdhury & others, 1992 (4) SCC 305

Ram Briksh Singh and others Vs. Ambika Yadav and another, (2004) 7 Supreme Court Cases 665

Jaswant Rai Vs. State of H.P., 2000 Cr. L.J. 1970 (1971) (HP)

For the petitioners/accused: Mr. N.K. Thakur, Sr. Advocate, with Ms. Jamuna Thakur, Advocate.

For the respondent : Mr. V.S. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

The present petition has been filed by the petitioners/accused against judgment, dated 19.07.2008, passed by learned Additional Sessions Judge, Una in Criminal Appeal No. 9 of 2007 and judgment passed by learned Judicial Magistrate, 1st Class, Court No. 1, Amb in case No. 24-1 of 2001/6-III/2002, convicting and sentencing the petitioners under the provisions of Section 61(1)(a) of the Punjab Excise Act to undergo one year rigorous imprisonment alongwith fine of Rs.2000/- and further convicting petitioner No. 2 to undergo simple imprisonment for one month under Section 181 of the Motor Vehicles Act.

2. Case of the prosecution was that ASI Madan Lal (PW-4) was on petrol duty alongwith LHC Gulzari Lal, Constable Narender Kumar and driver Constable Harish Kumar on the intervening night of 6/7.12.2000 near a place called *'Guga Chak Sarai'*. The police received a secret information to the effect that accused Jai Lal, S/o Sh. Amin Chand, R/o Village Rapoh Muchlian, was transporting a huge consignment of liquor in a vehicle bearing registration No. HP-19-4277 from Akrot side. Accordingly, a *ruka* was prepared and sent through LHC Gulzari Lal (PW-1) and a *nakka* was laid on the road to apprehend the said vehicle. A vehicle was noticed coming from Akrot side. This vehicle was stopped about 50-60 yards from the police vehicle and two persons came out from the said vehicle and tried to flee from the spot. However, one of them was nabbed by the police officials at the spot, though the other managed to escape. When the vehicle was checked, 360 bottles of IMFL bearing mark *'Old Tebrun'* in 30 cartons were recovered. The accused could not produce any permit authorizing him to transport the same. Accordingly, police lifted one bottle each of IMFL from each of the 30 cartons. Thereafter one nip each was taken out of these 30 bottles and the said bottles were sealed with seal impression 'K'. The vehicle was also taken into possession. Later on, the documents of the vehicle were produced by accused Sukhdev on 08.12.2000. The samples were sent to Central Testing Laboratory (hereinafter referred to as "CTL"). Report of the same disclosed that the seized bottles contained IMFL, which reports are Ex. PA to Ex. PF.

3. The learned trial Court, after hearing both the parties and going through the record, found a prima facie case against accused under Section 61(1)(a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh and under Section 181 of the Motor Vehicles Act. Charges were accordingly framed against the accused and put to them, to which the accused pleaded not guilty and claimed to be tried.

4. In order to prove its case, prosecution examined 9 witnesses. No witness was produced by the accused.

5. On the basis of material produced on record by the prosecution, learned trial Court concluded that the prosecution was successful in proving that the accused at the relevant date, time and place were found in exclusive and conscious possession of 360 bottles of IMFL without any permit in a vehicle bearing No. HP-19-4277 in violation of relevant provisions of Punjab Excise Act as applicable to the State of Himachal Pradesh. Accordingly, it convicted the accused under Section 61(1)(a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh. Accused Sukhdev was also convicted under Section 181 of the Motor Vehicles Act. The said conviction was on the ground that accused Sukhdev had not produced any driving licence in the Court during the course of trial.

6. Feeling aggrieved by the said judgment, the accused preferred an appeal which was dismissed by the Court of learned Additional Sessions Judge vide judgment dated 10.07.2008. Learned Appellate Court came to the conclusion that the learned trial Court had rightly held that the prosecution witnesses were cogent, credible and worth reliance which did not require any further corroboration and that the offences alleged against the accused adequately stood proved, established and brought home by the prosecution Thus, learned appellate Court held that no fault could be found with the conviction so recorded by the learned trial Court and it up-held the conviction of the accused under the provisions of the Punjab Excise Act as well as Motor Vehicles Act.

7. Feeling aggrieved by the said judgment, the present petition was preferred by the accused.

8. Mr. N.K. Thakur, learned Senior Counsel has strenuously argued that the judgments passed by both the Courts below were not sustainable in the eyes of law. According to Mr. Thakur, the conclusions which had been arrived at by both the Courts below were not borne out from the material produced on record by the prosecution. According to him, there were major contradictions in the statements of prosecution witnesses coupled with the fact that no independent witness was associated by the prosecution which made the version of the

prosecution highly doubtful. All these important aspects of the matter had been ignored by both the Courts below while convicting the accused for the offences alleged against them. According to Mr. Thakur, the prosecution had miserably failed to bring home the guilt of the accused beyond any reasonable doubt as far as the alleged recovery of liquor from them is concerned. As per him, the case put forth by the prosecution made it clear that the police was having prior information as disclosed in the challan, but despite this, no steps were taken to join or associate any independent or local witness of the area and the said non-association of independent witness created serious doubt about the veracity of the story of the prosecution especially as no satisfactory explanation has been offered by the police as to why this was not done. According to Mr. Thakur, the alleged recovery from the jeep of accused Sukhdev Singh created serious doubt about the story of the prosecution as the documents of the jeep ought to have been in the jeep itself which was taken into possession by the police on 06.12.2000 and it was not understood as to why these documents were shown to have been recovered from accused Sukhdev Singh subsequently. According to him, the prosecution had failed to bring any material on record to substantiate that accused Sukhdev either transported the liquor or had the knowledge of such liquor being transported. In fact, as per Mr. Thakur, accused Sukhdev Singh had been falsely implicated in the alleged office by the prosecution. He further argued that no proper procedure had been followed by the police in carrying search and seizure of liquor as well as while taking the sample and depositing the same in *malkhana*. He argued that there were major and material contradictions in the statements of PW-4 ASI Madan Lal and Investigating Officer Sh. Narinder Kumar (PW-8) with regard to taking of samples in the nips and their procurement. Further, according to him, both the learned Courts below have not appreciated that when sample was taken only from 30 bottles of liquor then, it could not have held by the learned Courts below that 360 bottles of IMFL were being transported in violation of the provisions of Punjab Excise Act as applicable to the State of Himachal Pradesh, as the offence, if any, was committed only qua 30 bottles of liquor. According to Mr. Thakur, the non-observance of the procedure in depositing the case property in *malkhana* also created serious doubt in the story of the prosecution and the link evidence was also missing to connect the petitioners/accused with the commission of the offence. Mr. Thakur also argued that this was in fact a case of unfair investigation which was apparent from the fact that in the site plan Ex. PW5/A, no *aabadi,* rain shelter or shops etc. were shown, whereas all these things existed at the spot. Thus, on these basis, he submitted that the conclusions arrived at by both the Courts below were perverse and the conviction of the accused was highly unjustified in law and accordingly, he prayed that the judgment of conviction passed against the accused be set aside and the accused be ordered to be acquitted because the prosecution had failed to prove its case beyond reasonable doubt against the accused.

9. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General has argued that there was neither any infirmity nor any perversity with the judgments passed by the learned Courts below. According to him, the accused were rightly convicted by the learned trial Court and this conviction was rightly upheld by the learned Appellate Court keeping in view the fact that the prosecution had been able to bring home the guilt of the accused. Mr. Chauhan has argued that neither there was any major discrepancy in the testimony of the prosecution witnesses nor the version of the prosecution could have been disbelieved only on this account that no local witness was associated when it was amply clear from the case put forth by the prosecution that it was not possible to associate any independent witness in the peculiar facts and circumstances of the case. Mr. Chauhan further contended that the presence of accused Jai Lal at the spot has not been disputed by the defence. In support of the alleged version of Jai Lal, neither his wife nor the alleged driver of the vehicle from which he alighted down was produced as witness by Jai Lal. With regard to independent witnesses, he argued that PW-2 and PW-5 have categorically stated that the steps were taken to associate the Pradhan and why he could not be associated has also been cogently explained by them. He further submitted that area where occurrence took place is not a densely populated area. Thus, he contended that there was no merit in the present revision petition and the same deserved to be dismissed.

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

11. PW-1 Gulzari Lal has stated that he was alongwith the police party and at night around 12:30 a.m., a secret information was received to the effect that accused Jai Lal was transporting huge quantity of liquor in vehicle No. HP-19-4277. On the receipt of said secret information, a *ruka* was prepared and sent to Police Station through said witness. He has stated in his cross-examination that he was coming from Amb to Chak Sarai in a vehicle. He has also stated that he had returned back to Chak Sarai at around 1:30 a.m.

12. PW-2 Constable Harish Kumar has stated that a secret information was received to the effect that liquor was being transported from Akrot side and accordingly, a *ruka* was sent to Police Station through LHC Gulzari Lal (PW-1). He has further stated that thereafter a wooden log was put on the road so as to ensure that the police was in a position to stop the vehicle and in case suspected vehicle was found, action could be taken in accordance with law. This witness has further deposed that LHC Gulzari Lal had come from Chak Sarai to Amb on foot.

13. PW-3 Jasbir Singh has stated that on 08.12.2000 accused Sukhdev had produced documents of vehicle which were taken into possession vide memo Ex. PW3/A. PW-4 SI Madan Lal has stated that a vehicle came at around 2:30 a.m., which was stopped at some distance and two persons got out from the same and tried to run away. One was nabbed who is accused Jai Lal, however, the other managed to escape. 360 bottles in 30 carton boxes were recovered from the vehicle and one nip was taken from each of the bottles of carton as sample for chemical examination, which were thereafter sealed with letter 'K'. Separate seal impressions were also taken.

14. Head Constable Rajesh Kumar has deposed as PW-5 that he prepared the site plan. HHC Subhash Chand (PW-6) has stated that on 22.12.2000, MHC Mehar Singh (PW-7) gave him sample nips sealed by letter 'K' to CTL, which were accordingly deposited by him. PW-7 Head Constable Mehar Chand has stated that he gave 30 nips for depositing the same at CTL. He sent sample nips alongwith sample seal to CTL.

15. PW-8 Constable Narinder has narrated the steps which were taken by the police to stop the suspected vehicle by placing the wooden log on the road. He has also stated that in the course of time when the efforts were being made to make local persons join investigation, lights of a vehicle approaching from Akrot side were noticed and this vehicle was stopped at a distance of about 50-60 yards from the vehicle of the police. From the said vehicle, two persons came out and started running and one of them was nabbed, whereas the other managed to escape.

16. PW-9 is Inspector Kailash Walia, who has also entered into the witness box and supported the case set up by the prosecution.

17. I have carefully perused the statements of PW-1 HHC Gulzari Lal and PW-8 Constable Narinder Kumar on which much stress has been laid by the learned counsel for the petitioners. Conjoint reading of the testimonies of these two witnesses along with other prosecution witnesses clearly establishes the story of the prosecution that accused Jai Lal was nabbed by the police at around 2:30 a.m. on 06.12.2000 at Akrot when he tried to run away after alighting from truck bearing No. HP-19-4277 (Utility) in which 360 bottles of IMFL mark Old Travon kept in 30 carton boxes, which liquor was being transported in violation of the provisions of Pubjab Excise Act as applicable to the State of Himachal Pradesh. The presence of the accused at the spot has not been denied. The story put forth by the accused as to why they were present at the spot has not been corroborated by them. The second accused had managed to escape from the spot but he was the owner of the truck. On the other hand, the prosecution has duly corroborated its version on the basis of testimonies of its witnesses which proves beyond reasonable doubt that the accused were transporting IMFL liquor illegally without any valid permit in the vehicle concerned on the fateful night. The prosecution has plausibly explained as

to why no independent witness could be associated. Further, it is settled law that non-association of independent witness does not *per se* renders the story of the prosecution disbelieveable. If the prosecution is able to substantiate its case on the basis of the testimonies of police witnesses, then the conviction can be based on the basis of testimonies of said police witnesses if the same inspires confidence. In the present case, the testimonies of police witnesses are cogent, reliable and trustworthy. The defence has not been able to impinge the truthfulness of the said witnesses. Minor discrepancies, if any, cannot be said to be so fatal so as to dislodge the entire case of the prosecution. It is also a matter of record that the vehicle in issue is registered in the name of accused Sukhdev Singh. It is not the case of accused Sukhdev Singh that the said vehicle had either been stolen or that it was taken away from his possession without his knowledge and that the same was being plied without his consent.

18. PW-6 HHC Subhash Chand and PW-7 HC Mehar Singh have duly proved the link evidence. PW-4 Madan Lal and PW-5 HC Rajesh Kumar have supported the case of the prosecution and their testimonies have not been impinged in any manner whatsoever by the defence. Accused Sukhdev Singh did not have a driving licence nor he produced any such licence before the police during the course of trial. The report of Chemical Examiner further corroborates the story of the prosecution that the samples which were taken from the confiscated bottles were that of IMFL. Therefore, keeping all these aspects of the matter in view, it cannot be said that the judgment of conviction returned by the learned trial Court and upheld by the learned Appellate Court is either perverse or findings returned were not borne out from the records of the case.

19. Even otherwise, this Court while exercising its revisional jurisdiction is not to act as an Appellate Court.

20. In my considered view, the findings which have been arrived at by the learned Courts below cannot be said to be alien to the material produced on record by the prosecution. Neither there is any mis-reading nor there is any mis-appreciation of evidence on record.

21. There is no infirmity with the judgments passed by the learned Courts below. It cannot be said that any material particular has been overlooked either by the learned trial Court or by the learned Appellate Court. There is no perversity in the findings arrived at by the learned Courts below. 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 absence or error on a point of law, re-appreciate evidence and reverse a finding of law.

22. It has been further held by the Hon'ble Supreme Court in ***Janta Dal*** Vs. ***H.S. Chowdhury & others***, 1992 (4) SCC 305 that 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.

23. The Hon'ble Supreme Court in ***Ram Briksh Singh and others*** Vs. ***Ambika Yadav and another***, (2004) 7 Supreme Court Cases 665, has again held that Revisional Court can interfere with the findings of lower court where Courts below have overlooked material evidence.

24. Though the power of this Court is as wide as the power of the Appellate Court, yet it will not hear the revision as an appeal and reappraise the evidence and will interfere only in exceptional cases to prevent flagrant miscarriage of justice. Revisional jurisdiction cannot be exercised by this Court to substitute its own view with that of the learned lower Court on a question of fact. Unless the finding of the Court below is shown to be perverse or untenable in law or is based on irrelevant evidence or ignoring relevant evidence, it is impermissible to interfere with the order of the learned Court below in revisional jurisdiction. This Court has held in **Jaswant Rai** Vs. **State of H.P**., 2000 Cr. L.J. 1970 (1971) (HP) that though the revisional powers

of the High Court are very wide, but are purely discretionary and should be exercised only in rare cases to prevent miscarriage of justice.

25. 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.

26. As far as the contention of Mr. Thakur that the judgment passed by the learned trial Court is liable to be set aside on the ground that the accused could not have been convicted for illicit transport of 360 bottles of IMFL when samples were only taken from 30 bottles is concerned, in my considered view, though there is force in it but the judgments passed by the learned Courts below do not entail reversal on this count. This is for the reason that even transporting 30 bottles of IMFL without a valid licence is violation of the provisions of Section 61(1)(a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh.

27. Therefore, in my considered view, the interest of justice will be served if the sentence imposed upon the accused is modified keeping in mind that the prosecution has not been able to establish that all 360 bottles were containing IMFL. Thus, as far as the conviction of accused under Section 61(1)(a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh and that of accused Sukhdev Singh under the provisions of Section 181 of the Motor Vehicles Act are concerned, the same are upheld. However, the sentence passed by the learned trial Court is modified and it is ordered that each of the convict shall undergo rigourous imprisonment for three months instead of one year and to pay a fine of Rs.5000/- and in default of payment of fine, each of the convict shall further undergo simple imprisonment for three months for offence under Section 61(1)(a) of Punjab Excise Act as applicable to the State of H.P. Sentence imposed upon accused No. 2 under Section 181 of the Motor Vehicles Act is also upheld and both the sentences are ordered to run concurrently. With the said modification in the sentence, the revision petition is disposed of in above terms.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Lachhi Ram and another .....Appellants.

Vs.

Smt. Dassi Devi and others .....Respondents.

RSA No. 142 of 2005
Reserved on : 25.05.2016
Date of Decision: 15.06.2016

Indian Succession Act, 1925- Section 63- Plaintiffs filed a suit for declaration and possession pleading that suit land was owned and possessed by D, their predecessor- mutations attested on the basis of Will stated to have been executed by D were wrong as no Will was executed by D- suit was partly decreed by the trial Court- an appeal was preferred which was dismissed- held, in second appeal, that it was duly proved by the evidence of the plaintiffs that deceased was 80 years old at the time of his death and that he was not in sound disposing state of mind about 4 to 5 years prior to his death- it was admitted by the defendants that defendant No. 1 was present at the time of execution of the Will and that D used to do everything on the asking of the defendants which shows that D was under the influence of the defendants- evidence led by the defendants was contradictory and the view taken by the Courts that Will was not executed by the deceased in sound and disposing state of mind is correct- Courts had taken a reasonable view which was supported by evidence- appeal dismissed. (Para-13 to 38)

Cases referred:
S.R. Srinivasa and others Vs. S. Padmavathamma, (2010) 5 Supreme Court Cases 274
H. Venkatachala Iyengar Vs. B.N. Thimmajamma, AIR 1959 SC 443
Sridevi and others Vs. Jayaraja Shetty and others (2005) 2 Supreme Court cases 784
Om Parkash and others Vs. Bhup Singh and others, Latest HLJ 2009 (HP) 106

For the appellants: Mr. Rahul Mahajan, Advocate.
For the respondents: Mr. Y. Paul, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. **:**

By way of this Regular Second Appeal, the appellants/defendants have challenged the judgment and decree dated 21.12.2004 passed by the Court of learned District Judge, Mandi in Civil Appeal No. 114 of 2003 and judgment and decree dated 31.10.2003 passed by the Court of learned Sub Judge, 1st Class, Court No. III in Civil Suit No. 81/91/84/2002 (91). The trial Court by way of its judgment dated 31.10.2003 had partly decreed the suit of the plaintiffs to the extent that plaintiffs therein were sole heirs of deceased Dolu and Will dated 22.01.1990 was illegal, void and inoperative, which judgment has been upheld in appeal by the learned first Appellate Court. The appellants herein were the defendants in the Civil Suit and the appellants before the first appellate Court.

2. Brief facts necessary for the adjudication of present appeal are that the respondents/plaintiffs (hereinafter referred to as "plaintiffs") filed a suit for declaration and for possession as a consequential relief on the grounds that the suit property defined in para 2(a) to para 2(k) of the plaint was owned and possessed by Dolu, predecessor-in-interest of the plaintiffs to the extent of share mentioned therein and plaintiffs No. 1 and 2 were the widows of Dolu and plaintiffs No. 3 to 5 were daughters of Dolu. According to the plaintiffs, the suit property was owned by Dolu and after his death, the plaintiffs being his heirs were entitled to inherit the suit property. Dolu died on 15.04.1991 and after his death, defendants took forcible possession of the land described in paras 2(a) to 2(k) of the plaint and on 05.05.1991, when plaintiffs prevented defendants from doing such unlawful acts, then the defendants stated that Dolu during his lifetime has executed alleged Will in their favour and subsequently the defendants against the provisions of law have illegally got attested Mutations No. 7, 44 and 89 in their favour on the basis of alleged Will at the back of the plaintiffs, which mutations were wrong, incorrect, void and illegal. It was further the case of the plaintiffs that defendants were alleging that Dolu had executed a Will dated 22.01.1990 in their favour which Will according to the plaintiffs was false, fictitious and forged document and in the alternative, the submission of the plaintiffs was that in case it is found that Dolu deceased had executed any alleged Will, then the same is void as Dolu was an old man and was not having disposing mind and was thus not competent to execute any alleged Will. Further, in the alternative, it was the case of the plaintiffs that if Dolu was found to be possessing sound mind, even then the alleged Will purported to have been executed by him was a void Will as the same was the result of undue influence and mis-representation as well as fraud.

3. In the written statement, the defendants denied the case of the plaintiffs and submitted that during his life time, Dolu executed a Will of his entire property on 22.01.1990 in favour of the defendants and they were entitled to succeed the property of late Shri Dolu in accordance with that Will. The defendants further denied that after the death of Dolu, defendants took forcible possession of the land. According to them, their parents died in early childhood and they were brought up by late Sh. Dolu and it was the defendants who were rendering services to late Sh. Dolu and the entire family was residing together as late Sh. Dolu was not having any male issue and, therefore, he was treating the defendants as his own sons and it is on account of

this love and affection that he has bequeathed the entire estate and other landed property in favour of the defendants. It was denied by them that the will was false, fictitious and a forged document. It was denied that Dolu was a very old man and was not having disposing mind. It was also denied that the Will was result of undue influence and misrepresentation. According to the defendants, the same was the result of love and affection of late Dolu towards the replying defendants and the same was executed by Dolu out of his free disposing mind in the presence of witnesses and accordingly, on these basis, the defendants denied the claim of the plaintiffs.

4. On the basis of the pleadings of the parties, the learned trial Court framed the following issues:

"Issue No. 1:	*Whether the plaintiffs are the heirs of Dolu deceased? OPP*
Issue No. 2:	*Whether the Dolu deceased has executed a valid Will on 22.01.1990 in favour of thedefendants? OPD*
Issue No. 3:	*Whether the Dolu deceased was not having disposing mind at the time of execution of the Will as alleged. If so, its effect? OPP*
Issue No. 4:	*If Issue No. 2 is found in the affirmative, then whether the Will in question is the result of undue influence and mis-representation and fraud as alleged? OPP*
Issue No. 5:	*Whether the suit in the present form is not maintainable? OPD*
Issue No. 6:	*Whether the plaintiff as got no endorceable cause of action? OPD*
Issue No. 7:	*Relief.*

5. On the basis of evidence produced on record in support of their respective case, the learned trial Court decided the said issues as under:

"Issue No. 1:	*Yes.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes.*
Issue No. 4:	*Yes.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Relief:	*Suit of the plaintiffs is partly decreed as per operative part of the judgment with no order as to cost.*

6. Accordingly, the learned trial Court partly decreed the case of the plaintiffs to the extent that the plaintiffs were sole heirs of deceased Dolu and Will dated 22.01.1990 was illegal, void and inoperative. The suit was decreed in the following terms:

> *"the suit of the plaintiffs succeeds and the same is partly decreed to the extent that plaintiffs are sole heirs of deceased Dolu and Will dated 22.1.1990 is illegal, void and inoperative. IN the peculiar facts and circumstances of the case, the parties are directed to bear the cost of the suit on their own."*

7. Feeling aggrieved by the said judgment passed by the learned trial Court, defendants filed appeal before the Court of learned District Judge, Mandi, which was also dismissed by the learned Appellate Court vide its judgment dated 21.12.2004. Learned Appellate Court held that on the basis of material placed on record, it can safely be said that the recitals of the said Will are full of suspicious circumstances and only because the Will had been registered, this did not mean that the Will has to be accepted as it was unless the propounder of the Will satisfy the Court that the Will was not surrounded by suspicious circumstances. Learned Appellate Court further held that the defendants had not adduced any evidence to prove as to what provision Dole Ram had made for his wife and minor daughters and as to why in the Will no property had been left by Dole Ram in favour of his wife and minor daughters. Learned Appellate

Court further held that it is settled law that where the Will is surrounded by suspicious circumstances, then it is for the beneficiaries of the Will to explain these suspicious circumstances to the satisfaction of the Court. Learned Appellate Court further held that in the present case, the beneficiaries of the Will, i.e. the defendants have taken active part in the execution of the Will and undisputed fact was that the natural heirs of Dole Ram had been excluded from the property completely. According to the learned Appellate Court, both these were strong suspicious circumstances which went against the defendants. It further held that in the facts and circumstance of the present case, Dole Ram was expected to make atleast some provisions for the plaintiffs and there is no explanation given in the recitals of the Will also as to why the natural heirs have been excluded from inheriting his property. Further, according to the learned Appellate Court, these important points could not be satisfactorily explained by the defendants as to why the plaintiffs were excluded from inheriting the property of Dole Ram. Accordingly, learned Appellate Court dismissed the appeal so filed by the defendants and upheld the judgment and decree passed by the learned trial Court. The said two judgments and decrees passed by the learned trial Court and the learned Appellate Court have been assailed by the appellants/defendants by way of present Regular Second Appeal.

8. This Regular Second Appeal was admitted on the following substantial questions of law on 04.04.2005:

> *"1. Whether the learned courts below have misconstrued and misinterpreted Ex. DA regarding its valid execution when it satisfied the legal conditions enumerated regarding its execution and proof under the Evidence Act and Indian Succession Act, which has resulted into wrong and erroneous finding of law. If so its effect?*
>
> *2. Whether the findings of learned courts below regarding Will being suspicious on account of exclusion of heirs and making no provisions for widow, is contrary to law. If so its effect?"*

9. Mr. Rahul Mahajan, learned counsel for the appellants has vehemently argued that the judgments and decrees passed by both the Courts below were perverse and were the result of mis-reading and mis-appreciation of the material on record. According to Mr. Mahajan, in the present case, the plaintiffs had failed to prove by way of bringing cogent material on record that the Will which had been propounded by deceased Dole Ram in favour of the appellants was no Will in the eyes of law. According to Mr. Mahajan, learned trial Court had erred in coming to the conclusion that Dole Ram deceased had not executed a valid Will on 22.01.1990 in favour of the defendants. According to him, the plaintiffs were not able to prove that deceased Dole Ram was either more than 80 years old or that he was not in a disposing state of mind when the Will was propounded in favour of the defendants. Further, according to Mr. Mahajan, the plaintiffs were also not able to substantiate that deceased Dole Ram was residing with them at the time of his death or when the deceased was ailing, it was the plaintiffs who took care of his health. On the contrary, according to Mr. Mahajan, the defendants had successfully established on record that they were treated by the deceased like his sons and it was on this account as he was not having any male descendant that he bequeathed his entire property in favour of the defendants. He further contended that the Will was executed by late Dole Ram and registered strictly in accordance with law and there was no suspicious circumstance which shrouded the Will with suspicion. According to him, the judgments passed by both the Courts below are perverse and are the result of mis-reading and mis-appreciation of evidence on record.

10. Mr. Mahajan argued that Will Ex.-DA was validly executed and it satisfied all legal conditions with regard to its execution. He argued that it was not as if every Will in which natural heirs are excluded, becomes a suspicious Will. As per him, in the present case, in view of the fact that the deceased was looked after by the defendants and natural heirs of deceased neither looked after him nor he had any male descendant, the Will was executed by the deceased in favour of the defendants out of love and affection. Mr. Mahajan submitted that this aspect of the matter has also been wrongly appreciated by both the Courts below. In these circumstances,

he submitted that the judgments and decrees passed by the learned Courts below were liable to be set aside and the suit filed by the plaintiffs was also liable to be dismissed with costs.

11. Mr. Y. Paul, learned counsel appearing for the respondents has argued that there was no merit in the appeal and there was neither any perversity nor any illegality in the judgments and decrees passed by the learned Courts below. According to him, whether the alleged Will executed by late Shri Dole Ram was a valid Will or not stood decided in favour of the plaintiffs by the learned two Courts below and this being a finding of fact returned by the learned trial Court as well as by the learned Appellate Court called for no interference by this Court in Regular Second Appeal. Further, according to Mr. Y. Paul, the judgments and decrees passed by the learned Courts below were otherwise also well reasoned and correct judgments based on the appreciation of material placed on record by both the parties because it stood proved from the records that the Will alleged to have been propounded by late Sh. Dole Ram was surrounded by suspicious circumstances as the natural heirs, i.e. the plaintiffs were left out in the Will without any explanation whatsoever and further the Will had not been executed in accordance with law and the beneficiaries of the Will had played active role in the execution of the same. On these basis, Mr. Y. Paul submitted that the judgments passed by the learned Courts below called for no interference.

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

13. Ex.-DA is the Will which has been allegedly propounded by Dole Ram. This Will has been witnessed by Bakshi Ram, S/o Sh. Dile Ram and Narpat, S/o Sh. Prem Dass. As per this Will, which has been executed on 22.01.1990, the testator of the Will has bequeathed the properties mentioned therein in favour of the defendants and neither any property has been bequeathed by him in favour of his natural heirs nor any cogent reason has been given as to why he has excluded his natural heirs from succeeding his property.

14. In order to substantiate its case that this Will was not a validly executed Will in accordance with law, Smt. Mathra Devi, plaintiff stepped into the witness box as PW-1. In her statement, she has deposed that Dole Ram was her father, who died about three years ago and at the time of his death, his age was about 80 years. She has further stated that her father was unwell for last five years before his death. He was not in sound and disposing mental position. He used to live with her and she used to take care of her father. She has further stated that Dole Ram had not executed any Will in favour of the defendants and the said Will was a forged one. She also stated that after the death of Dole Ram, his last rights were performed by the plaintiffs and not by defendants. She also stated that because of his indisposed state of mind, Dole Ram had burnt his legs in hearth (Chullah) and he had lost his sense of well being and eating habits etc. In her cross-examination, she has stated that Dole Ram was suffering from pains and swelling in his entire body as well as problem of cough and his mental condition was also not good. She also stated that Dole Ram was got treated by her in various hospitals, though she had not retained the medical records of any hospital. She also stated that Dole Ram was treated by her alone and defendants did not associate themselves in the same. She also stated in her cross-examination that Dole Ram died two three days after he had burnt himself in a hearth (Chullah). She has denied the suggestion that the defendants were brought up by Dole Ram. She also denied the suggestion that half of suit property is that of the defendants and half is of her father. She has admitted that defendant Lachhi Ram had gone to *Haridwar* after the death of her father, but she has also stated that she also accompanied him. She has denied the suggestion that till his death Dole Ram resided with the defendants.

15. One Shri Kala Ram has entered the witness box as PW-2 and deposed that before his death, Dole Ram used to remain ill and his mental condition was also not good. He was not in a position to understand as to what was good for him and what was not good for him. He also stated that before his death, Dole Ram has suffered burn injuries from hearth. He also stated that deceased used to reside with the plaintiffs and plaintiffs used to take good care of the deceased.

He also deposed that on account of his mental condition, Dole Ram was not in a position to execute any Will. He also deposed that the last rites of the deceased were attended by his daughters.

16. Similarly, PW-3 Madhav Ram has also deposed that age of Dole Ram was about 80 years and his mental health was not good. According to him, he was looked after by his wife and nephew. He also deposed that last rites of deceased were performed by his wife and daughters.

17. In order to prove the Will, defendant Lachhi Ram entered the witness box as DW-1. He stated that the parents of the defendants died when they were six to seven years old and they were brought up by Dole Ram and after the defendants grew up, they used to look after Dole Ram. He has further deposed that on 22.01.1990, Dole Ram had bequeathed his entire property to them by way of a Will. The Will was written by a Document Writer and the same was witnessed by Bakshi Ram and Narpat. Narpat has since died. According to him, after the Will was written by Document Writer, he made Dole Ram to read the same, who accepted the same to be correct. Very importantly, he thereafter stated that he and the witnesses were present there. His exact deposition is as under:

> *"mai wa gawahan bhi us samay vahi mouka per thai. Uske baad dolu ram ne is vasihat ke upar dastkhet kiye thai thatha narpat gawah ne apna angutha lagaya tha thatha bakshi ram gawah ne apne dasthkhet kiye thai. Iske baad hum sabhi tehsil chale gaye thai. Hamari pahchan deshraj vakil ne tehsildar ke samane kit hi."*

18. He has also stated that he has seen the signatures of Dole Ram on the Will which were appended by Dole Ram in his presence. As per him, when Dole Ram executed the Will, his mental condition was good and his health was also good. He executed the Will out of his free deposition and the defendants had not exerted any pressure on Dole Ram to execute the said Will. In his cross-examination, he has stated that on 22.01.1990, he and Narpat had gone to Mandi in a bus. He has also stated in his cross-examination that Bakshi Ram was co-brother (Sadhu) of Bhumi Ram, who was the brother of DW-1. He has also stated that Dole Ram had mentioned in front of Narpat and Bakshi Ram that he wanted to execute a Will in favour of the defendants and this was stated by him about 1-2 months before the execution of the Will.

19. Bakshi Ram entered into the witness box as DW-2. He stated that on 22.01.1990, Dole Ram had come to him and said that he wanted to execute a Will in favour of Lachu Ram and Bhumi Ram. As per him, those days he used to work in Rajmahal Hotel at Mandi and Dole Ram had come to DW-2 at the said place and thereafter, they had gone to the Court. In his cross-examination, he has denied the suggestion that before 22.01.1990, Dole Ram had ever come to him and mentioned that he wanted to execute a gift deed in favour of the defendants.

20. Besides this, the defendants have not produced any witness in support of the execution of Will. The Document Writer has also not been examined by the defendants.

21. Learned trial Court while adjudicating on Issue No. 2, i.e. as to whether Dolu deceased has executed a valid Will on 22.01.1990 in favour of the defendants, has in detail gone into all the aspects of the matter as to whether the alleged Will executed by Dole Ram was surrounded by suspicious circumstances or not. All these aspects of the matter have also been taken note of by the learned Appellate Court.

22. In my considered view, it cannot be said that either of the Courts have misread or mis-construed Ex.-DA or mis-interpreted the contents thereof or the circumstances in which the said Will was executed or registered.

23. The contention of plaintiffs that deceased Dole Ram was 80 years old when he died and that he was not in sound and disposing state of mind for about 4 to 5 years before his death has gone un-rebutted. Defendants have not been able to produce any cogent material on

record to demonstrate that either Dole Ram was not aged about 80 years when he died or that he was in a fit mental and physical condition for last 4 to 5 years before his death.

24. It is pertinent to mention here that the date of execution of Will is 22.01.1990 and Dole Ram has died on 15.4.1991, i.e. almost after one year of the execution of the alleged Will and the case of the plaintiffs is that Dole Ram was not in a fit state of mind for almost 4 to 5 years before his death.

25. Defendants have admitted that defendant No. 1 was present alongwith Dole Ram at Mandi when Dole Ram allegedly executed Will dated 22.01.1990 in favour of the defendants. In his cross-examination, defendant No. 1 has admitted that Dole Ram used to do everything on the asking of the defendants, which according to the plaintiffs was a pointer to the fact that Dole Ram was under the influence of said defendants. Witness Narpat is also close relative of defendant No. 2. There is no reason assigned in the Will as to why Dole Ram was bequeathing his entire property in favour of the defendants and was excluding his natural heirs from succeeding to any of his properties.

26. Now, if we see all these factors together, then the only conclusion which can be arrived at is that Dole Ram was not in a sound and disposing state of mind at the time when the Will has been purported to be executed by him. Further, the beneficiaries of the Will have played major role in the execution of Will as well as in the registration of the Will. This surrounds the Will with suspicious circumstances, especially keeping in view the fact that natural heirs of the testator of the Will have been excluded and ousted from succeeding the property of testator without any cogent explanation provided in the Will itself.

27. Further, there is inconsistency in the statements of DW-1 and DW-2. While in his deposition, DW-1 has categorically said that one or two months before the execution of Will, Dole Ram was stating in front of persons including DW-2 that he wants to bequeath his property by way of a Will, whereas DW-2 in his cross-examination has categorically stated that before 22.01.1990, Dole Ram never told him that he wants to bequeath his property in favour of the defendants.

28. In my considered view, the factum of Dole Ram having executed a Will in favour of the defendants in front of witnesses and thereafter having it registered before the registering authority does not itself make the Will a legal and valid Will in the eyes of law. Both the Courts below have correctly come to the conclusion that the Will in issue was surrounded with suspicious circumstances, in view of the fact that the natural heirs of Dole Ram were excluded from inheriting the property of Dole Ram and the beneficiaries of the Will had played an active role in the propounding of the Will. Further, it has been rightly held and appreciated by both the Courts below that defendants had failed to dispel this suspicion that the Will which was propounded by Dole Ram was on account of his free will and deposition.

29. It is evident from the pleadings of the parties as well as the material which has been placed on record by way of evidence by the parties that deceased Dole Ram was not in sound and disposing state of mind at the time when the Will in issue was allegedly executed by him bequeathing his entire property in favour of the defendants. The Will is otherwise surrounded with suspicious circumstances because besides the fact that the deceased Dole Ram excluded his natural heirs from succeeding his property without there being any cogent explanation in the Will as to why this was being done, the beneficiaries of the Will had admittedly played a major role in the preparation/execution as well as registration of the said Will.

30. In the present case, it cannot be said that the findings of fact arrived at by both the Courts below with regard to Ex. DA are not supported by evidence. There is no perversity in the said decisions of the learned Courts below on account of mis-appreciation of evidence. In my considered view, in view of the documentary and other evidence, the learned Courts below were correct in coming to the conclusion that Ex.- DA was surrounded with suspicious circumstances.

31. The Hon'ble Supreme Court in **S.R. Srinivasa and others** Vs. **S. Padmavathamma**, (2010) 5 Supreme Court Cases 274 has held that because the Will merely mentions that the natural heirs are well settled in their lives, it cannot be inferred that there was convincing reason as to why they were excluded from inheritance.

32. 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.

33. 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.

34. Learned counsel for the appellants has heavily relied upon the judgment of the Hon'ble Supreme Court in **Sridevi and others** Vs. **Jayaraja Shetty and others** (2005) 2 Supreme Court cases 784. In that case also, the testator was 80 years of age at the time of execution of the Will and in fact he died after 15 days of the execution of the Will. The Will so executed by the testator was held to be a valid Will. I am afraid that this judgment is of no help to the appellants for the reason that it is clear from the judgment of the Hon'ble Supreme Court that except the factum of testator being 80 years of age at the time of execution of Will and his having died after 15 days of the execution of the Will, nothing was brought on record to show that the testator was not in good health or not possessed of his physical or mental faculties. The Hon'ble Supreme Court also held that the submission of the learned counsel for the appellants that the testator had deprived the other heirs of his property was not true. In fact, the Hon'ble Supreme Court held that it is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the Will itself and this had been done by him to balance the equitable distribution of the properties in favour of all his children. Relevant paragraphs of the said judgment read as under:

> *"10. Shri Sanjay Parikh, learned advocate appearing for the appellants strenuously contended that the will propounded by the respondents was not a duly executed will. According to him, the burden to prove due execution of the will was on the propounders of the will which they have failed to discharge. That the will was surrounded by suspicious circumstances. The burden to remove the suspicion on the due execution of the will was also on the propounders which they have failed to discharge. According to him, the testator died within 15 days of the execution of the will and that he did not have the testamentary capacity to execute the will. Respondent No. 13 had taken a prominent part in the execution of the will as he was present in the house at the time of the alleged execution of the will. That natural heirs had been excluded from the properties bequeathed in favour of Dharmaraja Kadamba and Raviraja Kadamba without any valid reasons. That the respondents had failed to disclose the execution of the will in any of the earlier proceedings before the revenue authorities and the forest authorities which were contested between the appellants and Respondent Nos. 8-13 which throws a grave and serious doubt about the due execution of the will. That the will was got registered after a lapse of 4 years and did not see the light of the day till it was produced in the present proceedings after a lapse of more than 6 years. That the burden to dispel the suspicious circumstance enumerated above was on the propounders of the will which they had failed to discharge by leading cogent and acceptable evidence. As against this, Dr. Rajeev Dhavan, learned Senior Counsel*

appearing for the Respondent Nos. 8-13 contended that the due execution of the will had been proved by the testimony of the scribe and the two attesting witnesses coupled with the testimony of the hand-writing expert. That the attesting witnesses have categorically stated that the will had been executed in their presence and the testator signed the same while in sound disposing mind and in possession of full physical and mental faculties. The need to register the will after a lapse of 4 years arose as per the legal advice given to them. That the will had been disclosed to the respondents at the time of final obeisance ceremony of the deceased in the year 1976, and then in the year 1978 in the proceedings before the forest authorities. That the will was disclosed to the entire world at the time of its registration on 11.9.1980. According to him, there were no suspicious circumstances attending the due execution of the will and even if there were any such circumstances, the same had been dispelled by the respondents by leading cogent evidence.

15. Coming to the suspicious circumstances surrounding the will, it may be stated that although the testator was 80 years of age at the time of the execution of the will and he died after 15 days of the execution of the will, the two attesting witnesses and the scribe have categorically stated that the testator was in sound state of health and possessed his full physical and mental faculties. Except that the deceased is 80 years of age and that he died within 15 days of the execution of the will, nothing has been brought on record to show that the testator was not in good health or possessed of his physical or mental faculties. From the cross-examination of the scribe and the two attesting witnesses, the appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the will. Submission of the learned counsel for the appellants that the testator had deprived the other heirs of his property is not true. The family properties had been partitioned in the year 1961. The shares which were given to Dharmaraja Kadamba and Raviraja Kadamba were in possession of tenants and vested in the State Government after coming into force of Karnataka Land Reforms (Amendment) Act, 1973 whereas the properties which had been given to the daughters were in the personal cultivation of the family. The testator while executing the will bequeathed the properties which had fallen to his share in the partition and which he had inherited from his brother which were in his personal cultivation in favour of his two sons Dharmaraja Kadamba and Raviraja Kadamba and gave the right to receive compensation to other heirs of the properties which were under the tenants and had vested in the State Government. It is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the will itself. This had been done by him to balance the equitable distribution of the properties in favour of all his children.

16. Counsel for the appellants argued that Respondent No. 13 had taken prominent part in the execution of the will as he was present in the house at the time of the alleged execution of the will. We do not find any merit in this submission. Apart from establishing his presence in the house, no regarding the execution of the will. Mere presence in the house would not prove that he had taken prominent part in the execution of the will. Moreover, both the attesting witnesses have also stated that the daughters were also present in the house at the time of execution of the will. The attesting witnesses were not questioned regarding the presence of the daughters at the time of the execution of the will in the cross-examination. The presence of the daughters in the house at the time of execution of the will itself dispels any doubt about the so-called role which Respondent No. 13 had played in the execution of the will. They have not even

stepped into the witness box to say as to what sort of role was played by Respondent No. 13 in the execution of the will."

According to the learned counsel for the appellants, the very purpose of propounding the Will is to deprive natural heirs of the property by the testator, otherwise there may not be any reason for the testator to execute the Will. Mr. Mahajan states that in the present case, the testator intended to deprive his natural heirs from the property and, therefore, he took a conscious decision to execute Ex.-DA and bequeath the entire property in favour of the defendants. This submission of the learned counsel for the appellant on the face of it looks attractive, but when one goes slightly deep into the facts of the present case, then it emerges that 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. The Hon'ble Supreme Court in the judgment so relied upon by the learned counsel for the appellants has reiterated that it is the duty of the propounder of the Will to remove all suspicious circumstances 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. Because in the present case, the defendants have not been able to remove the suspicious circumstances surrounding the Will, therefore, the above judgment is also of no assistance to the appellants.

35. Coming again to the facts of the present case, the plaintiffs have proved that the testator besides being 80 years of age was not in sound state of health and was not possessed of physical or mental faculties during four five years before his death. Not only this, it is not a case where the testator has distributed his property unequally between his children. Here is a case where the children have been left out in totality and the entire property has been bequeathed in favour of his brother's children without any cogent explanation as to why he was depriving his natural heirs of his property. Further, admittedly, the propounders of the Will have played a major role in the preparation/execution as well as registration of the Will executed by deceased Dole Ram. Therefore, the judgment of the Hon'ble Supreme Court being relied upon by the learned counsel for the appellant does not further his cause.

36. Learned counsel for the appellants has also relied upon the judgment passed by this Court in **Om Parkash and others** Vs. **Bhup Singh and others**, Latest HLJ 2009 (HP) 106 and on the basis of the said judgment, he has contended that this Court can interfere with the judgments passed by both the Courts below where evidence has not been rightly considered and appreciated by the learned Courts below and if the conclusions arrived at are not supported by the evidence and the same are perverse. There is no dispute with this preposition of law and the scope of Section 100 of the Code of Civil Procedure even in those cases where there are incorrect findings, however the fact of the matter still remains that each and every case has to be adjudicated upon facts which are peculiar to it.

37. In the present case, in my considered view, it cannot be said that there is mis-appreciation of evidence by the learned Courts below or the conclusions which have been arrived at by the learned Courts below are not supported by evidence or the same are perverse. Therefore, the said judgment which has been relied upon by the learned counsel for the appellants is also of no assistance to them.

38. Keeping this aspect of the matter in view and in view of the law which I have discussed above, it cannot be said the learned Courts below have mis-read or mis-appreciated Ex. DA. Further, it also cannot be said that the learned Courts below have erred in coming to the conclusion that the Will in issue was not a legal and valid Will in which the natural legal heirs stood excluded from succeeding the property of the testator of the Will without any cogent explanation. Thus, both the substantial questions of law are answered accordingly.

39. Therefore, in view of my findings recorded above, the appeal being without any merit is dismissed with cost.

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

Shashi Bala ...Appellant.

versus

Dr.Y.S. Parmar University of Horticulture and Forestry ...Respondent.

LPA No.123 of 2010
Decided on: 15.06.2016

Constitution of India, 1950- Article 226- Petitioner was engaged as computer clerk under the project- project came into end in the year 1991- held, that petitioner cannot claim regularization against the post which was not sanctioned or against any other post- Writ Court had rightly declined the relief to the petitioner- appeal dismissed. (Para-2 to 6)

For the Appellant: Mr.Bimal Gupta, Senior Advocate, with Mr.Vineet Vashista, Advocate.
For the Respondent: Ms.Nargis Thakur, Advocate, vice Mr.Balwant Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment, dated 18th May, 2010, passed by a learned Single Judge of this Court in CWP(T) No.6853 of 2008, titled Shashi Bala vs. Registrar, University of Horticulture and Forestry, Nauni, whereby the writ petition filed by the petitioner (appellant herein) came to be dismissed, (for short, the impugned judgment).

2. The appellant/writ petitioner invoked the jurisdiction of this Court by the medium of the writ petition and prayed for the following main reliefs, on the grounds taken in the Memo of writ petition:

> *"(i) That the respondent may be directed to re-engage the services of the applicant after quashing and set asiding the order dated 31.7.1999;*
>
> *(ii) That the respondent may also be directed to regularize the services of the applicant as per the Government Instruction dated 8.7.1999 as such;*
>
> *(iii) That the respondent may also be directed to release all the consequential benefits like seniority, pay and other admissible service benefits etc.;"*

3. Respondent resisted the writ petition and filed the reply. After hearing the learned counsel for the parties, the writ petition came to be dismissed vide the impugned judgment.

4. The petitioner was engaged as Computer Clerk in the year 1991 under the Project called ICIMOD Mountain Women Development Centre on the following conditions:

> *"i) that her services can be dispensed with at any time without assigning any reason;*
>
> *ii) that she will have no claim for her regularization;*
>
> *iii) that she will have to execute an undertaking at the time of joining the post (as per proforma enclosed)."*

5. The Project under which the writ petitioner was engaged came to an end in the year 1999. The writ petitioner cannot claim regularization against a post which is not sanctioned one or for that matter, against any other post. The Writ Court has discussed this issue in paragraphs 7 and 8 of the impugned judgment and also supported his reasonings by various pronouncements, as detailed in paragraphs No.10, 14 and 15 of the impugned judgment.

6. The Writ Court has rightly made the discussion and passed the impugned judgment, which is speaking one and legal.

7. Having said so, no interference is required in the impugned judgment and the same is upheld. As a consequence, the 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 SANDEEP SHARMA, J.

State of H.P. ....Appellant
Versus
Bhagi Rath and another ....Respondents

LPA No.200 of 2014.
Date of decision: 15th June, 2016.

Constitution of India, 1950- Article 226- Relief was granted to similarly situated person by the Court which was upheld by the Apex Court- hence, direction issued to consider the case of the petitioner in accordance with the judgment passed by the High Court as upheld by Supreme Court. (Para-4 and 5)

For the appellant: Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.
For the respondents: Mr. J.L. Bhardwaj, Advocate, for respondent No.1.
Mr. Anita Jalota, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

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

This Letters Patent Appeal is directed against the judgment and order dated 6.3.2013 made by the learned Single Judge of this Court in ***CWP No. 5768 of 2012-G***, titled ***Bhagi Rath versus State of H.P. and another***, whereby the writ petition filed by the writ petitioner/respondent No.1 herein came to be granted, for short "the impugned judgment" on the grounds taken in the memo of appeal.

2. The learned Advocate General argued that the Writ Court has fallen in an error in granting the relief to the writ petitioner which is not only illegal but is novel in character and against the Rules, occupying the field.

3. The appellant has specifically pleaded in para 6 of the appeal how the impugned judgment is bad in law.

4. The learned counsel for respondent No. 1 was asked to show what is the foundation of the order vis-à-vis CCS (Pension) Rules, occupying the filed. He was not in a position to assist the Court but stated that the similarly situated persons have been granted the relief by this Court in CWP No. 4764 of 2013-G decided on 17th September, 2013 titled ***Amar Singh Maratha versus State of HP and others*** upheld by the apex Court while dismissing the SLP (C) No.18040/2014 on 17.11.2014 and the said judgment came to be implemented. He also made available the copy of the office order whereby the said judgment has been implemented. The copies of order made in SLP, judgment made by this Court and the office order, referred to supra are made part of the file.

5. In the given circumstances, we deem it proper to set aside the impugned judgment and direct the respondents to consider the case of the writ petitioner in the light of the judgment made by this Court in CWP No.4764 of 2013, upheld by the apex Court, referred to supra, and make decision within six weeks from today. Ordered accordingly.

6. Having said so, the impugned judgment is set aside and the LPA is allowed. The writ petition is disposed of, as indicated hereinabove, alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

State of H.P. .....Appellant.
Versus
Onkar Chand .....Respondent.

Cr. Appeal No. 190 of 2008
Date of decision: 15.6.2016

Indian Penal Code, 1860- Section 279 and 338- Accused was driving a bus with high speed, which hit the husband of the complainant- he sustained simple and grievous injuries – accused was convicted by the trial Court- an appeal was preferred, which was allowed- held, in appeal that trial court had relied upon the site plan - however, names of the persons whose assistance was taken while preparing site plan were not mentioned, which shows that site plan was prepared arbitrarily- PW-5 had improved her version- in these circumstances, Appellate Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. V.D Khidtta, 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 Additional Sessions Judge, Una, District Una, H.P. in Criminal Appeal No. 7 of 2006, whereby it while reversing the findings of conviction recorded on 27.3.2006 by the learned Judicial Magistrate, 1st Class, Court No. 1, Amb in Case No. 106-1 of 2004 acquitted the respondent (for short 'accused') for the offences punishable under Sections 279 and 338 of the Indian Penal Code.

2. The brief facts of the case are that complainant while appearing before the police at PHC Amb disclosed that on 17.5.2003 she had come to her parental home at village Katohar Khurd alongwith other family members for participating in a condolence function of near relative. After attending condolence complainant and other family members were waiting for a bus at Pakka Proh. Husband of the complainant in order to take water attempted to go towards the other side of the road. In the meantime HRTC bus bearing registration No.HP-18-3588 came from Una Side at a very high speed which hit the husband of the complainant. The accident took place at 1.15 Noon. The husband of the complainant on account of the accident fell on the road. He was taken to the hospital. On the basis of the statement of the complainant, FIR was registered. Site plan was also prepared. Injured was medically examined. He was found to have suffered simple as well as grievous injuries. 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, 338 of the I.P.C and 181 of the M.V Act, 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. 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 279 and 338 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 Appellate Court reversed the findings of conviction recorded against the accused by the learned trial Court on the score of the latter untenably imputing credence to Ex. PW-10/B. The reason which prevailed upon the learned first Appellate Court to disimpute credence to Ex.PW-10/B stood aroused on account of PW-11 the Investigating Officer omitting to communicate in his deposition the prime factum qua whose instance he prepared it. The apposite communication by the Investigating Officer qua the person at whose instance he prepared it was of utmost significance as PW-11 was not present at the site of incident at the time contemporaneous to its occurrence thereat. His absence at the site of accident at the time contemporaneous to its taking place thereat enjoined upon him to solicit the assistance of persons available thereat contemporaneous to its taking place. The solicitation of assistance if any by the Investigating Officer in the apposite investigations conducted by him of persons available at the site of occurrence warranted revelation of their names by him. The aforesaid communication would dispel an inference of the Investigating Officer arbitrarily preparing the site plan. Further more the non-revelation by the Investigating Officer of the names of the persons whose help he solicited in preparing the spot map would also have facilitated the defence to cross-examine the aforesaid persons. The camaflouraging of the names of the persons by the Investigating Officer at whose instance he prepared the relevant spot map fosters an inference of the site plan standing arbitrarily prepared by him also it foments a conclusion of its preparation being surmisal whereupon as tenably done by the learned Appellate Court no credence is imputable.

10. In addition, the non-revelation of the names of the persons at whose instance the Investigating Officer prepared the site plan has prejudiced the defence. In aftermath with credence being dis-imputable to Ex.PW-10/B, the main plank of the prosecution case squarely hinged upon besides it suffers a severe jolt.

11. Be that as it may the version qua the incident as embodied in the FIR suffers from a taint or blemish of untruthfulness arising from the factum of PW-5 Shamo Devi embellishing and improving while deposing in Court the factum as stands previously narrated by her qua the bus driven by the accused striking her husband while he was crossing the road as he intended to fetch water from other side of the road taint whereof stands constituted in her deposing in contradiction thereto of the bus driven by the accused striking her husband while he was taking water in front of the shop.

12. 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, mis-appreciating the evidence on record or 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.

13. 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 SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Sanjay .....Respondent.

Cr. Appeal No. 188 of 2008
Date of decision: 15.6.2016

Indian Penal Code, 1860- Section 279, 337 and 338- **Motor Vehicles Act, 1988-** Section 181, 192 and 196- Accused was driving a motor cycle in a rash and negligent manner- his motorcycle hit another motorcycle being driven by the complainant- accused was tried and acquitted by the trial Court- held, in appeal that testimony of the complainant did not inspire confidence- PW-2 feigned ignorance that accident had taken place as accused had become perplexed after his vehicle had skidded – statements of prosecution witnesses did not prove the prosecution case- appeal dismissed. (Para-9 to 12) Title: State of H.P. Vs. Sanjay Page-1930

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. Karan Singh Kanwar, 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 31.10.2007 by the learned Chief Judicial Magistrate, Sirmaur District at Nahan, H.P in Criminal Case No. 20/2 of 2005/04 whereby the it acquitted the respondent (for short 'accused') for the offences punishable under Sections 279, 337 and 338 of the Indian Penal Code readwith Sections 181, 192 and 196 of the Motor Vehicles Act.

2. The brief facts of the case are that on 6.12.2004 the accused was driving the motorcycle bearing registration No. HP18-4512 on Nahan-Kala Amb State Highway in rash and negligent manner so as to endanger human life and personal safety of others, as a result of which the accused collided his motorcycle against the motorcycle bearing No. HR04-6727 driven by the

complainant. As a result of the accident Kali Charan and Satish Kumar sustained simple as well as grievous injuries. The accused was found to be driving the vehicle without driving licence, RC and Insurance certificate. On receipt of information the police visited the spot and recorded the statement of complainant Krishan Lal under Section 154 Cr.P.C. FIR Ex.PW-10/A was registered. The investigating Officer during investigation prepared site plan Ex.PW-10/B. Photographs of the spot Ex.P-1 to P-6 were clicked. The vehicles were taken into police custody vide separate seizure memos Ex.PW-3/A and PW-3/B. Mechanical reports of the vehicles are comprised in Ex.PW-8/A and PW-8/B. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of I.P.C read with Sections 181, 192 and 196 of M.V Act, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence. He also examined one Rashid Mohd as his defence as DW-1.

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 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 complainant Krishan lal (PW-1) in his deposition comprised in his examination-in-chief has attributed therein negligence to the accused comprised in his driving his motor vehicle on the inappropriate side of the road. However, in his cross-examination he has admitted the suggestion put to him by the learned defence counsel of at the relevant time the vehicle driven by the accused ascending the road whereas the vehicle driven by him descending the road. He has also denied the suggestion put to him by the learned defence counsel of his not at the relevant time carrying fuel wood atop his motor vehicle. However he admits the suggestion put to him by the learned defence counsel of the width of the road at the relevant site being sufficiently wide. For testing the veracity of the deposition of the complainant, an allusion to the testimony of PW-2 who at the relevant time was occupying the pillion of the vehicle driven by the complainant is imperative. In case PW-2 contradicts the deposition of PW-1, obviously an inference would stand underscored of the version qua the occurrence deposed by PW-1, the complainant being bereft of sanctity besides uninspiring whereupon this Court would constrained to not record findings of conviction against the accused.

10. An allusion to the testimony of PW-2 brings forth the stark facet of his contradicting PW-1 qua the factum as deposed by the latter of the accused at the relevant time driving his vehicle on the inappropriate side of the road necessarily when hence it has to be inferred therefrom of the accused at the relevant time driving his vehicle on the appropriate side of the road besides when concomitantly it is to be concluded of the genesis of the prosecution

case embodied in the FIR standing ridden with falsity. Obviously thereupon the version comprised in the FIR qua the occurrence stands unsubstantiated. The further effect thereof is of the genesis of the prosecution case suffering erosion. In sequel, the findings of acquittal recorded by the learned trial Court do not warrant any interference.

11. Be that as it may with PW-2 portraying his ignorance qua whether the accident occurred on account of the accused being perplexed after his vehicle at the relevant time skidded on the road is a communication which is ridden with a vice of equivocation whereas in case PW-2 had categorically with unequivocality bespoken of the ill-fated occurrence standing sequelled by the accused driving his vehicle in a rash and negligent manner would rather constitute prime evidence to succor findings of conviction against the accused. Contrarily when he has deposed with equivocation qua the aforesaid prime factum also constrains this Court to hold of the findings of acquittal recorded by the learned trial Court not meriting any interference.

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 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.

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

The State of Himachal Pradesh and another ...Appellants.
Versus
Shri Rajinder Singh ...Respondent.

LPA No. 22 of 2016
Decided on: 15.06.2016

Constitution of India, 1950- Article 226- **Industrial Disputes Act, 1947-** Section 25- Services of the respondent were terminated- dispute was referred to Labour Court-cum-Industrial Tribunal- Tribunal made award in favour of the respondent- writ petition was filed challenging the award- held, that High Court can interfere with the award of the Tribunal only on the procedural level and cannot interfere with the findings of the fact, unless, Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence- it was not established that inadmissible evidence was made the foundation of the award or that the award was passed without any evidence- writ petition dismissed. (Para- 3 to 6)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157
M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others, I L R 2014 (V) HP 970
Gurcharan Singh (deceaed) through his LRs vs. State of H.P. and others, I L R 2015 (VI) HP 938 (D.B.)

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment, dated 6th January, 2015, made by the Writ Court in CWP No. 4621 of 2014, titled as The State of Himachal Pradesh & anr. versus Sh. Rajinder Singh, whereby the writ petition filed by the writ petitioners-appellants herein came to be dismissed (for short "the impugned judgment").

2. We have gone through the impugned judgment, which is legally correct for the following reasons:

3. Services of the respondent was 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, held that the workman was entitled to the relief and made the award.

5. The award passed by the Labour Court is based on the facts and the evidence led by the parties. It is well settled principle of law that the Writ Court cannot sit as an Appellate Court and set aside the award made by the Labour Court, which is based on evidence and facts.

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. This Court has also laid down the same principle in a batch of writ petitions, **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of HP and another,** being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:

> *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*

8. This Court in a series of cases, being **CWP No. 4622 of 2013 (supra)**; **LPA No. 485 of 2012,** titled as **Arpana Kumari versus State of H.P. and others,** decided on 11th August, 2014; **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on

21st August, 2014; **LPA No. 125 of 2014,** titled as **M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,** decided on 21st October, 2014; and **LPA No.143 of 2015, titled Gurcharan Singh (deceaed) through his LRs vs. State of H.P. and others, decided on 15th December, 2015,** while relying upon the latest decision of the Apex Court in **Bhuvnesh Kumar Dwivedi's case (supra),** has held that question of fact cannot be interfered with by the Writ Court. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which has influenced the impugned findings.

9. It is not the case of the writ petitioners-appellants that inadmissible evidence was recorded and that was made the foundation of the award or the award was passed without any evidence. The Writ Court has rightly made the discussion and conclusion.

10. Having glance of the above discussion, we hold that the impugned judgment is speaking one, requires no interference.

11. Viewed thus, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Vishal Bansal .....Petitioner.

Vs.

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

CWP No. 1113 of 2007
Reserved on: 04.05.2016
Date of Decision: 15.06.2016

Constitution of India, 1950- Article 226- Petitioner pleaded that he was a Member of Bilaspur District Truck Operator Society- he was being allotted work which was stopped abruptly w.e.f. 8.5.2016 – he filed a petition seeking direction to the Society to allot work to him- Society pleaded that membership of the petitioner was transferred in the name of P- Additional Registrar (Administration) dismissed the petition- revision was preferred which was also dismissed- writ petition was filed challenging the orders- held that petitioner had not disclosed initially that he had transferred the truck along with membership in favour of P - thus, he had not approached the authority with clean hands- authority had taken a correct view – writ petition dismissed.

(Para-22 to 30)

For the petitioner: Mr. B.C. Negi, Senior Advocate, with Mr. Praney Pratap Singh, Advocate.

For the respondents: Mr. V.S. Chauhan, Additional Advocate General, for respondents No. 1 to 3.
Mr. Dinesh Thakur, Advocate, for respondent No. 4.
Mr. Surinder Saklani, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, J.* :**

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

"a. That the impugned order dated 13.09.2006 Annexure P/7 passed by the Ld. Additional Registrar, Cooperative Societies and order dated 10.07.2007 Annexure P/15 passed by Joint Secretary Cooperative Society may kindly be quashed and set aside.

b. That order passed on the application under Order 1 Rule 10 Annexure P/12 may kindly be quashed and set aside.

c. That respondents No. 4 & 5 may be directed to allot the work to the petitioner in accordance with the bye-laws of the society as is being allotted to other situated members of the society.

d. That respondents No. 4 and 5 may be directed to immediately stop illegal GATTA system evolved by the respondent society.

e. That the respondents No. 4 & 5 may be directed to grant damages for wrongful denied work to petitioner.

f. Record of the case may be called for.

g. Any other order, this Hon'ble Court deems fit and proper, may kindly be issued in favour of the petitioners and against the respondents.

h. That the petition may be allowed with cost."

2. Facts as are necessary for the adjudication of the present petition are enumerated here-in-below. The petitioner filed a petition under Section 72 of the Himachal Pradesh Cooperative Societies Act, 1968 (hereinafter referred to as '1968 Act') against Bilaspur District Truck Operators Transport Society Ltd. (Regd.), Barmana, District Bilaspur, H.P., on the ground that he was a member of the said society and had purchased a TATA truck of 1995 model bearing registration No. HP-24-3927, which stood attached with the said society since the year 1995. Membership of the respondent-society was opened in the year 1998 and vide membership No. 157/954, he became the member of said society on 24.05.1998 as per the provisions and bye laws of the society and he continues to be a member of the said society. In the said capacity of his, he was being allotted the work of transportation as per the procedure being followed by the society without any hindrance or obstruction, which was abruptly stopped by the society w.e.f. 08.05.2006. The procedure being followed by the respondent-society for allotment of work was based on queue system which was followed by a call (pukar) and volunteers from the queue volunteered for the work. This call (pukar) was made two three times a day as per the demand made by ACC with whom the trucks of the respondent-society were attached. Case of the petitioner was that he was in queue since 2006 and had volunteered for call (pular) every time, but no work was being allotted to him though the same was being allotted to other members of the society and even to those who were not even members of the said society. It was further averred by him that this was being done on the basis of the oral directions issued by the President of the respondent-society. According to the petitioner, he was neither defaulter nor he was suffering from ineligibility for grant of work and, therefore, according to him, he was being discriminated by the petitioner-society in the matter of allotment of work. In these circumstances, he filed the petition under Section 72 of the 1968 Act, wherein he *inter alia* prayed that the respondent-society be directed to allot work to him as per the bye laws of the society as was being allotted to other similarly situated members of the society.

3. Respondent-society filed reply to the said petition. In the preliminary objections, it was submitted on behalf of the respondent-society that the petitioner had not approached the authority with clean hands and had tried to mislead the authority by making false and frivolous allegations. According to the respondent-society, the truck of the petitioner bearing registration No. HP-24-3927 was attached vide membership No. 157/958. Petitioner had sworn an affidavit dated 29.05.2006 duly attested by Executive Magistrate, Bilaspur, as per which, the membership with regard to truck No. H.P. 24-3927 commonly known as 'Gatta' was sold by him, i.e. petitioner to one Sh. Paramjeet Singh Thakur and the petitioner had averred in his affidavit that he has no objection for transferring the Gatta of the said vehicle and having the same registered in the name of Sh. Paramjeet Singh Thakur, who was owner of vehicle bearing registration No. HP 24B-6122. It was further mentioned in the reply that the father of the petitioner Sh. Chuni Lal Bansal was member of Managing Committee and he had been assigned the work of Office Incharge of the society. According to the respondent-society, the father of the petitioner had taken the original

record pertaining to his and his relatives vehicle illegally and now taking advantage of this fact that the society was not in possession of any record, the petitioner had filed frivolous petition in spite of the fact that he knew very well that he had sold Gatta of his truck in favour of Sh. Paramjeet Singh Thakur and accordingly on the strength of the Gatta so sold to Sh. Paramjeet Singh Thakur, another truck of Sh. Paramjeet Singh Thakur had been entered against the said Gatta sold by the petitioner to him. On merit, the stand of the respondent-society as enumerated in paragraphs No. 5 of the reply is quoted hereinbelow:

> *"...The truck in question earlier owned by petitioner was being allotted works normally and in the meanwhile the Gatta of the truck vide which, the truck was registered with the respondent No. 1 Society was sold to one Sh. Paramjeet Singh Thakur and another truck bearing No. H.P. 24B-6122 was registered vide Gatta number, which was earlier allotted to the petitioner. Since Sh. Chuni Lal was the Office Incharge, he orally acted upon this new arrangement made by the petitioner and one Sh. Paramjeet Singh Thakur and all the concerned were informed that the Gatta of truck bearing NO. H.P. 24-3927 was transferred and a new truck belonging to Sh. Paramjeet Singh Thakur bearing No. HP 24B-6122 has been allotted the said Gatta. Since then, the truck belonging to Sh. Paramjeet Singh Thakur is being allotted the work in normal manner as was earlier being allotted to Truck bearing No. HP 24-3927."*

4. In rejoinder, which was filed by the petitioner to the reply filed by the respondent-society, it was *inter alia* averred by him that the petitioner had brought to the notice of the authority before selling Gatta to Sh. Paramjit Thakur on 29.05.2006 that he had already purchased a Gatta alongwith truck No. HP-11-2513, which Gatta also belonged to the respondent-society. According to the petitioner, this Gatta was purchased by him on 25th May, 2006 and application to this effect was duly presented to the respondent-society, but the President of the said society insisted that an affidavit be filed and accordingly, the same was also filed before the authority concerned. Thus, according to the petitioner, it was only after having purchased Gatta alongwith truck No. HP-11-2513 that petitioner sold his Gatta on 29.05.2006.

5. In response to the said rejoinder, a sur-rejoinder was filed by the respondent-society, in which it was mentioned that at no point of time, petitioner brought to the notice of the respondent-society that he had purchased a Gatta alongwith truck bearing registration No. HP-11-2513. According to the society, the said truck bearing No. HP-11-2513 alongwith its Gatta was earlier owned by one Smt. Vidya Devi, W/o Sh. Lekh Ram, who had sold the same alongwith its Gatta to one Sh. Baldev as was apparent from affidavit dated 02.07.2005 and said Sh. Baldev Kumar had also submitted an affidavit of Smt. Vidya Devi dated 07.07.2006 in which it was stated that she had sold her truck to Sh. Baldev Kumar. It was further mentioned that as per the contents of the affidavit, the truck bearing registration No. HP-11-2513 also stood transferred in the name of Sh. Baldev Kumar. Thus, according to the society, it was not understood as to how Smt. Vidya Devi could have had transferred the truck in the name of the petitioner which she had already sold to Shri Baldev Kumar. Thus, the stand of the society was that Gatta which was initially issued to the petitioner, now stood registered in the name of Paramjeet Thakur and on the strength of the same, work was being allowed to Sh. Paramjeet Thakur. Similarly, as far as Gatta of Smt. Vidya Devi is concerned, the same had been transferred in the name of Sh. Baldev Kumar and work was being allotted to Sh. Baldev Kumar on the strength of the said Gatta.

6. This was followed by a supplementary affidavit filed by the petitioner, in which he refuted the stand of the respondent-society and reiterated that no Gatta had been transferred by Smt. Vidya Devi in favour of Sh. Baldev Kumar.

7. Response to the said supplementary affidavit was filed by the society, in which it was mentioned that as per the records of the society, truck bearing No. HP-11-2513 was sold by Smt. Vidya Devi to Sh. Baldev Kumar alongwith Gatta and the factum of petitioner having purchased truck bearing No. HP-11-2513 alongwith Gatta was never brought to the notice of

replying respondents and rather it was for the first time that it came to their knowledge from an affidavit which was annexed alongwith the rejoinder filed by the petitioner to the reply.

8. On the basis of the materials so produced by the respective parties before it, Additional Registrar (Administration) Cooperative Societies, H.P. vide its decision dated 13.09.2009 dismissed the petition filed by the present petitioner by holding as under:

> *"I have heard the counsels for the petitioner as well as for the respondents. I have also perused copies of affidavits brought on record by the petitioner/respondents in support of their pleas. It is observed that petitioner suppressed material facts of the case in the petition by not disclosing that membership with regard to Truck NO. HP24-3927 known as Gatta had been transferred in the name of Paramjeet Singh Thakur. Respondent have brought on record copy of the affidavit executed by the petitioner before Executive Magistrate Bilaspur (HP) on 29.05.2006 to the above effect. Petitioner filed rejoinder to reply of the respondents in which transfer of Gatta/Membership to Sh. Paramjeet Singh Thakur was admitted. In the rejoinder it was further submitted that petitioner had purchased another Gatta/Membership alongnwith truck No. HP 11-2513 from one Smt. Vidya Devi. Copy to the affidavit allegedly executed by Smt. Vidya Devi on 25.05.2006 was brought on record in support above claim. In sub-rejoinder, respondents refuted above claim of the petitioner. Copy of another affidavit dated 28.08.2006 executed by Smt. Vidya Devi was also presented. In this affidavit Smt. Vidya Devi stated that affidavit dated 25.05.2006 was got signed from her fraudulently by the petitioner Sh. Vishal Bansal and that the same may not be taken into consideration. I am inclined to reply on the affidavit dated 28.08.2006 of Smt. Vidya Devi due to the following reasons.*
>
> *(a) Petitioner had not disclosed all these materials facts in petition dated 01.06.2006.*
>
> *(b) Signatures of Smt. Vidya Devi on the affidavit point towards her being illiterate/nearly illiterate so that chances of getting her signatures on the affidavit without true knowledge of contents cannot be ruled out.*
>
> *(c) Petitioner has annexed with the supplementary affidavit a certificate from Registering & Licencing Authority, Arki, Distt. Solan datd 19.08.2006, wherein it has been certified that ownership of vehicle No. HP-11-2513 still stands in the name of Smt. Vidya Devi. This proves that vehicle alleged to have been sold on 25.08.2006 had not been transferred in the name of the petitioner till 19.08.2006, while normally vehicle are required to be registered in the name of purchaser within a period of one month. Disputed affidavit date 25.05.2006 was not utilized by the petitioner for getting the vehicle transferred/registered in his name. This generates suspicion about the purpose for which affidavit was got executed.*
>
> *Signatures of Sh. Vishal Bansal appended on affidavit dated 25.05.2006 apparently differ from signatures appended on present petition dated 01.06.2006. Some one has apparently impersonation and allegation of getting affidavit dated 25.05.2006 executed from Smt. Vidya Devi fraudulently is not considered relevant here but reliability of the petitioner certainly gets impaired.*
>
> *In view of the above, it is concluded that the petitioner has transferred Gatta/Membership in respect of Truck NO. 24-3927 owned by him in the name of Sh. Paramjeet Singh Thakur while there is no satisfactory evidence of purchase of another Gatta/Membership by the petitioner so that he has been rightly denied allotment of work by the respondents. This petition is accordingly dismissed."*

9. Feeling aggrieved by the said decision of the authority, the petitioner preferred revision petition under Section 94 of 1968 Act.

10. Vide its decision dated 10.07.2007, the revisional authority dismissed the revision so filed by the present petitioner (reflected in decision dated 10.07.2007 as Appeal No. 62 of 2006) by holding as under:

> *"Undisputedly, it was admitted by the petitioner in his rejoinder filed before the Additional Registrar, Co-operative Societies that the 'gatta' of Truck No. HP-24-3927 was sold to Shri Paramjit Singh Thakur dated 29.05.2006, which information was provided by the Respondent Society. As regards the Pint No. (ii), the Affidavits furnished by Smt. Vidya Devi, owner of the Truck were contradictory. Records reveal that at one point of time, through an Affidavit of Smt. Vidya Devi and Baldev Kumar dated 2.7.2005. Vehicle No. HP-11-2513 alongwith 'gatta' was sold by Smt. Vaidya Devi to Shri Baldev Kumar and upon such information, the work was assigned by the Respondent Society to Shri Baldev Kumar. Later on, as per information with the Respondent Society that the 'gatta' of Truck No. HP-24-3927 owned by the Petitioner was transferred to Shri Paramjit Thakur, he started getting work in respect of Vehicle No. HP-24B-6122 owned by him. The Affidavits, being contradictory, and taking into account that the transfer of names in the R.C. is procedural and takes time, the reliance upon the first affidavit and first information is natural and the Society is not a fault in acting upon accordingly."*

It is against the said two decisions passed by the authorities concerned that the present petition has been filed.

11. Replies were filed to the writ petition on behalf of the respondents. However, no rejoinder to the replies has been filed by the petitioner nor any rejoinder was intended to be filed by the petitioner when the matter was taken up for arguments and accordingly, the matter was heard on the basis of the material available on record.

12. During the pendency of the revision petition, one Shri Baldev Kumar (respondent No. 6) had also moved an application under Order 1 Rule 10 of the Code of Civil Procedure to be impleaded as party in the revision petition, which application of his was allowed vide order dated 18.06.2007. Petitioner has also laid challenge to the said order in the present petition.

13. According to the petitioner, the orders passed by the authorities in his petition under Section 72 of the 1968 Act as well in his revision petition filed under Section 94 of the 1968 Act were not sustainable in the eyes of law.

14. Mr. B.C. Negi, learned Senior Counsel representing the petitioner submitted that both the authorities below have failed to appreciate that the petitioner being member of the respondent-society was entitled to be allotted the work of transportation of cement etc. in his capacity as member of the said society. According to him, the factum of petitioner having sold his Gatta to Shri Paramjeet Singh Thakur was totally irrelevant because the petitioner had the entitlement to be allotted the work on the strength of his being member and till the time he continued to be member of the society, he was entitled to be allotted the work. According to Mr. Negi, this very important aspect of the matter has been overlooked by both the authorities below. Mr. Negi contended that the system of Gatta had no legal sanctity and therefore, transfer of Gatta allotted by the society to the petitioner, by him to Sh. Paramjeet Singh Thakur could not have been made basis by the respondent-society to deny the allotment of work of transportation of cement etc. to the petitioner.

15. Mr. Negi further submitted that the factum of petitioner not being able to satisfactorily explain as to in what circumstances he has purchased the Gatta/truck from Smt. Vidya Devi as the same was allegedly previously sold by her to Baldev Kumar was also of no relevance. The allotment of the work was solely dependent upon a person being member of the society and because it was not the case of the respondent-society that the petitioner had ceased to be a member of the society on his transferring/selling of Gatta in favour of any other person, allocation of work could not have been stopped in his favour by the respondent-society.

Accordingly, Mr. Negi argued that keeping in view this aspect of the matter, the orders passed by the authorities concerned which were challenged in the writ petition were not sustainable in the eyes of law.

16. Mr. Negi further argued that revisional authority had also erred in allowing the application filed by Sh. Baldev Kumar to be impleaded as party in the revision petition. According to Mr. Negi, said Sh. Balev Kumar was neither a necessary nor a proper party and the revisional authority erred in allowing the said application of his to be impleaded as party respondent in the revision petition.

17. Mr. Negi submitted that even otherwise *domius litis* is that of the petitioner and this very important aspect of the matter has also been overlooked by the revisional authority while allowing the application of Shri Baldev Kumar to be impleaded as party respondent in the revision petition. Therefore, he prayed for quashing of the said order also passed by the revisional authority.

18. Learned counsel for the respondents defended the orders passed by the authorities concerned and submitted that there was neither any infirmity nor any illegality with the orders which had been passed by the authorities below dismissing the original petition and revision petition of the present petitioner. According to them, the authorities had rightly come to the conclusion that there was no merit in the submissions of the petitioner that the respondent-society had arbitrarily denied the transportation work to him. It was submitted on behalf of the respondents that the case which in fact was being put forth by the petitioner both in the revision petition as well as in the present writ petition was totally different from the case which was initially put forth by the petitioner in the petition filed by him under Section 72 of the 1968 Act. According to the respondents, once the statutory authority found no merit in the petition filed by him under Section 72 of the 1968 Act, then the petitioner took a summer salt and laid challenge to Gatta system in the revision petition.

19. It was further submitted by the respondents that the petition filed under Section 72 of the 1968 Act was rightly dismissed by the authority concerned because the petitioner had not approached the said authority with clean hands and had suppressed material facts. It was not disclosed by the petitioner at the time when he filed the said petition that he had already sold his truck alongwith Gatta in favour of Shri Paramjeet Singh Thakur. Therefore, according to the respondents, there was no infirmity with the order passed by the authority dismissing the initial petition filed by the petition under Section 72 of the 1968 Act.

20. Similarly, according to them, the order passed by the revisional authority was also based on material produced on record by the parties and the conclusions arrived at by the revisional authority were duly supported and borne out from material on record. Further, as per the respondents, the petitioner cannot be permitted to take those grounds in the revision petition or in the writ petition which were not initially taken by him in the petition filed under Section 72 of the 1968 Act. Accordingly, they prayed that as there was no merit in the petition, the same be dismissed with costs.

21. I have heard the learned counsel for the parties and also gone through the documents produced on record by the respective parties.

22. This Court on 12.11.2007 had passed the following order:

> *"The controversy in this petition basically revolves around the prevalence of Gatta system as a mode or basis for giving work and allotment of business to the truck owners by respondent No. 4-Society for carriage of cement from the factory. Before we proceed any further in this matter, we would like to have the opinion of a Committee of Officers, as to whether the system presently in vogue is fool proof, efficient, as well as free from the vice and danger of mis-use and exploitation. We would also like to have the opinion from the said Committee as to whether a better and more meaningful system replacing the prevalent system can be introduced.*

The Committee to be appointed by us shall go into the entire gamut of all the issues associated with the allotment of business as well as engagement of trucks by respondent No. 4-Society so that mal-practices,favouritism, mis-use as well as corrupt means are avoided. The Committee shall bear in mind the fact that its opinion and recommendations shall be very helpful to this Court and useful in bringing about the positive transformation. Additionally, the opinion and the recommendations of the Committee can be later on applied to other Societies at other places.

With the agreement of the learned counsel for the parties, this Court hereby appoints the Committee comprising of the following:-

1. Mr. Sirikant Baldi, IAS.

2. Mr. Devesh Kumar, IAS.

3. The Registrar, Co-operative Societies, Himachal Pradesh, Ex-officio.

Based on the aforesaid observations and directions, the Committee shall complete its task and submit its report to this Court in three weeks from today. The Registrar, Cooperative Societies shall coordinate the meetings as well as functioning of the Committee. The Committee, undoubtedly shall hear the views of all parties concerned before formulating its opinion and recommendations.

List after three weeks."

23. In obedience to these directions, the committee so constituted placed on record its report alongwith affidavit dated 11.12.2007. The recommendations of the said committee are enumerated hereinbelow:

"4.0 RECOMMENDATIONS OF THE COMMITTEE

4.1 After hearing all the persons present in the meeting, Committee deliberated about the legality and relevance of the existing gatta system. The Committee observed that the number of trucks in the Society is more than the number of members and, therefore, every truck is assigned a number which is called 'gatta' in local parlance. On the basis of this number and truck number, the work of carriage of cement is given to a truck. Every day, a new list trucks is prepared by rotation so that every truck owner could get business in fair and equitable manner. Therefore, gatta system is nothing but a procedure devised by the Society to provide work to every truck listed in the truck register which at present has 2032 trucks. This system is necessary for day to day operation of the society.

4.2. The Committee also discussed about the legality of present gatta system at present in vogue. The gatta system is not provided in the H.P. Cooperative Societies Act, Rules and the bye-laws of the society. However, Committee feels that it cannot be termed as illegal, as it does not appear to be in contravention of any provisions of law. The only issue is that at present this is not provided in the bye laws. The Committee also notices that same system is also prevalent in Ambuja Cement factory at Darlaghat where similar types of Societies are functioning. Therefore, the committee recommends that this system may be provided in the bye-laws of the Society by making necessary amendments.

4.3 The existing members/truck owners should be allowed to sale his truck and gatta to any person who is eligible to become member of the Society. The suggestion of the learned counsel for petitioner that the truck/gatta should be transferred only to the existing members cannot be accepted. Such proposal will be restrictive and monopolistic and stop enrollment of new members in the society.

4.4 Some of the members present in the meeting pointed out that even if a member has sold his truck as well as gatta, he continues to be a member of the Society because necessary provision does not exist in the Rules and the bye laws to remove him from the membership of the Society. The Committee feels that where a member has sold his truck as well as his gatta, then there is no point of his continuing as member of the Society. Actually this is creating complications in the functioning of the Society. Therefore, the committee recommends that all members who are not possessing any vehicle should be removed from the membership of the society after providing them an opportunity of being heard. The Society should make necessary amendments in its bye laws to ensure that membership is automatically stands surrendered, in case an existing member has transferred his truck/gatta, and he does not own any other truck listed with the society.

4.5 The Committee recommends that in future whenever a member intimates to the Society that he has sold his truck alongwith gatta then affidavit should be taken from such member that his gatta may be transferred to the eligible person. Further if he does not own any other vehicle, then he should also mandatorily give in writing to surrender his membership.

4.6 In case, a truck owner loses his vehicle due to accident or vehicle is not condemned, then the Society should grant him six month's time to replace/purchase new vehicle failing which gatta could be forfeited.

4.7 During the discussins, some of the truck owners intimated that their trucks were figuting in 2032 list of trucks but the Society has not given them any work. This point was discussed in detail. The Secretary of the society intimated that these members had tippers whereas the society requires normal trucks. The Committee deliberated this issue in detail and felt that the Society cannot forfeit valuable right of carrying cement vested in a truck owner without providing opportunity of being heard to such truck owners/members and also without involving the office of the Assistant Registrar Cooperative Societies. Therefore, the Committee advised the Society that all such owners should be give four months time to ply their vehicle whose truck number is figuring in the list of 2032 trucks. All the correspondence with such truck owners should also be endorsed to the Assistant Registrar Cooperative Societies Bilaspur for his information. Moreover, the compliane of re-plying of these vehicles should be intimated to the Assistant Registrar Cooperative Societies Bilaspur within four moths.

4.8 The Committee also deliberated that in future additional trucks may be required in the society (in case volume of work increases). The addition of new members/new trucks should be through a transparent procedure. The Committee recommends that whenever Society decides to add new trucks, fresh applications should be invited from all eligible persons residing within the area of operation of the society by giving wide publicity. The existing members having only one truck would also be eligible to apply for second vehicle. In case number of application received is more than the number of new trucks required, then the same should be decided by draw of lots under the Chairmanship of Assistant Registrar Cooperative Societies or S.D.M. Bilaspur, in the presence of Applicants."

24. As per the writ record, neither there are any objections filed to the recommendations of the said committee by the petitioner nor the report of the committee has been challenged separately.

25. It is amply clear from a perusal of the averments made in the initial petition filed by the petitioner under Section 72 of the 1968 Act that it was not disclosed by him therein that he had sold/transferred his truck bearing registration No. HP-24-3927 alongwith Gatta in favour

of Shri Paramjeet Singh. This petition is dated 01.06.2006, whereas the Gatta already stood sold by the petitioner in favour of Shri Paramjeet Singh before the said date, which is evident from his application for attestation of affidavit which is dated 29.05.2006 and which is on record. Thus, at the time when the petitioner filed petition under Section 72 of the 1968 Act, there was concealment of major facts by him from the authority concerned. When the factum of his having sold Gatta and truck in favour of Shri Paramjeet Singh was mentioned in the reply filed to the petition filed by the respondent-society, then the petitioner came up with a new story in his rejoinder to the effect that before he sold his Gatta in favour of Shri Paramjeet Singh Thakur, he had already purchased another Gatta alaongwith truck from one Smt. Vidya Devi. Incidentally, none of these facts were disclosed by him in the initial petition filed by him for the reasons best known to him. The factum of the petitioner having purchased a Gatta from Smt. Vidya Devi alongwith her truck was also falsified by the respondent-society, who produced on record an affidavit of Smt. Vidya Devi to the effect that the truck in issue already stood sold alongwith Gatta in favour of Shri Baldev Kumar much before when the same was purportedly sold by Smt. Vidya Devi to the petitioner. It was on these basis that Additional Registrar (Administration), Cooperative Societies dismissed the petition filed by the petitioner under Section 72 of the 1968 Act by holding that it stood proved that the petitioner had transferred Gatta/membership in respect of his truck bearing registration No. HP-24-3927 owned by him in favour of Shri Paramjeet Singh, whereas there was no material on record to the effect that the petitioner had purchased Gatta/membership as was alleged by him and, thus, the allotment of work was rightly denied to him by the respondent-society. The revisional authority concluded and rightly so that it was apparent from the record that there was no dispute that Gatta of vehicle No. HP-24-3927 owned by the petitioner stood sold by him to Shri Paramjeet Singh Thakur on 29.05.2006, whereas on the strength of affidavit of Smt. Vidya Devi and Baldev Kumar dated 02.07.2005 vehicle No. HP-11-2513 alongwith Gatta was sold by Smt. Vidya Devi to Shri Baldev Kumar and on the basis of this information, the work was assigned by the respondent-society to Shri Baldev Kumar.

26. In my considered view, there is no infirmity with the conclusions which have been arrived at by the authorities below in dismissing the petition filed by the petitioner under Section 72 of the 1968 Act as well as subsequent revision petition filed by him. This Court has no hesitation in holding that the petitioner did not approach the authority under Section 72 of the 1968 Act with clean hands. He concealed material facts from the authority concerned and it was only the respondent-society which revealed the true and correct facts in the reply, which was filed by it to the petition under Section 72 of the 1968 Act. The respondent-society in its reply had categorically stated that the father of the petitioner was Office Incharge and taking advantage of this fact, the records were misplaced to the advantage of the petitioner. This serious contention of the respondent-society could not be dispelled by petitioner in the rejoinder or subsequent pleadings filed by the petitioner. He was not able to prove that he had purchased Gatta from Smt. Vidya Devi, as alleged by him before he sold his Gatta to Shri Paramjeet Singh. Learned counsel for the petitioner could not satisfy this Court as to why these necessary material facts were concealed by the petitioner in the original petition filed by him under Section 72 of the 1968 Act. There was no challenge to the Gatta system in the original petition so filed by him. It was only in the revision petition that challenge was laid to the said Gatta system, which in my considered view was not permissible because the petitioner himself being a beneficiary of the Gatta system had no locus to assail the same. Even otherwise, this controversy has now been put to rest by the committee which was constituted by this Court and whose recommendations are now part of the record. The recommendations of the committee have not been assailed in any manner whatsoever by the present petitioner. The said committee in its report has rightly held that Gatta system is nothing but a procedure devised by the society to provide work to every truck listed in the societies register and this system is necessary for day to day operation of the society. It is further mentioned in the report of the committee that though Gatta system is not provided in the H.P. Cooperative Societies Act, Rules and the bye laws of the society, however, the same cannot be termed as illegal as the same does not appear to be in contravention of any provisions of law.

27. Incidentally, Smt. Vidya Devi has also filed an affidavit to the effect that her affidavit dated 25.05.2006 which was being relied upon by the petitioner had been got executed from her fraudulently by the petitioner. This very important aspect of the matter could not be rebutted by the petitioner.

28. Therefore, in view of the above, there is neither any infirmity nor any illegality in the orders passed by the authorities dated 13.09.2006 and 10.07.2007 vide which the petition under Section 72 of the 1968 Act and the revision petition under Section 94 of the present petition have been rejected.

29. Now coming to the order passed by the revisional authority dated 11.06.2007 vide which it has allowed the application of Sh. Baldev Kumar to be impleaded as party respondent in the revision petition, in my considered view, there is no infirmity in the same. It cannot be said that Shri Baldev Kumar was a stranger to the issue being adjudicated by way of revision petition, especially in view of the fact that the alleged Gatta and truck which had been purchased by the petitioner from Smt. Vidya Devi in fact stood sold/transferred by Smt. Vidya Devi to said Shri Baldev Kumar much before its purported purchase from Smt. Vidya Devi by the petitioner. Even otherwise, learned counsel for the petitioner could not point out as to what prejudice was caused to the petitioner by the said application having been allowed by the revisional authority.

30. In view of the above discussion, I do not find any merit in the present writ petition and the same is accordingly dismissed and so are all the miscellaneous applications. Interim order, if any, stands vacated.

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

Harish Kumar .....Appellant.

Versus

Manorama Devi & others. ....Respondents.

RSA No. 228 of 2014
Decided on : 16.6.2016

Specific Relief Act, 1963- Section 5- Plaintiffs filed a suit for possession pleading that defendant started raising shed over the suit land- he also got himself recorded to be in possession of the suit land- possession of the defendant over the suit land is unlawful and illegal- hence, suit was filed for seeking possession- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that predecessor-in-interest of the plaintiffs acquired title by way of sale deed – possession was also delivered to him- defendant had failed to prove any title in himself – adverse possession pleaded by defendant was not proved- owner is entitled to take possession- suit was rightly decreed by the Courts- appeal dismissed. (Para-8 and 9)

For the Appellant: Ms. Leena Guleria, Advocate.
For the Respondents: Mr. H.K Paul, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment and decree rendered by the learned District Judge, Kangra at Dharamshala in Civil Appeal No. 95-P/XIII/2012 on 29.7.2013, whereby it while affirming the judgment and decree rendered on

31.12.2009 by the learned Civil Judge (Junior Division) Palampur, District Kangra, H.P. in Civil Suit No. 130/2007, dismissed the appeal preferred by the defendant/appellant herein.

2. The brief facts of the case are that the plaintiffs/ respondents (for short the "plaintiffs") are owners of the land comprised Khata No. 355, Khatauni No. 593, Khasra No. 577, land measuring 0-00-48 hectares situated at Mohal and Mauja Dadh Jhikla, Tehsil Palampur, District Kangra H.P. (for short "the suit land"). It is averred that the suit land is lying vacant and was in their possession. However on 19.6.2007 the defendant/appellant herein (for short "defendant") started raising shed on the suit land. When the defendant was resisted from doing so then he claimed that his possession over the suit land is duly recorded in the revenue records. The plaintiffs thereafter approached the Patwari Halka and obtained revenue record on 25.6.2007 and were surprised to know that the defendant has illegally got himself recorded in the column of possession of the suit land in the revenue records. It is averred that possession of the defendant over the suit land is unlawful and illegal. Hence the present suit.

3. The defendant contested the suit and filed written-statement. He in his written-statement has taken preliminary objections inter alia maintainability, cause of action, estoppel, locus standi, valuation and plaintiffs having not approached the Court with clean hands. On merits, the suit has been contested by setting up the title on the basis of his alleged adverse possession. As per the defendant, he is in possession of the suit land from 2.12.1975 and his possession over the suit land was never objected to by anyone and now his possession has ripened into ownership on the basis of adverse possession. On all these submissions, the defendant prayed for the dismissal of the suit.

4. The plaintiffs filed a replication to the written-statement filed by the defendant and reasserted the stand taken in the plaint.

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

"*1. Whether the plaintiff is owner of the suit land, as alleged? OPP.*

2. Whether the plaintiff is entitled for decree of possession, as prayed for? OPP

3. Whether the defendant has become owner of the suit land by way of adverse possession? OPD

4. Whether the defendant is in possession of the suit land since 2.12.1975? OPD

5. Whether the suit of the plaintiff is not maintainable in the present form? OPD

6. Whether the plaintiff is estopped by his act and conduct to file the suit? OPD

7. Whether the plaintiff has no cause of action to file the suit? OPD

8. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD

9. Relief."

6. On an appraisal of evidence adduced before the learned trial Court, the learned trial Court decreed the suit filed by the plaintiffs. In an appeal preferred therefrom by the defendant before the learned first Appellate Court the learned First Appellate Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now, the defendant has instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned Courts below in their impugned judgment(s). When the appeal came up for admission on 12.8.2014, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

2. "*(1) Whether on account of mis-appreciation of the pleadings and misreading of the oral as well as documentary evidence available on record, the findings recorded by both Courts below are erroneous and, as such, the judgment and*

decree impugned in this appeal being perverse and vitiated is not legally sustainable?"

Substantial question of Law:-

8. Uncontrovertedly as depicted in Ex.P-4 the predecessors-in-interest of the plaintiffs herein namely Madan Lal and Desh Raj acquired title qua the suit land under an alienation effectuated by its lawful owner in their respective favour. The aforesaid acquisition of title qua the suit land by Madan Lal and Desh Raj from its lawful owner occurred in the year 1962-1963. In sequel thereto, the revenue Officer concerned under his apposite order of 15.7.1962 attested mutation of ownership qua the suit land in their favour. A perusal thereof also unfolds the factum of both Madan Lal and Desh Raj standing delivered thereat, possession of the suit land by its hitherto owner. However as unraveled by Ex.P-1 the name of the defendant stands reflected in its apposite column of possession. Nonetheless with the apposite remarks column of Ex.P-1 holding reflections of the defendant holding possession of the suit land since the time of his predecessor-in-interest, yet the aforesaid reflections therein would be inadequate for this Court to conclude therefrom of his holding possession of the suit property in a lawful capacity especially when there occurs no reflection in Ex.P-7 of the predecessor-in-interest of the defendant holding possession thereof as a tenant on payment of rent to the plaintiffs herein.

9. Be that as it may even when the plaintiffs herein as enunciated by the aforesaid documentary evidence hold title qua the suit property besides with the extant possession of the suit property of the defendant continuing since his predecessor-in-interest in a capacity other than of each respectively holding it as tenants under the lawful owners, the defendant herein yet concerted to non-suit the plaintiffs herein by canvassing in his written-statement a plea of with his predecessor-in-interest holding with an animus possidendi, possession of the suit land since 2.12.1975 on whose demise its possession with an alike animus possidendi remains with him, possession whereof hence on elapse of the statutorily prescribed period of limitation has by prescription ripened "into absolute ownership" of the defendant qua the suit land, the non-appreciation of the aforesaid factum by each of the learned Courts below stands canvassed by him to sequel their renditions standing ingrained with a vice of theirs discarding relevant and germane evidence whereupon hence their impugned renditions warrant interference by this Court. However, even when the said espousal of the defendant to non-suit the plaintiffs stood embodied in his written-statement yet the defendant while adducing evidence in substantiation thereto has in his examination-in-chief not made any communications therein of possession held qua the suit land by his predecessor-in-interest since 1975 and on his demise his possession thereof holding the indispensable ingredient of it being with an animus possidendi. For lack of an apposite communication by the defendant in his testimony comprised in his examination-in-chief qua the apposite ingredient of his through his predecessor-in-interest holding possession of the suit property with an animus possidendi since 1975, possession whereof hence on elapse of the statutorily prescribed period of time stands by prescription ripened "into absolute ownership", disables this Court to conclude of hence the defendant/appellant adducing cogent evidence to sustain his plea of his acquiring title qua the suit property by adverse possession. Contrarily the imperative inference which warrants its standing drawn by this Court is of the reflections, if any, in the apposite revenue record of the predecessor-in-interest of the defendant holding possession of the suit property and on his demise the latter holding its possession being merely permissive possession, possession whereof is neither in the capacity of both holding it as tenants under their respective lawful owners nor in any other lawful capacity rather theirs holding possession of the suit land merely as licencees under lawful owners who stand foisted with a tenable right to reclaim possession thereof. Consequently, the endeavor of the plaintiffs to seek restoration of the suit property from the defendant is legally apt besides also the concurrently recorded findings of both the Courts below do not suffer from any infirmity, hence the impugned judgment(s) and decree(s) are maintained and affirmed. In view of the above, the appeal is dismissed as also the pending applications if any. Substantial question of law answered accordingly.

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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

Jugal Kishore & others ... Respondents.

Cr. Appeal No 490 of 2009.
Reserved on 23.5.2016.
Decided on: 16.6.2016.

N.D.P.S. Act, 1985- Section 20- Car was stopped and searched- 1.4 kgs. charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that testimonies of prosecution witnesses are contradicting each other- no independent witness was associated at the time of investigation, although, investigation was completed in the police post- there were discrepancies regarding the number of seals –samples sent for analysis were also not tallying – trial Court had considered all these factors to record acquittal- view taken by trial Court was reasonable one- appeal dismissed. (Para-23 to 36)

For the appellant. : Mr. V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, Dy. Advocate General.

For respondents No.1 & 2 : Mr.Anoop Chitkara, Advocate.

For respondent No.3: Mr. Praveen Chauhan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

The present appeal has been filed by the State against judgment dated 29.6.2009 passed by the Court of learned Special Judge, Fast Track, Kullu in Sessions Trial No. 22 of 2008, vide which the learned Trial Court has acquitted the accused for the commission of offence under Section 20 read with Section 29 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (in short the 'Act').

2. In brief the case of the prosecution was that on 21.11.2007, HC Moti Ram along with HHC Lal Singh, HHC Jai Krishan and Constable Chaman Lal were present in connection with patrol and Nakabandi duty at Samod Nalla at around 5:00 a.m., when one vehicle came from Manikaran side and was signaled to stop by the police party. The registration number of the said Santro Car was DL 2CW-1248 and the same was read with the aid of torch light. The driver of the car was questioned and he disclosed his name as Tarun Kumar R/o New Delhi. The other occupant of the car disclosed his name as Jugal Kishore R/o Palampur.

3. The car was searched with the aid of torch light and on search one attache case kept near the feet of accused Jugal Kishore was recovered. The attaché case was black in colour having zip and sticker on its body. The checking of the same revealed that it was containing polythene envelope wrapped with the aid of cello tape 'khaki' in colour and black colour substance had been kept inside the polythene envelop in the shape of balls, sticks and chocolates. The recovered substance was emitting the smell of charas.

4. As it was a dark and secluded place and no independent witness was found present on the spot, HC Moti Ram along with accused persons and other police personel came to police post Manikaran where scale and weights were taken from HHC Chander Prakash. HHC Lal Singh and Constable Chaman Lal were associated as witnesses. The attaché case was opened and it was found that charas had been kept in all the envelopes found inside the attaché case and the same was kept in the shape of balls, sticks and chapattis. The recovered charas was

weighed and the same was found weighing 7Kg 400 Gram. Two samples of charas weighing 25 grams each were separated from the recovered charas and were sealed in separate parcels. Remaining charas was further sealed in separate parcel. Three seal impressions of 'T' were affixed on each sample parcel and nine seal impressions of 'T' were affixed on bulk parcel. NCB-I in triplicate were filled by HC Moti Ram and sample of seal impressions 'T' were obtained separately and seal after use was handed over to HHC Lal Singh. Seizure memo was prepared on the spot and the Santro Car along with documents was also taken into possession by the police. HC Moti Ram prepared rukka which was sent to police station Kullu through HHC Jai Krishan, on the basis of which, FIR was registered against the accused. Thereafter, HC Moti Ram along with accused persons and other police officials returned back to the spot. HC Moti Ram inspected the spot in the presence of accused and site plan was prepared. Accused Jugal Kishore and Tarun Kumar disclosed that they had purchased the charas from Manikaran. HC Moti Ram returned back to Manikaran along with the accused persons. A futile attempt was also made to search the person who had sold the charas to the accused person. Accused persons were apprised about the commission of offence and punishment prescribed under the NDPS Act. Separate arrest memos were prepared which were duly signed by the accused persons. During the course of Jamatalashi of accused Tarun Kumar, two barrier slips were recovered and the same were also taken into possession. On 22.11.2007, HC Moti Ram came to Police Station Kullu along with accused persons and case property for the purpose of resealing before SHO Pratap Singh. SHO Pratap Singh resealed the case property and deposited the same in Malakhana Kullu with MHC Manoj Kumari. Entry to this effect was made in Malakhana Register by MHC Manoj Kumari. During the course of investigation, accused Jugal Kishore made disclosure statement that charas had been purchased from holder of Mobile No. 93187-47963. Accused Naresh Kumar was arrested on 10.12.2007 and on 13.12.2007 he made a disclosure statement while in police custody that mobile phone No. 93187-47963 has been thrown in river Parbati Manikaran out of fear when he came to know about the recovery of charas which had been sold by him to the other accused. On the basis of the said disclosure statement, he lead the police party to Manikaran bus stand near bridge and identified the place from where mobile phone No. 93187-47963 was thrown in river Parbati. MHC Manoj Kumari had sent sample along with relevant documents on 22.11.2007 to FSL, Junga through Constable Sukh Dev. He obtained the receipt from the laboratory and handed back the same to MHC Manoj Kumari. The case property was not tampered at any stage. HC Moti Ram also prepared a special report and handed over the same to Dy.SP Kullu. Report of FSL, Junga was received according to which contents of the sample were found to be that of charas. After completion of investigation, the accused were charged for the offences punishable under Section 20 and 29 of the NDPS Act to which they pleaded not guilty and claimed trial.

5. In order to substantiate its case, the prosecution, in all, examined 13 witnesses.

6. PW1, HHC Lal Singh, deposed that on 21.11.2007 he alongwith HHC Jai Krishan, Constable Chaman Lal and HC Moti Ram were present at Samod Nalla in connection with nakabandi. At around 5:00 a.m., one vehicle came from Manikaran side and the same was signaled to stop with the aid of torch. The registration number of the said vehicle was DL-2-CW-1248 which was Santro Car. On questioning, driver of the car has disclosed his name as Tarun Kumar resident of Delhi. The second person who was occupying the seat near the driver disclosed his name as Jugal Kishore resident of Palampur. The vehicle was checked by HC Moti Ram and on search one attaché was found having been kept near the feet of accused Jugal Kishore. The attaché was black in colour and it was having a zip and there was a sticker of RCM on the same. He further deposed as under:- **"The attaché was checked by HC Moti Ram and it was found containing 12 packets having been wrapped with the aid of cello tape khakhi in colour. One packet was opened and it was found containing black coloured substance. This substance was in the shape of chapattis, chocolate, sticks and balls. This substance was emitting smell of charas. It was secluded place. There was darkness on the spot. No independent person was present on the spot. Further proceedings could not be conducted on the spot due to darkness."** He also deposed that both the accused along with attaché and

the recovered charas were brought to Police Post, Manikaran in the Santro car and thereafter HC Moti Ram obtained scale and weights from HHC Chander Prakash. HC Moti Ram again opened the attaché in Police Post Manikaran and 12 packets lying in the attaché were again checked and these packets were found in the form of chapattis, chocolates, balls and sticks. The weight of the recovered charas was 7Kg 400 grams. Two samples of charas of 25 grams each were separated from recovered charas and thereafter sealed in separate parcels and remainder was put back in the same 12 packets and the packets were put back in the same attaché and were sealed in separate parcels by affixing three seal impressions of 'T'. NCB-I in triplicate was filled on the spot and samples of seal impressions 'T' were obtained separately and Ext. PA was handed over to him. Search and seizure memo was prepared by HC Moti Ram at the spot. The car was taken into possession by HC Moti Ram. Rukka was prepared by HC Moti Ram and was sent to PS Kulu through HHC Jai Krishan. Thereafter, the accused were brought to the spot by HC Moti Ram. PW1 and Constable Chaman Lal were present with HC Moti Ram who had accompanied them to the spot. Site plan of occurrence was prepared by HC Moti Ram and thereafter all of them returned back to PP Manikaran.

7. PW2, HHC Jai Krishan, also corroborated the story of prosecution. In his statement he has deposed as under:- **"HC Moti Ram opened zip of attaché and it was found containing 12 packets having been wrapped with the aid of cello tape khakhi in colour. One packet was opened and checked and it was found containing black coloured substance in the shape of chapattis, balls and sticks. This packet was emitting smell of charas. The attaché was closed by HC Moti Ram. It was secluded place and it was dark on the spot and as such, it was not possible to conduct further proceedings on the spot."**

8. PW3, HHC Chander Prakash, deposed that he was posted as HHC at PP Manikaran w.e.f. August, 2005 to June, 2008. On 21.11.2007, HC Moti Ram obtained scale and weights from him. The scale was manual and weights were from the range of 5 grams to 1 Kg. He was also associated with the investigation of the case by HC Moti Ram. He further stated that one attaché of black in colour was opened in PP Manikaran in his presence by HC Moti Ram. Accused persons were also present at PP Manikaran and besides them Constable Chaman Lal, HHC Lal Singh and HHC Jai Krishan were also present. The attaché was found containing 12 packets which were wrapped with cello tape khakhi in colour. Each packet was checked and opened and the same were found containing charas in the form of chapattis, chocolates, balls and sticks. The recovered charas was weighed and it was found to be 7Kg 400 grams. He has further deposed as under:- "**Two samples of charas were separated from the recovered charas and were sealed in separate parcels. Each sample was 25 grams in weight. Remainder of charas was put in the same attaché and 12 empty packets were also put in the same attaché and were sealed in separate parcel. Three seal impressions of T were affixed on each sample parcel and bulk parcel was sealed by affixing 9 seal impressions of T. NCB-I in triplicate were filled by HC Moti Ram. Samples of seal impressions T were obtained separately and one such sample is Ext. PA. Seal after use was handed over to HHC Lal Chand."** He further deposed that on 13.12.2007 accused Naresh Kumar had given disclosure statement to HC Moti Ram in his presence as well as in the presence of Constable Chaman Lal to the effect that he had thrown his mobile phone in river Parbati. This statement was reduced into writing which was signed by him, Constable Chaman Lal and the accused. He also stated that during police custody accused Naresh Kumar disclosed that he had been receiving constant calls on his mobile phone to the effect that charas had been recovered by the police from the possession of accused Tarun Kumar and Jugal Kishore and thereafter he had thrown the said mobile phone in river Parbati. Pursuant to this disclosure statement, accused Naresh Kumar took the police to Manikaran and identified the place where the mobile phone was thrown in river Parbati by him.

9. PW4, HC Moti Ram, also corroborated the case of the prosecution. In his statement he has deposed as under:- "**The Centro car was checked with the light of torch. One attachee black in colour was found having kept near the feet of Jugal Kishore. Accused Jugal Kishore was asked by me to get his attaché checked. The smell of charas was**

emitting from the attaché. Attache was opened and one packet was also opened and it was found containing black coloured substance. This black coloured substance had been kept in the packet in the shape of sticks, chocolates, chapattis and balls. It was secluded place. No independent person was present on the spot. It was dark on the spot and as such, further proceedings could not be conducted there. Thereafter, I along with case property, accused persons and police officials returned back to PP Manikaran in the centro car. In police post Manikaran, attaché was reopened. 12 packets containing charas were found in the attaché. Scale and weights were obtained from HHC Chander Prakash. Recovered charas was weighed and it was found to be 7Kg and 400 grams."

10. PW5, Constable Inder Singh, had brought the Rojnamcha of PP Manikaran. PW6, Gita Gopal, was the caretaker of Reliance Tower at Manikaran who has deposed that his mobile phone number is 98170-06026 and that of accused Naresh Kumar mobile number was 98173-32474. He has further stated that he knew accused Naresh Kumar and used to converse with him on telephone. He was declared as a hostile witness.

11. PW7, MHC Manoj Kumari deposed that on 22.11.2007, SHO Pratap Singh deposited three sealed parcels, NCB-I in triplicate, samples of seal impressions T and H and other concerned documents with her. Necessary entries were made by her in Malkhana Register and on the same day she handed over the same to Constable Sukh Dev vide RC No. 316/2007 with a direction to deposit the same at FSL, Junga. She also deposed that case property remained intact in her custody and the same was not tampered at any stage.

12. PW8, Alok Kapoor, was the Customers' Care Executive in Reliance Info Ltd. Shimla who provided necessary detail calls of mobile No. 93187-47963. PW9, Ajay Kumar, proved the toll tax receipt Ext. PM which had been issued by him. He was serving as a Supervisor at Toll Tax Barrier at Swarghat.

13. PW10, Constable Sukh Dev, deposed that on 22.11.2007 MHC Manoj Kumari had handed over sealed sample parcels, samples of seal impressions T and H and other documents vide RC No. 316 of 2007 with a direction to deposit the same at FSL, Junga. MHC Manoj Kumari had handed over two sealed sample parcels containing 25 grams of charas each to him for being taken to FSL, Junga which were deposited at FSL, Junga on 23.11.2007 and receipt obtained from the laboratory was handed over to MHC Manoj Kumari at PS Kullu. He was declared as a hostile witness and in his cross-examination he stated that only 25 gram charas had been handed over to him by MHC Manoj Kumari for being taken to FSL, Junga.

14. PW11, HC Balbir, proved the copy of special report Ext. PZ which was received by Dy.SP Kullu and who after appending his endorsement handed over the same to him.

15. PW12, Inspector Pratap Singh, stated that on 21.11.2007 rukka Ext. PG was received at PS Kullu through HHC Jai Krishan and on the basis of which FIR Ext. PA/C was registered at PS Kullu. He also stated that on 22.11.2007 at around 9:30 a.m. HC Moti Ram had produced three sealed parcels, NCB-I in triplicate and case property for the purpose of resealing. He resealed bulk parcel by affixing nine seal impressions of H and each sample parcel was resealed by affixing three seal impressions of H. Bulk parcel had already been sealed by affixing nine seal impression of T and one sample parcel was bearing three seal impressions of T and second sample parcel was bearing three seal impressions of seal T.

16. PW13, SI Ramesh Chand, had recorded the statement of witness Gita Pal under Section 161 Cr.P.C. and had taken into possession receipt book from Gara Mora Barrier, Distt. Bilaspur vide Ext.PA/G.

17. The learned Trial Court framed the following points for the purpose of determination:-

> "1. Whether on 21.11.2007, at 5.00 am, at Samod nullah near Manikaran, accused Jugal Kishore and Tarun Kumar were found in the conscious and

exclusive possession of 7KG and 400 grams of charas while transporting the same in vehicle No. DL.2CW-1248, as alleged?

2. Whether on 21.11.2007, at Manikaran, accused Naresh Kumar had committed criminal conspiracy with co-accused Jugal Kishore and Tarun Kumar to transport 7 KG and 400 grams of charas in vehicle No. DL.2CW-1248 as alleged?

3. Whether link evidence is present and complete in order to connect the recovered stuff with the sample having been analyzed in the laboratory?

4. Whether there is non-compliance of provisions of Section 42 of NDPS Act?

5. Whether there is non-compliance of provisions of Section 50 of NDPS Act?

6. Final order."

18. These points were answered as under by the learned Trial Court:-

"Point No.1. No.

Point No.2. No.

Point No.3. No.

Point No.4. No.

Point No.5. No.

Point No.6: All the accused are acquitted per operative portion of the judgment."

19. Thus, the learned Trial Court on the basis of material produced on record by the prosecution concluded that the prosecution had failed to bring home the guilt of the accused for the commission of the offences punishable under Section 20 and 29 of the NDPS Act beyond any reasonable shadow of doubt and accordingly it acquitted all the accused by giving them benefit of doubt.

20. Mr. V.S. Chauhan, learned Additional Advocate General has strenuously argued that the judgment passed by the learned Trial Court whereby it had acquitted the accused for committing offences under Section 20 and 29 of the NDPS Act, 1985 was not sustainable in the eyes of law. Mr. Chauhan submitted that the learned Trial Court had acquitted the accused persons on flimsy grounds on the basis of hypothetical reasoning and had erred in not appreciating the evidence on record in the correct perspective. According to him, the reasoning returned by the learned Trial Court was manifestly unsustainable and there was no occasion for the learned Trial Court to have had discarded the consistent testimony of the prosecution witnesses on material points. According to Mr. Chauhan, the learned Trial Court had wrongly brushed aside the cogent and trustworthy evidence of PW No. 1, PW No. 2 and PW No. 4 by holding that there were contradictions in their testimonies which were fatal to the case of the prosecution, whereas the testimony of the said witnesses was cogent, reliable and there were no major contradictions so as to disbelieve their statements. He further argued that the learned Trial Court had erred in coming to the conclusion that PW4 was not supported by PW1 and PW2. According to him, both PW1 as well as PW2 had categorically stated that when the attaché case was checked, 12 packets having been wrapped with the aid of cello tape, khakhi in colour were found and on opening one packet black coloured substance in the shape of chapattis, chocolate, sticks and balls was found and the substance recovered was emitting the smell of charas. He further contended that both PW1 and PW2 had categorically stated that the place where the recovery was effected was secluded place and no independent witness was available and due to darkness the proceedings could not be carried out at the spot. According to him, the testimony of all these witnesses was clear and categoric and there were no material contradictions and the prosecution in fact had been successful in bringing home the guilt of the accused. He further argued that the learned Trial Court has heavily relied upon minor discrepancies in the statements of PW1, PW2 and PW4 for disbelieving the case of the prosecution. He further urged that the conclusions arrived at by the learned Trial Court to the effect that accused Naresh Kumar was

not involved and that the charas had not been purchased from him by accused Jugal Kishore and Tarun Kumar was contrary to the records. According to him, it stood established from the record that Naresh Kumar was the holder of mobile No. 93187-47963 and it stood proved that he was involved in the business of charas and when he came to know that accused Jugal Kishore to whom he sold the charas wascaught by police he threw the said mobile phone in river Parbati. Therefore, he urged that judgment passed by the learned Trial Court was liable to be set aside and the accused were liable to be convicted for offences with which they were charged.

21. Mr. Anoop Chitkara, learned counsel for respondents has argued that there was no merit in the appeal filed by the State and the judgment passed by the learned Trial Court was neither perverse nor were the findings contrary to material on record produced by the prosecution. According to him, the findings arrived at by the learned Trial Court were based on material placed on record by the prosecution and the learned Trial Court had rightly come to the conclusion that the prosecution had failed to bring home the guilt of the accused. According to him, the accused persons were falsely implicated to save one Mr. Ronit who happened to be an influential person and because accused persons were being implicated by concocting a story, it was for this reason that the prosecution had not associated any independent witnesses at the time of search etc. Further according to him, the learned Trial Court had rightly come to the conclusion that there were major contradictions in the statements of PW1, PW2 and PW4 which were fatal to the case of the prosecution and according to him the State had not been able to make out any case so as to warrant interference in the well reasoned judgment passed by the learned Trial Court. Thus, according to him, it could not be said that the findings which were returned by the learned Trial Court were either perverse or were not borne out from the record of the case. Mr. Chitkara, thus prayed that there was no merit in the appeal and the same was liable to be dismissed and the judgment passed by the learned Trial Court was liable to be upheld.

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

23. As per the case of prosecution, the alleged incident took place on 21.11.2007 at around 5:00 a.m. HC Moti Ram signaled the Santro Car to stop which was being driven from Manikaran side by accused Tarun Kumar. According to PW1, the vehicle was checked by HC Moti Ram and one attaché was found kept near the feet of accused Jugal Kishore. This attaché was checked by HC Moti Ram and it was found containing 12 packets wrapped with the aid of cello tape and when one packet was opened, it was found containing black colour substance which was emitting smell of charas. He further deposed that it was a secluded place and there was darkness on the spot and no independent witness was present on the spot. Thus, it is evident from his statement that the attaché was opened by HC Moti Ram at the spot itself and 12 packets were found in the same out of which one was opened at the spot itself.

24. PW2, HHC Jai Krishan, has also deposed that the car was signaled to stop by HC Moti Ram and when HC Moti Ram checked the car with the aid of torch, one attaché was found lying near the feet of accused Jugal Kishore which was opened by HC Moti Ram in which 12 packets were found wrapped with cello tape, out of which one packet was opened which was containing black colour substance and was emitting smell of charas. He has thereafter deposed that the attache was closed by HC Moti Ram and as it was a secluded place and it was dark, therefore, it was not possible to conduct further investigation on the spot. Thus, according to this witness also the attaché was opened by HC Moti Ram on the spot and out of which 12 packets was found inside the attaché and one packet was opened on the spot.

25. Now when we see the statement of PW4 Moti Ram, his deposition is in total contrast and total contradictions to what has been mentioned by PW1 and PW2. According to him, when the car in issue was checked with the help of torch, one attaché black in colour was found kept near the feeet of accused Jugal Kishor and accused was asked by him to get his attaché checked. He further deposed that the smell of charas was emitting from the attaché. In

other words according to PW4 HC Moti Ram even before the attaché in issue was opened he was aware of the fact that the smell of charas was emitting from the same. He has further deposed that thereafter the attaché was opened and one packet was also opened and it was found containing black colour substance. Thereafter, according to him, as it was a secluded place and no independent person was present on the spot and it was dark, he along with accused persons and police officials returned back to PP Manikaran in the Santro car with the case property and in Police Post Manikaran attaché was opened and 12 packets of charas was found in the attaché.

26. Thus, it is clear that PW4 has not stated that at the spot when the attache was opened, 12 packets were found inside the attaché. According to him, the attaché was opened and one packet was also opened. He has not mentioned the number of packets which were found in the attaché at the spot. According to him, it was in the police post when the attaché was reopened 12 packets containing charas were found in the same.

27. However, PW1 and PW2 are very categoric that when PW4 opened the attaché at the spot it was found containing 12 packets which were wrapped with cello tape khakhi in colour. PW1 and PW2 do not mention anywhere that smell of charas was emitting from the attaché, whereas PW4 is very categoric that even before the attaché was opened, the smell of charas was emitting from the same.

28. PW1, PW2 and PW4 in unison have stated that the spot from where the car was stopped was a secluded place due to which no independent witness could be associated. It is further their case that as it was dark, therefore, no further investigation could be carried out at the spot and in these circumstances HC Moti Ram brought the accused in the car along with other police officials and the case property to PP Manikaran. Further proceedings in the matter according to the prosecution were thereafter conducted at PP Manikaran. If the version of the prosecution has to be believed then the prosecution has miserably failed to explain as to why no independent witness was associated by the police in police post Manikaran. Even if we were to believe the story of the prosecution that the place where the car was stopped was secluded, therefore, no independent witness could be associated, we fail to understand as to what prevented the police from associating independent witness at PP Manikaran. By no stretch of imagination it can be said that Manikaran is a secluded place or that no independent witness whatsoever was available in and around PP Manikaran. All these facts when taken together shroud the case of the prosecution with suspicion.

29. Similarly, perusal of Ext. PB i.e., search and seizure memo will demonstrates that there is no mention in the same that 12 packets were found inside the attache case when it was opened which were wrapped with cello tape khakhi in colour. What has been stated by PW1, PW2 and PW4 in their depositions is not borne out from the contents of Ext.PB. In their statements, these witnesses have categorically stated that **bulk parcel was sealed by affixing nine seals of impression 'T' whereas in Ext. PB it is mentioned that bulk parcel was sealed with three seal impressions of 'T'. This discrepancy also remains totally unexplained by the prosecution**.

30. The consistency in the inconsistencies of the version of PW1, PW2 and PW4 is strengthened by the mode and manner in which they have deposed about the manner of the arrival of the police party at PP Manikaran from the spot where the car was stopped by the police party. PW1, HHC Lal Singh, has deposed that in police post Manikaran proceedings were conducted in the office room and one police Constable was present at the room when they reached the police post. PW2, HHC Jai Krishan has deposed that no police official was present in the room when they reached PP Manikaran and the office room was unbolted by HC Moti Ram. HC Moti Ram stated that HHC Chander Prakash was present in the Police Post when he reached at the said police post. This inconsistency in the statement of police witnesses gains relevance and importance keeping in view the fact that no independent witness has been associated by the police in the course of proceedings conducted by the police party in PP Manikaran. Though the learned Additional Advocate General has tried to submit that these contradictions are minor and

cannot be given so much credence so as to disbelieve the version of the prosecution, however, we are afraid that the above mentioned contradictions when read in conjunction with other contradictions cannot be termed to be minor. The end result of this is that the story of the prosecution cannot be believed to be true because due to the inconsistencies in the statements of PW1, PW2 and PW4 it cannot be said that these witnesses are trustworthy and defence has not been able to impinge the truthfulness of these witnesses. As far as this proposition of law is concerned, that conviction can be based solely on the testimony of police witnesses, there is no dispute qua the same. However, the fact of the matter still remains that conviction can be based on the sole testimony of police witnesses provided the said testimonies are found to be cogent, truthful and trustworthy.

31. Another important aspect of the matter is the specific defence taken by the accused persons to the effect that on 20.11.2007 they had visited Manikaran Gurudwara where one Mr. Ronik met them who arranged their stay in the said Gurudwara. According to the accused, said Mr. Ronik asked them to take him to Delhi the next morning and he was to pay them Rs. 2000/- for the said purpose. Mr. Ronik had given them his mobile number and when they contacted him in the morning and asked him to come to Gurudwara immediately, he came along with some other person in the parking complex of the Gurudwara along with one attaché case, briefcase and bag. Two police personnel came from bridge side and when Mr. Ronik saw police personnel, he left the aforesaid articles on the spot and fled away. Accused told the police that the attaché case, briefcase and bag belong to Mr. Ronik. The attaché case was locked. The same was broken by the police and accused persons were taken to PP Manikaran for questioning on the basis of suspicion and thereafter they have been falsely implicated in the case.

32. PW12, Pratap Singh, In-charge of PS Kullu at the relevant time, has admitted in his cross examination that SI Ramesh was directed by him to investigate qua the involvement of Ronik in the present case. The fact that involvement of Ronik was investigated in the matter raises doubt with regard to the story of the prosecution, as has been propounded and gives some credence to the theory which has been put forth by the accused.

33. All these facts when taken together, coupled with non involvement of any independent witness at PP Manikaran raises serious doubt about the truthfulness of the story of the prosecution.

34. Similarly, according to the prosecution accused Jugal Kishore and Tarun Kumar had purchased charas from co-accused Naresh Kumar holder of mobile No. 93187-47963. HC Moti Ram has stated on oath that during the course of investigation it was revealed that charas was purchased from the holder of above mobile phone number. Naresh Kumar was arrested during the course of investigation and his disclosure statement is Ext.PC in which he has stated that the mobile set in issue was thrown by him at Manikaran in Parbati River and he could get the place identified. Incidentally, this mobile set was not recovered. Cross-examination of PW4 Moti Ram reveals that he has admitted that the said mobile set was in the name of one Dalip Kumar. Said Dalip Kumar has not been examined on oath by the prosecution and it stands established on record that Naresh Kumar was not the holder of mobile phone.

35. Further PW4, HC Moti Ram has testified on oath that on 22.11.2007 he came to PS Kullu along with the accused persons and case property and case property was produced before SHO Partap Singh. PW12 SHO Partap Singh has stated that HC Moti had produced three parcels, NCB-I in triplicate and the accused persons before him. The case property was produced for the purpose of resealing and he resealed the bulk parcel by affixing nine seal impressions of H. Each sample parcel was sealed by affixing three seal impression of H and bulk parcel had already been sealed with nine seal impression of 'T'. He deposited the said articles with MHC Manoj Kumari. Manoj Kumari has entered the witness box as PW7 and has stated that on 22.11.2007 SHO Partap Singh deposited three sealed parcels, NCB-I in triplicate, samples of seal impression T and H and other concerned documents with her and that bulk sealed parcel was bearing 9 seal impressions of T and sample parcels were also bearing three seal impressions of T

on each parcel. **Surprisingly, Ext.PB seizure memo shows that the bulk parcel was bearing only three seal impression of T. It is categorically mentioned in this documents that HC Moti Ram had sealed bulk parcel by affixing three seal impression of seal T**. If that is the case, then that bulk parcel which was bearing three seal impression of T has not been deposited with the Malkhana and it is some other parcel which bears nine seal impressions of T which has been deposited in the Malkhana. Further PW10 Constable Sukhdev who has deposited the same at FSL, Junga has mentioned in his cross-examination that two sealed sample parcels were handed over to him by MHC Manoj Kumari for depositing the same at FSL, Junga. Thereafter, when he was declared as a hostile witness and was subjected to cross-examination, he changed his version and stated that one sample was taken by him to FSL, Junga which was handed over to him by MHC Manoj Kumari. However, in the statement recorded under Section 161 Cr.P.C. he states that he had taken two samples for the purpose of examination to FSL Junga. MHC Manoj Kumari has deposed that only one parcel had been sent to the laboratory. This also demonstrates that again there are major contradictions in the statements of PW7 MHC Manoj Kumari and PW10, Constable Sukh Dev. If the report of FSL Junga is read, it is mentioned in column No. 4 of the said report Ex. PP that sample was received in the laboratory on 22.11.2007 whereas PW10, Constable Sukh Dev, has deposed that he has deposited the sample on 23.11.2007. Further SHO Partap Singh has deposed that he resealed the sample on 22.11.2007.

36. The learned Trial Court has also dealt with these aspects of the matter in a threadbare manner and thereafter it has come to the conclusion that the prosecution has not been able to bring home the guilt of the accused beyond reasonable doubt.

37. According to us, the conclusions so arrived at by the learned Trial Court cannot be faulted. It is apparent and evident from the discussion made hereinabove that the case of the prosecution is full of loopholes. There are major contractions and inconsistencies in the story put forth by the prosecution through its star witnesses PW 1, PW2 and PW4. No plausible explanation has been given by the prosecution as to why no independent witness was associated at PP Manikaran. The prosecution has miserably failed to link co-accused Naresh Kumar with the happening of the alleged incident on the morning of 22.11.2007. Therefore, in our considered view it cannot be said beyond reasonable doubt that the prosecution on the basis of material produced on record has been able to prove its case against the accused. In these circumstances, the judgment passed by the learned Trial Court whereby the accused have been acquitted of the charges alleged against them cannot be faulted with. Therefore, we do not find any reason to interfere with the well reasoned judgment passed by the learned Trial Court and accordingly the present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Sunita Kumari .....Petitioner.

Versus

State of Himachal Pradesh & others .....Respondents.

CWP No. 7004 of 2014
Reserved on: 14.06.2016
Decided on: 16.06.2016

Constitution of India, 1950- Article 226- Petitioner is a widow and belongs to BPL family- her case for appointment as Part Time Water Carrier was forwarded by Pardhan, School Management Committee- her case was approved by State Government but respondent No. 5 was selected in place of the petitioner- held, that recommendation was made on 4.8.2014 and respondent No. 5 was appointed as part Time Water Carrier on 2.8.2014- respondent No. 5 was also a widow and

she belonged to BPL family- respondent No. 5 is also suffering from breast tumour- appointment of respondent No. 5 was made as per policy- writ petition dismissed. (Para-11 to 14)

For the petitioner:	Mr. Tara Singh Chauhan, Advocate.
For the respondents:	Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for respondents No. 1 to 4. Mr. Trilok Jamwal, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner for directing respondents No. 1 to 4 for considering her case for appointment as Part Time Water Carrier and quashing and setting aside the appointment of respondent No. 5 as Part Time Water Carrier.

2. As per the petitioner, she is a widow and belongs to BPL family and her case for appointment as Part Time Water Carrier in Government Senior Secondary School, Saroh, Tehsil Bangana, District Una, H.P., was forwarded by Pardhan, School Management Committee. The request of School Management Committed was approved by the State Government vide letter dated 30.06.2014. Conversely, respondent No. 5, Smt. Parmila Devi, was selected in place of the petitioner, who was not eligible for appointment as Part Time Water Carrier, as the petitioner's appointment had already been approved.

3. It is further averred by the petitioner that husband of respondent No. 5 is alive and, therefore, benefit of Rule 12 of Part Time Water Carrier Scheme, 2011, cannot be extended to her. As per the petitioner, her case was approved on 02.06.2014 for appointment as Part Time Water Carrier and her selection was never withdrawn by the respondents, therefore, appointment of respondent No. 5 and not of the petitioner is against law.

4. The petitioner further averred that respondents No. 2 to 4 did not issue appointment letter to her, despite the approval of her candidature and kept the matter pending, whereas they instantly issued appointment letter to respondent No. 5. The action of respondents No. 1 to 4 is highly discriminatory, unfair and arbitrary. The petitioner is a widow and she has to maintain two children.

5. On the other hand, respondents No. 1 to 4 have stated in their reply that respondent No. 3, being the Appointing Authority, started the process for appointment of respondent No. 5, vide letter dated 23.07.2014, and respondent No. 5 was asked to submit the desired documents for appointment as Part Time Water Carrier, as her appointment was approved by respondent No. 2 vide letter dated 10.07.2014. The approval of appointment of petitioner was received in the office of respondent No. 3 on 01.08.2014 through fax, and the petitioner could not be appointed as her approval was received late. The appointment of respondent No. 5 was made purely on first come first serve basis.

6. Respondents No. 1 to 4 have further averred that as per the policy, respondent No. 5 was eligible for being appointed as Part Time Water Carrier, as she is a widow and also belongs to low income group. Respondents No. 1 to 4 have prayed for dismissal of the writ petition.

7. Respondent No. 5 has also filed reply to the writ petition and it is contended by her that she is a widow belonging to BPL category. Her case for appointment as Part Time Water Carrier was approved by the Government as per the Policy and consequently she had furnished all the required documents to respondent No. 3 and after verification of the documents, she was appointed on 02.08.2014. She joined as such on 04.08.2014 and till date she is discharging the

duty of Part Time Water Carrier. It is also averred that respondent No. 5 has a child of three years of age. She is 12th pass and has also done one year computer course.

8. Respondent No. 5 further submitted that she had applied for appointment as Part Time Water Carrier and her name was approved for appointment. Consequently, respondent No. 2 issued direction to respondent No. 3, being the Appointing Authority, to verify her documents. It is only after scrutiny of her documents that she was found eligible for being appointed as Part time Water Carrier and she was appointed as such on 02.08.2014 and she joined on 04.08.2014. The appointment of the petitioner was made solely on first come first serve basis and under the provisions of Rule 12 of Part Time Water Carrier Scheme, 2011.

9. As per respondent No. 5 she, as per the Policy, is eligible for the post of Part Time Water Carrier, as she is widow and belongs to low income group. Respondent No. 5 also submitted that she is suffering from breast tumour and is under treatment from Indira Gandhi Medical College, Shimla.

10. I have heard learned counsel for the parties and have gone through the record in detail.

11. The petitioner belongs to BPL family and she is widow and having two children who are dependent upon her. On 04.08.2014, the Pardhan, School Management Committee, Government Senior Secondary School, Saroh, Tehsil Bangana, District Una, H.P. has recommended to the Deputy Director Higher Education, Una, that the petitioner be appointed as Part Time Water Carrier, as her name had been approved by Hon'ble Chief Minister of Himachal Pradesh for the said post. Annexure P-6 shows that Hon'ble Chief Minister had approved the appointment of the petitioner on 02.05.2014, but it is on record that the Pardhan, School Management Committee, has issued the recommendation only on 04.08.2014 to the Deputy Director, Higher Education, Una. At the same point of time, the Deputy Director, Higher Education, Una, made the appointment of respondent No. 5 on 02.08.2014 as Part Time Water Carrier in Government Senior Secondary School, Saroh, Tehsil Bangana, District Una, H.P. As per respondents No. 1 to 4, the process for the appointment of respondent No. 5 was started on 23.07.2014, as per the approval received in the office of respondent No. 3 on 10.07.2014, from the office of respondent No. 2, and the approval for the appointment of the petitioner was received in the office of respondent No. 3 on 01.08.2014. As the approval for the appointment of respondent No. 5 was received prior to the approval of the petitioner, she was ordered to be appointed by respondent No. 3.

12. The reply is supported by the affidavit of Director Higher Education. There is also nothing on record to show that the Director Higher Education was having any malice or ill-will towards the petitioner. It is observed that the petitioner as well as respondent No. 5, both are widows, belonging to BPL families and are nearly similarly situated except that the petitioner has to feed two children whereas respondent No. 5 has to feed a child and she is also suffering from breast tumour. The relevant extract of the policy (Part Time Water Carrier Scheme, 2011), is extracted as under:

> ***"The Government will have the power to appoint any candidate as Part Time Water Carrier on compassionate ground without following the selection process if the candidate is below the poverty or has a Low Income Certificate issued by the Naib Tehsildar, Tehsildar, SDO © or executive Magistrate of the concerned area and if the candidate is a:***
>
> ***(i) widow, or***
>
> ***(ii) Member of family living in extreme indigent conditions. Family includes father, mother and their children (This certificate will be issued not below the rank of SDO (C) Or***
>
> ***(iii) Women deserted by the husband or otherwise destitute, or***
>
> ***(iv) Handicapped persons; or***

(v) An orphan"

13. As discussed above, respondents No. 1 to 4 issued the appointment order to respondent No. 5, as her recommendation was received in the office of respondent No. 3 prior in time to the recommendation of the petitioner and the appointment is made as per the Policy referred hereinabove, so it cannot be said that the appointment of respondent No. 5 is against law/rules.

14. In view of the above discussion, the action of respondents No. 1 to 4 cannot be said to be arbitrary, illegal and against the confines of legitimacy or vitiated by any other reason, so there is no reason to quash the appointment of respondent No. 5 and direct respondents No. 1 to 4 to appoint the petitioner in place of respondent No. 5. Being devoid of merits, the writ petition dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

15. The writ petition, so also pending application(s), if any, shall stand(s) disposed of.

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

Bajaj Allianz General Insurance Company Limited ...Appellant.

Versus

Shri Pawan Kumar and others ...Respondents.

FAO No. 16 of 2011
Decided on: 17.06.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that it is not liable to pay compensation- held that offending vehicle was a tractor, which falls within definition of a light motor vehicle- tractor along with trolley was insured with the Insurer- hence, insurer was rightly saddled with liability. (Para-13 to 20)

Cases referred:

Baldev Singh versus Jagdish Chand & another, I L R 2016 (II) HP 977

Oriental Insurance Company versus Gulam Mohammad (since deceased) & others, Latest HLJ 2014 (HP) 244

Joginder Singh @ Pamma versus Vikram @ Vickey and others, Latest HLJ 2014 (HP) Suppl. 292

Oriental Insurance Company versus Sudesh Kumari and others, 2014 (2) Shim. LC 918

For the appellant: Mr. Aman Sood, Advocate.

For the respondents: Mr. Karan Singh Kanwar, Advocate, for respondent No. 1.
Mr. Rajesh Verma, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is judgment and award, dated 30th July 2010, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 41-N/2 of 2008, titled as Sh. Pawan Kumar versus Lalit Pandey and others, whereby compensation to the tune of ₹ 2,65,849/- 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-injured and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimant-injured, 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-insured has questioned the impugned award on the ground that the owner-insured has committed breach in terms of the mandate of Sections 147 to 149 of the Motor Vehicles Act, 1988 (for short "MV Act") read with the terms and conditions contained in the insurance policy.

4. Thus, the only question to be determined in this appeal is – whether the Tribunal has rightly saddled the appellant-insurer with liability?

5. In order to determine this issue, it is necessary to give a flashback of the case, the womb of which has given birth to the instant appeal.

6. The claimant-injured invoked the jurisdiction of the Tribunal for grant of compensation on the ground that he became the victim of a motor vehicular accident, which was allegedly caused by the driver, namely Shri Chottan Singh, while driving tractor, bearing registration No. HP-17B-9546 on 11th December, 2006, at about 8.30 P.M. near Batapul, Tehsil Paonta Sahib, District Sirmaur.

7. The claim petition was resisted by the respondents on the grounds taken in the respective memo of objections.

8. On the pleadings of the parties, following issues came to be framed by the Tribunal on 26th November, 2008:

> *"1. Whether the petitioner sustained injuries in an accident, which was the result of rash and negligent driving of the vehicle by respondent No. 2, as alleged? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation the petitioner is entitled to and from whom? OPP*
>
> *3. Whether the petition is not maintainable in the present form? OPR-1& 2*
>
> *4. Whether the petition is bad for non-joinder of necessary parties? OPR-1&2*
>
> *5. Whether the driver was not holding an valid and effective driving licence at the time of the accident? OPR-3*
>
> *6. Whether the driver of the vehicle was being driven in violation of terms and conditions of the Insurance Policy at the relevant time? OPR-3*
>
> *7. Relief."*

9. Parties have led evidence.

Issue No. 1:

10. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant-injured has proved issue No. 1, which is not in dispute. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issues No. 3 and 4:

12. It was for respondents No. 1 and 2 in the claim petition, i.e. the owner-insured and the driver of the offending vehicle, to prove issues No. 3 and 4, have not led any evidence to this effect, thus, have failed to discharge the onus. They have not questioned the findings made

by the Tribunal. Accordingly, the findings returned by the Tribunal on issues No. 3 and 4 are upheld.

Issues No. 5 and 6:

13. It was for the insurer to prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the offending vehicle and the same was being driven in violation of the terms and conditions contained in the insurance policy, has failed to discharge the onus . The record does disclose that the driver of the offending vehicle was having a driving licence to drive a tractor.

14. The discussion made by the Tribunal in paras 31 to 33 of the impugned award is correct, need no interference for the following reasons:

15. The tractor is a motor vehicle in terms of the definition given in Section 2 (44) of the MV Act, which reads as under:

> *"2. .....*
>
> *(44) "tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller."*

16. It would also be profitable to reproduce the definition of 'trailer' given in Section 2 (46) of the MV Act herein:

> *"2. .....*
>
> *(46) "trailer" means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle."*

17. The argument of the learned counsel for the appellant-insurer that the offending vehicle was being driven in breach of the terms and conditions contained in the insurance policy is devoid of any force for the reason that this Court in **FAO No. 187 of 2010,** titled as **Baldev Singh versus Jagdish Chand & another,** decided on 8th April, 2016, has held that tractor falls within the definition of 'light motor vehicle'.

18. The same principle has been laid down by this Court in the cases titled as **Oriental Insurance Company versus Gulam Mohammad (since deceased) & others,** reported in **Latest HLJ 2014 (HP) 244; Joginder Singh @ Pamma versus Vikram @ Vickey and others,** reported in **Latest HLJ 2014 (HP) Suppl. 292;** and **Oriental Insurance Company versus Sudesh Kumari and others,** reported in **2014 (2) Shim. LC 918.**

19. The insurance policy is on the record as Ext. RW-1/D. While going through the insurance policy, one comes to an inescapable conclusion that the tractor alongwith trolley was insured with the appellant-insurer at the relevant point of time.

20. Having said so, the Tribunal has rightly made the discussion while deciding issues No. 5 and 6. Even otherwise, the appellant-insurer has not led any evidence to prove how the risk of trolley of the tractor was not covered in terms of the insurance policy. Accordingly, the findings returned by the Tribunal on issues No. 5 and 6 are upheld.

Issue No. 2:

21. The quantum of compensation is not in dispute, thus, the same is upheld.

22. In view of the discussions made hereinabove, the appellant-insurer has rightly been saddled with liability and the Tribunal has not fallen in an error.

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 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.

25. 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.

Sh.Devi Singh . .....Appellant.
Versus
Smt. Reeta Devi and others .....Respondents

FAO (MVA) No. 184 of 2010
Date of decision: 17th June, 2016.

Motor Vehicles Act, 1988- Section 149- It was contended that insurer was wrongly discharged from liability- held, that claimant cannot file appeal for discharging the insured from liability- appeal dismissed. (Para-3 and 4)

For the appellant: Mr.H.C. Sharma, Advocate.
For the respondents: Mr. Vaibhav Tanwar, Advocate, for respondent No.1.
Mr. V.S. Chauhan, Advocate, for respondent No.5.
Respondents No. 2 to 4 deleted.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 23.12.2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. in MAC No. 1-S/2 of 2008, titled *Sh. Devi Singh versus Smt. Reeta Devi and others*, for short "the Tribunal", whereby compensation to the tune of Rs.1,91,000/- alongwith interest @ 9% per annum, came to be awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

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

3. The claimant has questioned the impugned award on the ground that the impugned award is inadequate and the Tribunal has fallen in an error in saddling the owner with the liability and discharging the insurer from the liability. The argument though attractive, is devoid of any force.

4. This Court in FAO No. 220 of 2010 titled Smt. Kanta Devi and another versus Smt. Rita Devi and others decided on 29th April, 2016, arising out of the same accident, held that the claimant cannot file appeal for discharging the insured from the liability. The said judgment has attained finality. Thus, the appeal, so far as it relates to saddling the insurer with the liability, merits to be dismissed.

5. The Tribunal has rightly awarded the compensation and made the discussion in paras 24 to 26 of the impugned award. The impugned award is well reasoned needs no interference. The amount awarded cannot be said to be inadequate rather adequate. Thus, the second argument advanced by the learned counsel or the appellant is also rejected.

6. Having said, the appeal is dismissed and the impugned award is upheld.

7. 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.

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

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

National Insurance Company Ltd. ...Appellant.

Versus

Smt. Jhansi Devi and others ...Respondents.

FAO No. 495 of 2010
Decided on: 17.06.2016

Motor Vehicles Act, 1988- Section 166- Compensation of Rs. 13,45,064/- along with interest @ 9% per annum awarded in favour of the claimants - the insurer was saddled with liability- Insured has not questioned the impugned award, thus, the same has attained finality- insurer had opposed the award on the ground that the awarded amount is excessive- held, that Tribunal had fallen in error in awarding interest at the rate of 9% and rate of interest reduced from 9% to 7.5% per annum - Accounts Branch had deducted Rs. 8 lacs towards income tax- awarded amount and interest accrued on the deposits made under the orders of the Court in Motor Accident Claims cases is not liable for income tax - awarded amount be strictly released in favour of the claimants as per terms and conditions contained in the award. (Para- 4 to 11)

Cases referred:

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 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

Court on its own motion vs The H.P. State Cooperative Bank Ltd. and ors, I L R 2014 (V) HP 782

For the appellant: Mr. Lalit K. Sharma, Advocate.

For the respondents: Mr. Ashwani Pathak, Senior Advocate, with Mr. Sandeep K. Sharma, Advocate, for respondents No. 1 to 5.

Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

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

This appeal is directed against judgment and award, dated 7th September, 2010, made by the (Motor Accident Claims Tribunal)-cum-Presiding Officer, Fast Track Court, Mandi,

H.P. (for short "the Tribunal") in Claim Petition No. 117 of 2003/210 of 2005, titled as Smt. Jhansi Devi and others versus Sh. Kamal Kishor and others, whereby compensation to the tune of ₹ 13,45,064/- with interest @ 9% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimants, the driver and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has questioned the impugned award on the ground that the amount awarded is excessive.

4. I have examined the pleadings and gone through the impugned award. It is not the case of the appellant-insurer that the owner-insured has committed any breach, not to speak of willful breach. Thus, the appeal, on the face of it, is misconceived.

5. Learned counsel for the appellant-insurer argued that the amount awarded is excessive. I have gone through the discussions made in paras 18 to 20 of the impugned award and am of the considered view that the amount appears to be meagre, cannot be said to be excessive in any way and merits to be upheld.

6. However, it appears that the Tribunal has fallen in an error in awarding interest @ 9% per annum.

7. 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.

8. Viewed thus, the rate of interest is reduced from 9% to 7.5% per annum from the date of filing of the claim petition till its realization.

9. At this stage, learned counsel for claimants-respondents No. 1 to 5 stated at the Bar that the Accounts Branch of this Registry has deducted about ₹ 8 lacs towards income tax.

10. I deem it proper to record herein that this Court in **CWPIL No. 9 of 2014,** titled as **Court on its own motion versus The H.P. State Cooperative Bank Ltd. and others,** decided on 15th October, 2014, has held that the award amount and interest accrued on the deposits made under the orders of the Court in Motor Accident Claims cases is not liable for income tax.

11. In view of the above, the amount cannot be deducted.

12. Registry is directed to release the entire 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.

13. Having said so, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

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

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

Niru Ram .....Appellant.
Versus
State of Himachal Pradesh & others ....Respondents.

RSA No. 102 of 2004
Decided on : 17.6.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that she had been enjoying her right in the suit land prior to regular settlement without any interruption and she had become owner by way of adverse possession- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that plea of adverse possession cannot be used as sword but can only be used as shield- appeal dismissed.

(Para-5 and 6)

For the Appellant: Mr. Anand Sharma, Advocate.
For the Respondents: Mr. Vivek Singh Attri, Deputy Advocate General for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant Regular Second Appeal stands directed against the impugned judgment and decree rendered by the learned District Judge, Chamba Division Chamba, H.P., in Civil Appeal No. 21 of 2003 of 4.12.2003 whereby it affirmed the judgment and decree of 15.11.2002 rendered in Civil Suit No. 126/98-70/2001 by the learned Sub Judge, Ist Class, Dalhousie, District Chamba H.P.

2. The predecessor-in-interest of the appellant herein (for short "the plaintiff") instituted a suit for declaration and permanent prohibitory injunction in the Court of Sub Judge Ist Class, Dalhousie, District Chamba, H.P qua the suit land comprised in Khasra Nos. 7, 8 and 15 kitta 3 Khatouni No. 4/6 min, situated in Mohal reserve jungle Badei, H.B No. 202 Pargana Chowari, Tehsil Bhatiiyat, District Chamba, H.P (for short the "suit land"). The plaintiff pleaded that she had been enjoying her right in the suit land prior to regular settlement without any interruption and therefore had become owner by way of adverse possession. The State of H.P. contested the suit and filed written-statement. In its written-statement it has taken preliminary objections inter alia maintainability, time barred, non-joinder of necessary parties, locus standi, valuation, jurisdiction and no legal notice being served upon them etc. It is also contended that State is the absolute owner in possession of the suit land. The plaintiffs filed a replication to the written-statement filed by the defendants and reasserted the stand taken in the plaint. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties at contest:-

"1. Whether the plaintiff has become owner of the suit land by way of adverse possession as alleged ?OPP
2. Whether the plaintiff is entitled to a decree for permanent prohibitory injunction as prayed for? OPP
3. Whether the plaintiff has no locus-standi to file the present suit? OPD
4. Whether the suit is not maintainable in the present form? OPD

5. Whether no legal notice has been served upon the defendants No. 1 to 3, if so, its effect? OPD.
6. Whether the suit is bad for non-joinder of necessary parties? OPD
7. Whether the suit is time barred? OPD
8. Whether this Court has no jurisdiction to try the suit? OPD
9. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD
10. Relief."

3. The relief aforesaid stands prayed for before the learned trial Court by the plaintiff against the State of Himachal Pradesh which stands recorded in the apposite revenue record to be holding title qua it. The relief as prayed for by the plaintiff in his suit stood declined to him by the learned trial Court. In an appeal preferred therefrom by the plaintiff before the learned District Judge, Chamba, the latter Court concurred with the findings recorded by the learned trial Court hence proceeded to dismiss the appeal preferred therebefore by the plaintiff. The plaintiff has instituted the instant appeal before this Court assailing the findings recorded by the learned District Judge in his impugned rendition. She however died during its pendency and under the rendition of this Court of 27.8.2013 she came to be substituted by her LRs (appellant herein)

4. Since the appeal stood admitted by this Court on the following substantial question of law, consequently this Court would decide the instant appeal by merely rendering answers thereto.

"a) Whether the learned Courts below have mis- interpreted the documents Ex. P-1, P-2, P-3, P-4, P-5, P-6 which are the Jamabandies with effect from 1956-57 to 1986-87 and Jamabandies PX and PY for the years 1991-92, 1995-96 vide which the possession of the plaintiff has been mentioned as 'Kabza Najaez' and also the oral evidence?"

Substantial question of law:-

5. Vivid pronouncements occur in the Jamabandi qua the suit land comprised in Ex.P-1 and P-2 of the predecessor-in-interest of the plaintiff besides of the plaintiff extantly standing recorded therein to be holding possession of the suit land. However the plaintiff during her life time held unauthorized possession of the suit land and on her demise her LRs who are the appellant herein also hold unauthorized possession thereof. The learned counsel for the appellant with vigor contends before this Court qua the depictions aforesaid in the apposite revenue records of the appellant herein continuously since 1956 through their respective predecessors-in-interest up to now holding unauthorized possession/occupation of government land is perse magnificatory of theirs holding possession thereof with a hostile animus besides with an animus possidendi, possession whereof incessantly continuing since then up to now stands ripened by prescription into "absolute ownership". However the aforesaid address made before this Court by the learned counsel for the appellant is legally unsound besides is bereft of any tenacity rather stands discountenanced by this Court in its rendition reported in 2016(1) Him L.R. 134, the relevant paragraph 12,13 and 14 whereof stand extracted hereinafter, wherein this Court has with formidability rendered a pronouncement of the plea of adverse possession not being open for its standing either reared or canvassed by the plaintiff, contrarily it being available for its being resorted to as a shield by the defendant alone.

"12. The learned District Judge, Kangra returned findings to the effect that the possession of the plaintiffs was never interrupted despite the compromise decree before the Additional District Judge, Dharamshala. According to him, due to long, continuous and recorded possession of more than 12 years, the plaintiffs have acquired title to the suit property by way of adverse possession. The plaintiffs have filed suit for declaration of ownership and also in the alternative for possession based on adverse possession.

13. Their lordships of the Hon'ble Supre Court in the case of Gurdwara Sahib vrs. Gram Panchayat Village Sirthala and another, reported in (2014) 1 SCC 669 have held that even if the plaintiff was found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Their lordships have held as follows:-

"8. There cannot be any quarrel to this extent the judgments of the Courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can se this adverse possession as a shield/defence."

14. Accordingly, in view of the definitive law laid down by the Hon'ble Supreme Court in the judgment cited hereinabove, it is held that the declarative suit filed at the instance of the plaintiffs was not maintainable on the basis of adverse possession. The learned first appellate Court has erred in law by reversing the findings rendered by the learned sub Judge 1st Class (1) Dehra dated 23.4.2002 by declaring the plaintiffs to be owners-n-possession of the suit land by way of adverse possession."

6. While revering the aforesaid mandate of law encapsulated in the aforesaid verdict of this Court, the nursing of the plea of adverse possession by the plaintiff against the defendant whereupon she canvasses of given the aforesaid portrayals qua the suit land in the aforereferred jamabandis of hers with an animus possidendi holding uninterrupted possession of the suit land during her life time and on her demise possession thereof standing likewise held by the appellant herein rendering it to ripen by prescription ensuing from the statutorily prescribed period of limitation elapsing since then uptill now "into absolute title" being neither available to her for espousal in the plaint nor hence evidence if any in consonance therewith as occurs on record is readable rather is oustable.

7. In view of the above, there is no merit in the appeal, the same is accordingly dismissed. Impugned judgments and decrees stand maintained and affirmed. Substantial question of law is answered accordingly. However, the defendants shall not evict the appellant herein from his possession over the suit land unless they initiate appropriate proceedings in accordance with law against the appellant herein. All pending applications stand disposed of accordingly. Records be sent back.

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

FAO No.254 of 2010 with
FAO No.253 of 2010.
Reserved on: 03.06.2016.
Pronounced on:17.06.2016

1. FAO No.254 of 2010

Oriental Insurance Co. Ltd. .....Appellant

Versus

Anjana Sharma and another ..... Respondents

2. FAO No.253 of 2010

Oriental Insurance Co. Ltd. .....Appellant

Versus

Abhinav Pankaj and another ..... Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was driving the Scooty and A was pillion rider - a Jeep coming from opposite side being driven by R rashly and negligently hit the Scooty due to which deceased sustained injuries and succumbed to the same- while pillion rider sustained

multiple injuries- Tribunal allowed the Claim Petition and granted compensation of Rs. 3,39,000/- along with interest at the rate of 6% per annum in favour of the claimant and saddled the insurer with the liability- Tribunal also allowed the Claim Petition and granted compensation of Rs. 99,800/- along with interest at the rate of 6% per annum in favour of the injured and the insurer was saddled with the liability – feeling aggrieved from the awards, appeals were preferred- held, that Tribunal had relied upon the statement of claimant / pillion rider, who appeared as PW-4 and had brushed aside the evidence led by the respondents- Tribunal had not discussed the statements of RW-1, RW-3, RW-4 and RW-5, who are independent witnesses and not related to any of the parties- claimant / pillion rider was an interested witness - an FIR was registered against the driver of the Scooty, whereas, no FIR was registered against the driver of the Jeep- it was duly proved that accident was the outcome of rash and negligent driving of the driver of the Scooty, therefore, the claim petition filed by the mother of the deceased was not maintainable- appeals are allowed, impugned awards are set aside and claim petitions are dismissed.

(Para-17 to 27)

FAO No.254 of 2010

For the appellant: Mr.Deepak Bhasin, Advocate.

For the respondents: Mr.Rajnish Maniktala, Advocate, for respondent No.1.
Mr.S.D. Vasudeva for respondent No.2.

FAO No.253 of 2010

For the appellant: Mr.Deepak Bhasin, Advocate.

For the respondents: Nemo for respondent No.1.
Mr.S.D. Vasudeva for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

By the medium of these appeals, the insurer has challenged two awards, dated 20th March, 2010, passed by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, H.P., (for short, the Tribunal), in Claim Petition No.79-P/II-2006, titled Anjana Sharma vs. Rajinder Kumar and another, (subject matter of FAO No.254 of 2010), and in Claim Petition No.80-P/II-2006, titled Abhinav Pankaj vs. Rajinder Kumar and another, (subject matter of FAO No.253 of 2010), whereby both the claim petitions were allowed and the insurer was saddled with the liability, (for short, the impugned awards).

2. Since both the appeals arise out of one accident, therefore, the same were heard together and are being disposed of by this common judgment.

Brief facts:

3. Claimants in both the Claim Petitions invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short, the Act) for grant of compensation, as per the break-ups given in the respective claim petitions. It was averred that on 6th May, 2005, Sapnesh was driving the Scooty bearing No.HP-39A-3596 and Abhinav Pankaj was pillion rider. At about 3.30 p.m., when they were coming towards Kalu-Di-Hatti from Maranda side, a Jeep bearing registration No.HP-29-1085, coming from opposite side, being driven by its driver, namely, Rajinder Kumar rashly and negligently, hit the Scooty as a result of which, Sapnesh sustained injuries and succumbed to the same, while the pillion rider Abhinav Pankaj sustained multiple injuries.

4. Anjana Sharma, being the mother of deceased Sapnesh, filed claim Petition No.79-P/II-2006, for grant of compensation to the tune of Rs.7.00 lacs, as per the break-ups given in the Claim Petition. The Tribunal, vide the impugned award, allowed the Claim Petition and granted compensation to the tune of Rs.3,39,000/-, with interest at the rate of 6% per annum from the date of institution of the Claim Petition, in favour of the claimant and saddled

the insurer with the liability. Apart from it, costs to the tune of Rs.2,000/- were also awarded in favour of the claimant-mother.

5. Injured Abhinav Pankaj also filed claim Petition No.80-P/II-2006, for grant of compensation to the tune of Rs.4.00 lacs, on account of the injuries sustained by him in the accident. The Tribunal, vide the impugned award, allowed the Claim Petition and a sum of Rs.99,800/-, with interest at the rate of 6% per annum from the date of institution of the Claim Petition, was awarded in favour of the claimant-injured and the insurer was saddled with the liability. In addition, Rs.2,000/- were also awarded as costs in favour of the claimant-injured.

6. The driver/owner of the offending Jeep and the insurer (present appellant) have contested the Claim Petitions before the Tribunal by filing separate replies.

7. The Tribunal, framed almost similar issues in both the Claim Petitions. The issues framed in Claim Petition No.79-P/II-2006 (subject matter of FAO No.254 of 2010) are being reproduced below:

> *"1. Whether deceaed Sapnesh died in motor vehicle accident with vehicle No.HP-29-1085 being driven by respondent No.1 rashly and negligently? OPP*
>
> *2. If issue No.1 is proved in affirmative, whether the petitioner is entitled for compensation, if so how much and from whom? OP Parties.*
>
> *3. Whether the respondent No.1 was holding a valid and effective driving licence at the time of accident? OPR-1*
>
> *4. Whether the jeep in question was being plied in contravention of terms and conditions of insurance policy as alleged? OPR-2*
>
> *5. Whether the petition is not maintainable in the present from as alleged? OPR-1*
>
> *6. Whether the accident was the result of rash and negligent driving of driver of scooty No.HP-39A-3596 as alleged? OPR-1 & 2.*
>
> *7. Relief."*

8. In order to prove their respective claims, parties, more or less, led similar evidence. The Tribunal after examining the evidence and the pleadings of the parties, allowed both the Claim Petitions and awarded compensation as detailed above.

9. Feeling aggrieved, the insurer has questioned the impugned awards on the ground that the Tribunal has fallen into an error in saddling it with the liability. The claimants and the driver/owner/insured have not questioned the impugned awards on any count, thus, the same have attained finality in so far as the impugned awards relate to them.

10. Thus, the only question needs to be determined in these appeals is – Whether the insurer came to be rightly saddled with the liability?

11. During the course of hearing, the learned counsel for the appellant-insurer argued that the deceased was driving the Scooty in a rash and negligent manner and had hit the Jeep bearing No.HP-29-1085, which was stationary at the relevant point of time. The said factum sought to be substantiated from the testimony of RW-3 HC Hari Ram, RW-4 Atma Ram and RW-6 Rajinder Kumar (driver/owner of the offending Jeep). It was also submitted that the Tribunal has wrongly appreciated the statement of PW-4 Abhinav Pankaj and has fallen into an error in relying upon his statement, who also sustained injuries in the accident, in coming to the conclusion that the offending Jeep, at the time of accident, was being driven rashly and negligently by its driver.

12. It was further submitted by the learned counsel for the appellant/insurer that in regard to the accident, no FIR was registered against the driver of the offending Jeep, suggestive of the fact that the offending Jeep was not being driven rashly and negligently. It was also submitted that FIR was registered against the deceased Sapnesh, who was driving the Scooty rashly and negligently at the time of accident, and since the said Sapnesh died in the accident,

therefore, the FIR resulted into untraced report having been accepted by the Court of competent jurisdiction.

13. In view of the above, it was submitted by the learned counsel for the insurer that the Tribunal has misinterpreted the evidence led before it and has wrongly fastened the liability on the insurer. Accordingly, it was prayed that the impugned awards be set aside.

14. On the other hand, learned counsel for respondent No.1 in FAO No.254 of 2010, while supporting the impugned award, submitted that PW-4 Abhinav Pankaj has categorically stated before the Tribunal that, at the time of accident, the offending Jeep, being driven in a rash and negligent manner, was coming from opposite side. It was submitted that the statements of the witnesses relied upon by the learned counsel for the appellant/insurer to prove that the offending Jeep was stationary at the relevant point of time, are not inspiring confidence and cannot be relied upon. Thus, it was submitted that the appeals are liable to be dismissed.

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

16. From the above, it is clear that the controversy, in both the appeals, revolves around issues No.1 and 6, and my findings on these issues are as follows.

17. The parties have led evidence. The Tribunal, while coming to the conclusion that the accident was the outcome of rash and negligent driving of the driver of the Jeep, has relied upon the statement of claimant Abhinav Pankaj, the pillion rider, who appeared as PW-4 in Claim Petition filed by Anjana Sharma and as PW-2 filed by said Abhinav Pankaj himself. The Tribunal brushed aside the evidence led by the respondents and based his findings on the sole statement of Abhinav Pankaj since, as per the Tribunal, Abhinav Pankaj was the only person who had witnessed the accident.

18. The Tribunal has lost sight of the fact and has not properly appreciated the evidence, oral as well as documentary, produced by the respondents. The independent witnesses examined by the respondents, in both the cases, are similar. Therefore, for the sake of brevity, the evidence led by the respondents in the Claim Petition No.79-P/II-2006, filed by Anjana Sharma, is being referred to.

19. The Tribunal has not discussed the statements of RW-1 HC Ranjeet Singh, RW-3 HC Hari Ram, RW-4 Atma Ram and RW-5 Shakuntla Devi. All these witnesses are independent witnesses, not related to any of the parties, while the pillion rider PW-4 Abhinav Pankaj was an interested witness since he himself had filed the claim petition and prayed for grant of compensation (subject matter of FAO No.253 of 2010). Thus, the statement of PW-4 Abhinav Pankaj has to be appreciated while keeping in view the said fact.

20. FIR No.120/05, dated 6th May, 2005, was registered at Police Station and has been proved on record as Ext.PW-2/A, a perusal of which shows that it was recorded therein that the accident had taken place due to the rash and negligent driving of the driver of the Scooty. RW-3 HC Hari Ram stated that FIR No.120/05 (Ext.PW-2/A) was recorded against the driver of the Scooty Sapnesh, who died in the accident, therefore, untraced/cancellation report was presented before the Judicial Magistrate concerned. The said untraced/cancellation report was proved on record as Ext.RW-3/A, wherein it has been unequivocally recorded by the investigating officer that during investigation, it was found that the driver of the Scooty, namely, Sapnesh, had hit the Jeep on the wrong side of the road. It is apt to reproduce hereunder the relevant portion of the untraced/cancellation report Ext.RW-3/A:

> *".....The evidence brought on record clearly establishes the guilt of the deceased Sapnesh. Had he exercised care and caution and adhered to the norms of safe driving this unfortunate accident would not have taken place. Not only did the accused himself perish in that fatal accident, but the pillion rider Abhinav also sustained grievous injury which is also directly attributable to the rash and*

negligent driving of the deceased Sapnesh. Therefore, offence under Section 279, 338, 304-A IPC are clearly made out against Sapnesh. However, since he cannot be brought to book for his offence as he is no longer alive, and a untraced report is submitted for your perusal and consideration……..”

21. RW-4 Atma Ram stated that on the fateful day and at the relevant point of time, he was taking tea outside the Railway Quarters, heard a loud sound and noticed that the driver of the Scooty had struck against the stationary Jeep. This witness has clearly stated that the accident had occurred due to rash and negligent driving of the driver of the Scooty, namely, Sapnesh. Though the claimants have cross examined this witness, however, nothing could be extracted which could be made the basis for disbelieving the version of this witness.

22. RW-5 Shakuntla Devi, official from the office of Judicial Magistrate Ist Class, Palampur, stated that the FIR No.120/05, Police Station Palampur, was ordered to be kept as untraced challan.

23. Having glance of the above discussion, the Tribunal has fallen into an error in relying upon the statement of the sole witness Abhinav Pankaj in holding that the accident had occurred due to the rash and negligent driving of the driver of the Jeep. The reasoning given by the Tribunal in coming to such a conclusion in paragraph 21 of the impugned award is not supported by the evidence, as discussed hereinabove.

24. In view of the above, issue No.1 is decided against the claimants and Issue No.6 is decided in favaour of the insured/owner/driver and the insurer of the Jeep, in both the claim petitions.

25. As a consequence, it is held that since the accident was the outcome of rash and negligent driving of the driver of the Scooty, namely, Sapnesh, therefore, the claim petition filed by the mother of the deceased Sapnesh was not maintainable.

26. As far as the claim petition filed by the pillion rider Abhinav Pankaj is concerned, unfortunately he has not arrayed the owner and the insurer of the Scooty as parties. Therefore, the claim petition filed by him suffers from non-joinder of necessary and important parties and accordingly merits to be dismissed and the same is also dismissed.

27. Viewed thus, both the appeals are allowed, the impugned awards are set aside and the claim petitions are dismissed.

****

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

Oriental Insurance Co. Ltd. .....Appellant

Versus

Prajwal Singh and others ..... Respondents

FAO No.: 552 of 2008
Decided on : 17.06.2016

Motor Vehicles Act, 1988- Section 149- Deceased was driving the offending vehicle at the time of accident - he died in the accident- Insurer contended that driver did not possess a valid driving licence and vehicle was being plied in contravention of terms of the insurance Policy, but insurer has not led any evidence to prove these facts- insurance policy has been proved on record - compensation awarded by the Tribunal cannot be said to be on the higher side- there is no merit in the instant appeal and the same is dismissed. (Para-7 to 13)

For the appellant: Mr.Lalit K. Sharma, Advocate.

For the respondents: Mr.Vinod Thakur, Advocate, for respondent No.1.
Mr.Vijay Chaudhary, Advocate for respondent No.2.
Mr.Nimish Gupta, Advocate, for respondents No.3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Subject matter of this appeal is the award, dated 11th July, 2008, passed by the Motor Accident Claims Tribunal, Fast Track Court, Chamba, H.P., (for short, the Tribunal), in Claim Petition No.23/2008/05, titled Prajwal Singh vs. Oriental Insurance Company Ltd. and others, whereby the claim petition was allowed and compensation to the tune of Rs.4,41,500/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit, was awarded in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

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

3. The insurer has questioned the impugned award on the ground that the Tribunal has fallen into an error in saddling it with the liability. Therefore, the only question needs to be answered is – Whether the Tribunal has rightly fastened the insurer with the liability? The answer is in the affirmative for the following reasons.

4. The claimant, being the minor son of Ashok Kumar, on account of the death of the said Ashok Kumar in a vehicular accident occurred on 16th October, 2000 at about 11 PM, near Banikhet, filed the claim petition for grant of compensation to the tune of Rs.5.00 lacs as per the break-ups given in the claim petition.

5. Original respondents No.1 and 2, i.e. the insurer and the owner resisted the claim petition by filing replies. On the pleadings of the parties, the following issues came to be settled:

> *"1. Whether on 16.10.2000 at about 11 AM, at Khairi Bridge near Banikhet, Shri Ashok Kumar, father of the petitioner died in a vehicular mishap, as alleged? OPP*
>
> *2. Issue No.1 is proved, to what amount of compensation the petitioner is entitled to and from whom? OPP*
>
> *3. Whether the petition is not maintainable, as alleged? OPR-1*
>
> *4. Whether the petition is collusive, as alleged? OPR-1*
>
> *5. Whether the petitioner has no locus standi to file the petition, as alleged? OPR-1*
>
> *6. Whether the similar petition was dismissed, as alleged? OPR*
>
> *7. Whether the driver of the vehicle was not holding a valid and effective driving licence at the time of accident, as alleged? OPR-1*
>
> *8. Whether the offending vehicle was being plied in contravention of terms of the insurance Policy, as alleged? OPR-1*
>
> *9. Relief."*

6. In order to prove his case, the claimant examined two witnesses, namely, PW-1 Gurdhian Singh and PW-2 Surjan Singh. The insurer has examined RW-1 Uttam Chand, official from the office of District & Sessions Judge Chamba, while the owner of the offending vehicle has stepped into the witness box as RW-2.

7. After hearing the learned counsel for the parties and having perused the record, my issue-wise findings are as under.

Issue No.1:

8. The Tribunal has categorically recorded findings under this issue that the deceased Ashok Kumar, at the time of accident, was driving the offending vehicle bearing No.HP-47-2280 and died in the accident, which findings are not in dispute. Accordingly, the same are upheld.

9. Before Issue No.2 is taken up for adjudication, I deem it proper to take up other issues at the first instance.

Issues No.3 to 6:

10. Onus to prove all these issues was upon the insurer, has not led any evidence. Even during the course of hearing of the instant appeal, the learned counsel for the appellant/insurer was not able to show from the record as to how the claim petition was not maintainable or the claimant had no locus standi to file the petition. On the contrary, a perusal of the record would reveal that the claim petition was maintainable in its present form. Accordingly, all these issues are decided in favour of the claimant and against the insurer.

Issue No.7:

11. The Tribunal has held that the deceased was holding a valid and effective driving licence at the time of accident. The insurer has not led any evidence to prove that the deceased was not having a valid and effective driving licence at the time of accident. The Tribunal has rightly made discussion in paragraph 16 of the impugned award, which are borne out from the records. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

Issue No.8:

12. The factum of insurance is admitted. It was for the insurer to prove that the offending vehicle was being plied, at the time of accident, in contravention of the insurance policy, has not led any evidence to that effect. On the other hand, insurance policy has been proved on record as Ext.RW-1/A, which does disclose that the vehicle was duly insured. Thus, it cannot be claimed by the insurer that the vehicle was being plied in contravention of the insurance policy and the owner had committed any breach, what to speak of willful breach. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No.2:

13. This issue pertains to quantum of compensation. The compensation awarded by the Tribunal cannot be said to be on the higher side, rather it is meager. However, the claimant has not filed any appeal, accordingly the same is reluctantly upheld.

14. Having glance of the above discussion, there is no merit in the instant appeal and the same is dismissed. Consequently, the impugned award is upheld. The Registry is directed to release the entire amount in favour of the claimant, alongwith up-to-date interest, forthwith strictly in terms of the impugned award.

****

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

FAOs No. 4163 of 2013 & 444 of 2012
Decided on : 17.06.2016.

1. FAO No. 4163 of 2013

Oriental Insurance Company Ltd. ....Appellant

Versus

Sh Dev Sawroop & others ...Respondents

2 **FAO No. 444 of 2012**

Oriental Insurance Company Ltd. ....Appellant

Versus

Smt. Kamla Devi & others ....Respondents.

Motor Vehicles Act, 1988- Section 149- Accident was caused by the Tractor in which one person sustained injuries and one person died- insurance policy covered the risk 1+1- held that it was for the insurer to plead and prove that owner had committed willful breach of the terms and conditions of the policy- insurer had not led any evidence to establish the same- he was rightly saddled with liability- appeal dismissed. (Para-9 to 13)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation vs National Insurance Company, (2013) 10 SCC 217
Oriental Insurance Company Ltd. vs Smt. Rikta alias Kritka & others, I L R 2014 (VI) HP 1163

FAO No. 4163 of 2013

For the Appellant:	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Kumar, Advocate.
For the respondents:	Ms. Aruna Sharma, Advocate, for respondent No. 1 Mr. Peeyush Verma, Advocate, for respondents No. 2 & 3.

FAO No. 444 of 2012

For the Appellant:	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Kumar, Advocate.
For the respondents:	Mr. Rajesh Kumar, Advocate, vice Mr. Rajinder Thakur, Advocate, for respondents No. 1 to 4. Mr. Peeyush Verma, Advocate, for respondents No. 5 & 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

FAO No. 4163 of 2013 is directed against the award dated 5th April, 2013, passed by the Motor Accident Claims Tribunal-I, Sirmaur, District at Nahan, H.P. (for short 'the Tribunal') in MAC Petition No. 41-MAC/2 of 2011, titled Dev Sawroop versus Jagmohan Singh & others, whereby compensation to the tune of Rs.1,84,600/- with interest at the rate of 7.5% per annum from the date of the claim petition till its realization was granted in favour of the claimant-respondent No. 1 herein and the insurer-appellant was saddled with liability, hereinafter referred to as 'impugned award-I'.

2. By the medium of **FAO No. 444 of 2012**, the appellant-insurer has questioned the award dated 31st August, 2012, passed in MAC Petition No. 54-MAC/2 of 2010, titled Kamla Devi & others versus Jagmohan Singh & others, whereby compensation to the tune of Rs.6,55,000/- with interest at the rate of 7.5% per annum from the date of the claim petition till its realization was granted in favour of the claimants-respondents No. 1 to 3 and the insurer-appellant was saddled with liability, hereinafter referred to as 'impugned award-II'.

3. Both these appeals are outcome of the vehicular accident, which was allegedly caused by driver, namely, Yashpal @ Ramesh Kumar, while driving vehicle-tractor bearing registration No. HP-16-3208, at about 3.00 p.m. at Dawade Ki Ser, Tehsil Pachhad, District Sirmaur, H.P., in which Lal Chand and Dev Swaroop sustained injuries, and Lal Chand succumbed to the same.

4. Injured Dev Swaroop and legal heirs of the deceased Lal Chand filed claim petitions before the Tribunal for grant of compensation as per the break-ups given in the claim petitions.

5. The insurer, driver and owner-insured have resisted the claim petitions on the grounds taken in their memo of objections.

6. Almost similar issues were framed by the Tribunal in both the claim petitions. I deem it proper to reproduce the issues in one of the claim petitions i.e. Claim Petition No. 41-MAC/2 of 2011:-

> *"1. Whether the petitioner sustained injuries in the motor vehicle accident, which occurred due to rash and negligent driving of the offending vehicle i.e. tractor No. HP-16-03208 by respondent No. 2 on 5-8-2010 at about 10.45 PM. near Dawade-ke-ser near village Bagod Bhenllan, as alleged? …OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? …OPP*
>
> *3. Whether the petition is not maintainable in the present form, as alleged?…OPR-3*
>
> *4. Whether the driver of the offending vehicle did not possess a valid and effective driving licence at the relevant time, as alleged? …OPR-3*
>
> *5. Whether the offending vehicle was being driven in contravention of the terms and conditions of the Insurance Policy, as alleged? ….OPR-3*
>
> *6. Whether the claim petition has been filed by the petitioner in collusion with the respondent No. 1 & 2, as alleged? …OPR-3*
>
> *7. Relief.*

7. The claimants have led evidence in both the claim petitions. The insurer, driver and owner have not led evidence in Claim Petition No. 41-MAC/2 of 2011, subject matter of FAO No. 4163 of 2013. Thus, the evidence led by the claimants has remained unrebutted.

8. The insurer has led evidence in Claim Petition No. 54-MAC/2 of 2010, subject matter of FAO 444 of 2012.

However, the driver and owner have not led any evidence.

9. I have gone through the record. The Insurance Policy is on the file of Claim Petition No. 41-MAC/2 of 2011, subject matter of FAO No. 4163 of 2013, which does disclose that it covers the risk of '1+1'.

10. It was for the insurer to plead and prove that the owner has committed willful breach in terms of the mandate of Sections 147 & 149 of the Motor 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) .....*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v) .....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have*

contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of available the Act."

11. 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.

12. This Court in **FAO No. 322 of 2011**, titled as **IFFCO-TOKIO Gen. Insurance Company Limited versus Smt. Joginder Kaur and others**, decided on 29.08.2014 and **FAO No. 523 of 2007,** titled as **Oriental Insurance Company Ltd.** versus **Smt. Rikta alias Kritka & others,** decided on 19.12.2014, has laid down the same principle.

13. The argument of the learned Counsel for the insurer that Tribunal has fallen in an error in saddling the insurer with liability, is devoid of any force for the reason that the insurer has failed to prove it.

14. Having said so, both the appeals are dismissed and impugned awards are upheld.

15. The Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned awards, through payees account cheque or by depositing in their accounts.

16. Send down the record after placing a copy of the judgment on each of the Tribunal's file.

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

FAOs No. 283 & 284 of 2010
Reserved on: 03.06.2016
Decided on: 17.06.2016

FAO No. 283 of 2010

Oriental Insurance Company Ltd. ...Appellant.

Versus

Smt. Shanta and others ...Respondents.

FAO No. 284 of 2010

Oriental Insurance Company Ltd. ...Appellant.

Versus

Master Pratyush Kant and another ...Respondents.

Motor Vehicles Act, 1988- Section 149- Insurance policy shows that risk of three persons was covered- premium was also paid for third party- additional amount was paid which covered the risk of driver and the insured- risk of passengers was covered and it was not pleaded that deceased was a gratuitous passenger- therefore, insurer was rightly held liable to pay the compensation. (Para-16 to 29)

Cases referred:

New India Assurance Co. Ltd. Versus Shanti Bopanna and others, 2014 ACJ 219
Oriental Insurance Company Limited versus Pankaj & others, I L R 2014 (V) HP 726
National Insurance Company Ltd. versus Balakrishnan and another, 2012 AIR SCW 6286

For the appellant(s): Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Nishant Kumar, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 to 3 in FAO No. 283 of 2010 and for respondent No. 1 in FAO No. 284 of 2010.

Nemo for respondent No. 4 in FAO No. 283 of 2010 and respondent No. 2 in FAO No. 284 of 2010.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are outcome of a motor vehicular accident, which was allegedly caused by the driver, namely Karam Singh, who also died in the said accident, while driving Maruti Car, bearing registration No. PB-02K-0078, rashly and negligently on 11th August, 2008, at about 5.30 A.M. at Nehar Nalla near Kutt, District Chamba, in which husband and wife, namely Shri Vishal Sharma and Smt. Alka Sharma, sustained injuries and succumbed to the injuries, constraining the claimants to file two claim petitions before the Motor Accident Claims Tribunal, Chamba Division, Chamba (HP) (for short "the Tribunal").

2. The claimants in MAC Petition No. 62 of 2008 (subject matter of FAO No. 283 of 2010) are the parents and minor son of deceased-Vishal Sharma.

3. In MAC Petition No. 64 of 2008 (subject matter of FAO No. 284 of 2010) claimant, namely Master Pratyush Kant, has claimed compensation on account of death of his mother, deceased-Alka Sharma.

4. The claimants in both the claim petitions have prayed for grant of compensation, as per the break-ups given in the respective claim petitions.

5. Both the claim petitions were resisted by the insurer and the owner-insured of the offending vehicle on the grounds taken in the respective memo of objections.

6. Similar set of issues came to be framed in both the claim petitions. I deem it proper to reproduce the issues framed by the Tribunal in MAC Petition No. 62 of 2008 (subject matter of FAO No. 283 of 2010) herein:

> *"1. Whether Vishal Sharma died due to rash and negligent driving of Car No. PB-02K-0078 by driver Karam Singh? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to compensation, if so, to what amount and from whom? OPP*
>
> *3. Whether deceased was unauthorized occupant of the vehicle in question, as alleged? OPR-1*
>
> *4. Whether driver of the vehicle was not holding a valid and effective driving licence at the time of accident? OPR-1*
>
> *5. Whether the vehicle in question was being driven in contravention of the terms and conditions of the insurance policy? OPR-1*
>
> *6. Relief."*

7. The claimants have led evidence in both the claim petitions. The owner-insured and the insurer, i.e. the respondents in the claim petitions, have not led any evidence in both the claim petitions. Thus, the evidence led by the claimants has remained unrebutted.

8. The Tribunal, after scanning the evidence, oral as well as documentary, made two separate awards on 15th February, 2010, and awarded compensation to the ₹ 6,53,000/- and ₹ 4,52,000/- in MAC Petitions No. 62 of 2008 and 64 of 2008, respectively, with interest @ 7.5%

per annum from the date of filing of the claim petitions in favour of the claimants with a direction to the insurer to satisfy the awards (for short "the impugned awards").

9. The claimants and the owner-insured of the offending vehicle have not questioned the impugned awards on any count, thus, have attained finality so far the same relates to them.

10. The insurer has questioned both the impugned awards by the medium of both these appeals on the ground that the Tribunal has fallen in an error in saddling it with liability.

11. The ground of attack in both the appeals is that the deceased couple and the son, namely Master Pratyush Kant were travelling in the Maruti Car, thus, they were unauthorized occupants and their risk was not covered.

12. The dispute in both the appeals is viz-a-viz issues No. 3, 5 and part of issue No. 2. Thus, I deem it proper to determine both these appeals by this common judgment.

Issue No. 1:

13. The claimants have led evidence and proved that the driver of the offending vehicle, namely Shri Karam Singh, had driven the Maruti Car, bearing registration No. PB-02K-0078, rashly and negligently on 11th August, 2008 and caused the accident, in which deceased-Vishal Sharma and Alka Sharma sustained injuries and succumbed to the injuries. The said findings are not in dispute, accordingly, the findings recorded by the Tribunal on issue No. 1 are upheld.

14. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 5.

Issues No. 3 and 5:

15. Both these issues are interconnected, thus, are being determined together.

16. It was for the insurer to lead evidence, has not led any evidence to prove that the owner-insured of the offending vehicle has committed any willful breach or has violated the terms and conditions contained in the insurance policy, thus, has failed to discharge the onus.

17. It is beaten law of the land that it is for the insurer to plead and prove that the owner-insured has committed breach, that too, willful breach.

18. The factum of insurance is admitted. I have gone through the insurance policy, which is on the record of MAC Petition No. 62 of 2008 as Ext. R-3. The perusal of the same does disclose that risk of '3+1' was covered. While going through the details of premium paid, which is contained in the Schedule of Premium, it is crystal clear that premium has been paid of third party cover. Meaning thereby, the risk of third party is also covered.

19. Additional amount has also been paid which covers the risk of the driver and the owner-insured. The legal representatives of deceased driver are not before this Court and it appears that they have not filed any claim petition.

20. It is not the case of the insurer that the deceased couple and the son was travelling in the offending vehicle as gratuitous passengers or had hired the vehicle.

21. The case projected by the claimants in both the claim petitions is that the deceased couple alongwith their son was travelling in the offending vehicle. The owner-insured of the offending vehicle has filed reply and has admitted paras 8, 9 and 14 to 22 of the claim petition. Thus, the factum of accident and the death of the couple is admitted.

22. Learned Senior Counsel appearing on behalf of the insurer argued that the deceased couple was travelling in the offending vehicle as gratuitous passengers, thus, their risk was not covered.

23. I have dealt with the similar question as Judge of the Jammu and Kashmir High Court at Jammu in the case titled as **New India Assurance Co. Ltd. Versus Shanti Bopanna and others,** reported in **2014 ACJ 219,** and held that the insurer is liable.

24. This question was also raised before this Court in a series of cases including **FAO No. 71 of 2011,** titled as **New India Assurance Company Ltd. Versus Smt. Anuradha and others,** decided on 10th January, 2014; a batch of FAOs, **FAO No. 364 of 2010,** titled as **Oriental Insurance Co. Ltd. Versus Puni Ram & others,** being the lead case, decided on 18th July, 2014; and **FAO No. 202 of 2013,** titled as **Oriental Insurance Company Limited versus Pankaj & others,** decided on 10th October, 2014, wherein this Court, while discussing the judgment rendered by the Apex Court in the case titled as **National Insurance Company Ltd. versus Balakrishnan and another,** reported in **2012 AIR SCW 6286,** held that risk was covered and the insurer is liable.

25. In **Pankaj's case (supra),** the vehicle involved was also a private vehicle - Maruti Alto. It is apt to reproduce relevant paras of the judgment herein:

> *"8. I have gone through the insurance policy, Ext. R-3. The perusal of the same do disclose that risk was covered and also premium amount has been paid for 3 + 1 persons, details of which have been given in the schedule of premium. Additional premium has been paid for the driver and the employee also. Thus, it cannot lie in the mouth of the appellant-insurer that the risk of the claimant-injured was not covered. The Tribunal has rightly discussed this issue while determining issues No. 3 and 4 in paras 29 and 30 of the impugned award.*
>
> *9. .....*
>
> *10. .....*
>
> *11. The Insurance Regulatory and Development Authority (IRDA) has laid down some guidelines. In terms of that guidelines, the insurer cannot resist the claim petition against the occupants of the vehicle, whose risk is covered in terms of the policy. This issue came up for consideration before the High Court of Delhi in a case titled as* ***Yashpal Luthra and another versus United India Insurance Co. Ltd. and another,*** *reported in* ***2011 ACJ 1415,*** *and all these guidelines were discussed.*
>
> *12. .....*
>
> *13. This Court in cases titled* ***New India Assurance Company Ltd. versus Smt. Ritu Upadhaya and others,*** *being FAO (MVA) No. 135 of 2011, decided on 10th January, 2014,* ***New India Assurance Company Ltd. versus Smt. Anuradha and others,*** *reported in* ***Latest HLJ 2014 (HP) 1; United India Insurance Company Ltd. versus Smt. Kulwant Kaur & another,*** *being FAO No. 226 of 2006, decided on 28th March, 2014 and in a bunch of appeals,* ***FAO No. 560 of 2009,*** *titled as* ***Oriental Insurance Company Limited versus Smt. Bantu (since deceased) and others*** *being the lead case, decided on 22nd August, 2014, decided the same issue and has held that the insurer is liable.*
>
> *14. Having said so, the argument of the learned counsel for the appellant-insurer fails and the Tribunal has rightly saddled the appellant-insurer with liability."*

26. The insurer in the said appeals have questioned the judgments made by this Court in FAOs 71 of 2011, 364 of 2010 and 202 of 2013 before the Apex Court by the medium of Special Leave to Appeal being SLPs (C) No. 13031/2014, 4857-4870/2015 and 7420/2015, which came to be dismissed vide orders, dated 25th August, 2014, 23rd March, 2015 and 16th March, 2015, respectively.

27. Having said so, the argument of the learned Senior Counsel is not tenable.

28. It is also worthwhile to record herein that the insurer has not pleaded in its reply that the deceased were gratuitous passengers. The only ground taken is that the deceased were the unauthorized occupants in the offending vehicle, which it has failed to prove.

29. Viewed thus, the findings recorded by the Tribunal on issues No. 3 and 5 are upheld and the same are decided in favour of the claimants and the owner-insured and against the insurer.

Issue No. 4:

30. It was for the insurer to lead evidence 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, thus, has failed to discharge the onus. Even, the learned Senior Counsel appearing on behalf of the insurer has not argued that the driver was not having a valid and effective driving licence.

31. However, I have gone through the driving licence, which is on the record of MAC Petition No. 62 of 2008 as Ext. R-2, the perusal of which does disclose that the driver of the offending vehicle was holding a valid and effective driving licence at the relevant point of time. Thus, the findings recorded by the Tribunal on issue No. 4 are upheld.

Issue No. 2:

32. The quantum of compensation is not in dispute. The only dispute is as to who is to be saddled with liability. In view of the discussions made hereinabove, the insurer is saddled with liability.

33. In the given circumstances, both the impugned awards merit to be upheld and the appeals are to be dismissed. Accordingly, the impugned awards are upheld and both the appeals are dismissed.

34. Registry is directed to release the awarded amount in both the claim petitions in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards through the payee's account cheque or by depositing the same in their respective bank accounts.

35. Send down the records after placing copy of the judgment on each of the Tribunal's file.

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

Oriental Insurance Company .....Appellant

Versus

Neelma Devi & others ..... Respondents

FAO No.442 of 2009
Date of decision: 17.06.2016

Motor Vehicles Act, 1988- Section 149- Deceased had died due to rash and negligent driving of the driver- Insurer contended that driver did not possess a valid driving licence at the time of accident, award is excessive and the Tribunal had awarded interest on the higher side – held, that accident had taken place on 2nd August, 2006- licence was renewed on 24th July, 2004 and was valid up to 20th January, 2007, meaning thereby that driver had valid and effective driving licence at the time of accident- it was for the insurer to plead and prove this fact, but no evidence was led

by the insurer to prove this plea - Tribunal had awarded interest @ 9% per annum, which is excessive and is reduced to 7.5% per annum - appeal dismissed. (Para-9 and 17)

Cases referred:

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

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

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

mrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738;

Savita versus Binder Singh & others, reported in 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari vs 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) H.P. 1149

For the appellant:	Mr.G.C. Gupta, Senior Advocate, with Mr.Vinod Kumar, Advocate.
For the respondents:	Mr.Dinesh Thakur, Advocate, for respondents No.1 to 6.
	Mr.Malay Kaushal, Advocate, for respondent No.7.
	Nemo for respondent No.8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 7th May, 2009, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P., (for short, "the Tribunal") in M.A.C. No.91 of 2006, titled Neelma Devi & others vs. Sukh Dev Kaushal & others, whereby a sum of Rs.5,20,000/- alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimants and the insurer came to be saddled with the liability (for short the "impugned award").

2. The claimants, the driver 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. Learned counsel for the appellant argued that the Tribunal has wrongly saddled the insurer with liability for the reason that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident and the insured-owner has committed willful breach. The argument, though attractive, is devoid of any force for the reasons enumerated hereinbelow.

4. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short, the Act), for grant of compensation on account of death of Desh Raj in a vehicular accident, which occurred on 2nd August, 2006, near village Doli (Namhol). The claimants, being the widow, sons and daughters, filed the claim petition claiming compensation to the tune of Rs.20 lacs, as per the break-ups given in the claim petition.

5. The respondents have resisted the claim petition by filing replies and following issues came to be framed in the claim petition:-

> *"1. Whether late Shri Desh Raj (deceased) died on account of injuries sustained by him on 2.8.2006, at about 5.00 P.M. near Namhol, District Bilaspur,*

H.P. due to the rash and negligent driving of Bus No.HP-69-0215, being driven by respondent No.2 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 offending bus was being driven by an unauthorized person, who was not having a valid and effective driving licence? …OPR-3.

4. Whether the offending bus was being driven without documents as well as contravention of the terms and conditions of the insurance policy? …OPR-3.

5. Relief."

6. The claimants, in order to prove their case, have examined six witnesses, namely, PW-1 Jagdish Chand, PW-2 Dr.A.K. Soni, PW-3 Neelma Devi (claimant), PW-4 HC Jai Ram, PW-5 Sher Singh and PW-6 Sukh Dev. On the other hand, respondents examined RW-1 Manoj Kumar, RW-2 ASI Ram Dass and RW-3 Sada Ram (driver of the offending vehicle).

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

8. The findings returned by the Tribunal on issue No.1 are not in dispute. Accordingly, the same are upheld.

9. Before taking up issue No.2, I deem it proper to deal with issues No.3 and 4. It was also for the insurer to prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident. The insurer has not taken pains to examine any official from the office of Licencing Authority concerned to prove the said factum, thus, has failed to discharge the onus.

10. Still, I have gone through the driving licence, which has been proved on record as Ext.R-4, a perusal of which does disclose that the licence was renewed on 24th July, 2004 and was valid upto 20th January, 2007. The accident had taken place on 2nd August, 2006, meaning thereby that at the time of accident, the driving licence was valid and effective one.

11. It is settled proposition of law that it is the duty of the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 to 149 of the Act, has not led any evidence and has failed to discharge the onus.

12. 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."

13. 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 fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

14. Having said so, the findings returned by the Tribunal on issues No.3 and 4 are upheld.

15. Now, coming to issue No.2, the Tribunal has rightly made the guess work and has rightly assessed the compensation. However, the Tribunal has awarded interest at the rate of 9%, which is on the higher side. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,* reported in *(2002) 6 Supreme Court Cases 281*; *Santosh Devi versus National Insurance Company Ltd. and others,* reported in *2012 AIR SCW 2892*; *Amrit Bhanu Shali and others versus National Insurance Company Limited and others,* reported in *(2012) 11 Supreme Court Cases 738*; *Smt. Savita versus Binder Singh & others,* reported in *2014 AIR SCW 2053*; *Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,* reported in *2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,* reported in *(2015) 4 Supreme Court Cases 433,* and *Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another*,** reported in ***(2015) 4 Supreme Court Cases 434***, and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental***

Insurance Company versus Smt. Indiro and others, being the lead case, decided on **19.06.2015**.

16. Accordingly, 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 realization.

17. The Registry is directed to release the entire amount in favour of the claimants, alongwith interest as awarded above, forthwith, strictly in terms of the impugned award and the excess amount, if any, worked out in favour of the insurer on account of slashing of the rate of interest, shall be refunded to the insurer through payee's account cheque.

18. The appeal stands disposed of accordingly.

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

Pardeep Kumar ..... Appellant
Versus
State of Himachal Pradesh .....Respondent

Cr. Appeal No. 439/2015
Reserved on: May 30, 2016
Decided on: June 17, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found sitting on seat No. 17 of bus- he was having a packet in his lap, which was checked and 464 grams charas was found in the bag- accused was tried and convicted by the trial Court- held, in appeal that PW-8 to PW-10 have categorically stated that accused was carrying a bag, which was found to be containing 464 grams charas- search, seizure and sampling proceedings were completed at the spot strictly in accordance with law- charas was recovered from the bag- there was no requirement of complying with Section 50 of N.D.P.S. Act- prosecution had proved its case against the accused beyond reasonable doubt- accused was rightly convicted by the trial Court- appeal dismissed. (Para-13 and 14)

For the appellant : Mr. Vijay Sharma and Mr. Abhishek Kaushik, Advocates.
For the respondent : Mr. Neeraj K. Sharma, Deputy Advocate General .

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

The instant appeal has been filed against Judgment dated 1.10.2015 rendered by the learned Special Judge-III, Solan, District Solan (HP) in Sessions Trial No. 9FTC/7 of 2013, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for five years and to pay a fine of `1.00 Lakh and in default of payment of fine, to further undergo simple imprisonment for one year.

2. Case of the prosecution, in a nutshell, is that on 10.2.2013, HC Ambi Lal (PW-10), IO SIU, Solan alongwith HC Ajay Kumar, Constable Bhupinder Singh, Constable Amit Kumar, Constable Rohit Kumar was on patrolling and traffic checking duty towards Shamti, Jatoli and Oachhghat. At about 11.00 AM, a private bus i.e. Bhagnal Coach came from Rajgarh side and it was signalled to stop. The bus, bearing registration No. HP-64-4597, was enroute Liyat-Giripul-Solan. Police entered the bus. Passengers were advised to keep their luggage with

them. Police started checking luggage. When they reached seat No. 17, a person was found sitting with a micron packet in his lap. It was checked and opened. It contained his clothes, two micron small packets tied with thread. These micron packets were opened. Black coloured substance in the form of balls and sticks was recovered. It was found to be *cannabis*. It weighed 464 grams. Sealing proceedings were completed at the spot. *Pullinda* was sealed with three seal impressions of seal 'A'. sample of seal was taken on piece of cloth. NCB form in triplicate was filled in. impression of seal 'A' was put on the same. Seal after use was handed over to Baldev Kumar. *Rukka* PW-10/C was sent through Constable Amit Kumar to the Police Station, Sadar, Solan for the registration of FIR. FIR Ext. PW-6/A was registered. *Pullinda* was resealed by ASI Krishan Chand (PW-11) with six seal impressions of seal 'T'. Case property was sent to FSL Junga through Constable Sudhir Sharma. Report of FSL is Ext. PX. Investigation was completed. Challan was put up in the Court after completing all the codal formalities.

3. Prosecution has examined as many as eleven witnesses. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court convicted the accused as noticed above. Hence, this appeal.

4. Mr. Vijay Sharma and Mr. Abhishek Kaushik, Advocates have vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Neeraj K. Sharma, Deputy Advocate General has supported Judgment dated 1.10.2015.

6. PW-2 Madan Lal testified that on 10.2.2013, he was coming to Solan from his village in private bus. About 25-30 persons were travelling in the bus. At about 11.00 AM, the bus was intercepted at Jatoli by the police. Police personnel entered the bus and directed the passengers to remain on their seats as they intended to carry out search. Search was started. During search, it was told that *Charas* had been recovered from the accused. Police obtained his signatures on 4-5 papers. *Charas* was weighed in his presence. It weighed 464 grams. *Charas* was put into white bag. His signatures were obtained. 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 the accused was holding a micron bag which contained clothes and two other bags which were tied with woolen thread. He also admitted that these two bags contained stick and round shaped black substance stated to be *Charas*. He also admitted that thereafter *Charas* was put back in the same bags and these bags were wrapped with a cloth which was sealed by the police with three seals of seal impression 'A'. He had appended his signatures on the parcel as well as Ext. PW-2/A. He also admitted his signatures on parcel Ext. P-4. Ext.PW-2/B was also signed by him. He also admitted that seal after use was handed over to Baldev. In his cross-examination by the learned defence counsel, he testified that about 2-2 ½ hours were consumed at the spot in conducting necessary proceedings. Vehicle was intercepted near rain shelter Jatoli Bus Stop.

7. HHC Narender Parkash (PW-5) deposed that he was posted as MHC Malkhana in Police Station, Sadar, Solan. On 10.2.2013 at about 6.25 PM, ASI Krishan Chand handed over three seals of seal impression 'A' and six seals of seal impression 'T' alongwith seal impression, NCB form in triplicate and micron bag Ext. P-9, containing shirt Ext. P-11 and jean Ext. P-10. Contraband was sent by him to the FSL Junga on 11.2.2013 through Constable Sudhir Sharma. He deposited the contraband in FSL and returned the RC to him which contained receipt of FSL. He made necessary entries in the Malkhana register at the time of receipt and dispatch of articles.

8. PW-7 Constable Sudhir Sharma has taken the case property to FSL Junga.

9. PW-8 Constable Amit Kumar is the official witness. He testified the manner in which bus was intercepted at Jatoli and accused was found sitting on seat No. 17. He was holding a light white coloured micron bag in his lap. Bag was open. It contained *Charas*. *Charas* weighed 464 grams. Search, seizure and sampling proceedings were completed at the spot. *Rukka* mark 'X' was handed over to him for carrying to the Police Station, Sadar, Solan. He took it to

Police Station, Sadar, Solan. In his cross-examination, he testified that the bus was intercepted at bus stop. However, there was no rain shelter adjacent to the bust stop. Search was effected from both sides of the bus.

10. PW-9 Baldev Kumar was the conductor of the bus. He testified that on 10.2.2013, he was working as a conductor on bus bearing registration No. HP-64-4597. Tarun Kumar was driver of the bus. They proceeded from Pulwahal to Solan at 6.30 AM. At about 1100 AM when they arrived at Jatoli, the police intercepted the bus. About 30 passengers were travelling in the bus. Accused was also travelling in the bus and was sitting on seat No. 17. Police entered the bus and directed the passengers to keep their respective luggage with them. All the passengers kept their respective luggage with them. However, a bag was found lying unattended under the seat on which accused was sitting. Bag was checked. It contained *Charas*. *Charas* was weighed. It weighed 464 grams. *Charas* was put back in the same bag and bag was put in white cloth. His signatures were obtained thereon. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he deposed that he had issued tickets Ext. PW-9/A and Ext. PW-9/B to the accused. He identified his signatures on Ext. P-4, sample seal Ext. PW-2/A and seizure memo Ext. PW-2/B. He has not raised any objection at the time of signing the documents. Accused has not disowned the bag. He and witnesses remained inside the bus throughout the recovery proceedings.

11. PW-10 HC Ambi Lal is also an official witness. He testified the manner in which bus bearing registration No. HP-64-4597 was intercepted at Jatoli. When he reached seat No. 17, accused was found sitting on the same carrying a micron bag in his lap. Bag was checked. It contained *Charas*. Search, seizure and sampling proceedings were completed at the spot. He prepared special report Ext. PW-4/B. He handed over parcel Ext. P-4, specimen seal Ext. PW-2/A, NCB form in triplicate to ASI/SHO Krishan Chand, who resealed parcel Ext. P-4 with six seal impressions of 'T', specimen impression mark-Y thereof was separately taken and embossed on NCB form. He denied the suggestion that there were many shops towards Solan near Jatoli. He admitted that there was rack inside the bus but no luggage was found therein. Four police personnel have entered the bus. He denied the suggestion that PW-6 Amit Kumar was not present at the spot and he has not carried *Rukka* from the spot to the Police Station.

12. PW-11 ASI Krishan Chand has resealed the case property with six seal impressions of 'T'. he also filled in necessary columns of NCB form.

13. Accused was travelling in a Bus bearing registration No. HP-64-4597. He was occupying seat No. 17. PW-8 Amit Kumar and PW-9 Baldev and PW-10 Ambi Lal have categorically stated that accused was occupying seat No. 17. He was carrying a white coloured micron bag in his lap. It was opened. It contained 464 grams of *Charas*. Search, seizure and sampling proceedings were completed at the spot strictly in accordance with law. Case property was produced before PW-11 Krishan Chand. He resealed the same with six seal impressions of 'T'. FSL report is Ext. PX. PW-2 Madan Lal and PW-9 Baldev, though declared hostile but they have admitted their signatures on the documents. PW-2 Madan Lal, in his cross-examination by the learned Public Prosecutor admitted that accused was carrying a micron bag and when bag was opened, it contained *Charas*. Similarly, PW-9 Baldev Kumar has admitted in his examination-in-chief that accused was travelling in his bus and was sitting on seat No. 17. He has issued tickets Ext. PW-9/A and Ext. PW-9/B to the accused. PW-9 Baldev Kumar has testified that accused has not disowned the bag.

14. Mr. Vijay Sharma and Mr. Abhishek Kaushik, Advocates have further contended that Section 50 of the Act has not been complied with. However, fact of the matter is that *Charas* has been recovered from a bag, thus, Section 50 of the Act is not attracted in the instant case. They further argued that accused was not travelling in the bus in question. However, accused has been issued tickets by PW-9 Baldev Kumar.

15. Prosecution has proved its case against the accused beyond doubt.

16. 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.

Ramesh Kumar & another .....Appellants

Versus

National Insurance Company Ltd. & others .....Respondents

FAO No.269 of 2011
Date of decision: 17.06.2016

Motor Vehicles Act, 1988- Section 166- Claim petition was filed by the legal heirs of the deceased H, who died in an accident- accident was caused by rash and negligent driving of driver of the offending vehicle- Tribunal had awarded compensation of Rs. 3,34,000/- along with interest at the rate of 9% per annum in favour of the claimants- the owner-insured and the driver were saddled with the liability - the insurer and the claimants have not questioned the award and the same has attained finality – feeling aggrieved from the award, an appeal was preferred- held, that it was for the insurer to plead and prove that the claim petition was not maintainable and vehicle was being driven in breach of terms and conditions of insurance policy- an application was moved for placing on record copy of the insurance policy and the copy of the driving licence, which is allowed and documents are ordered to be taken on the record - insurer shall also be afforded opportunity to lead evidence- Tribunal is directed to conclude the case afresh after recording the evidence within three months. (Para- 8 to 15)

For the appellants: Mr.Kulbhushan Khajuria, Advocate.
For the respondents: Ms.Shilpa Sood, Advocate, for respondent No.1.
Ms.Nishi Goel, Advocate, for respondents No.2 to 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 14th January, 2011, passed by the Motor Accident Claims Tribunal-II, Solan, District Solan, H.P., (for short, "the Tribunal") in Case No.5-NL/2 of 2009, titled Surat Ram & others vs. Ramesh Kumar & others, whereby a sum of Rs.3,34,000/- alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimants, and the owner-insured and the driver came to be saddled with the liability (for short the "impugned award").

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

3. Feeling aggrieved, the owner and the driver have filed the instant appeal on the ground that the Tribunal has fallen into an error in saddling them with the liability.

4. The claimants have invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs.10 lacs, as per the break-ups given in the claim petition, on account of the death of Heera Lal in an accident on 22nd September, 2008. The claim petition was resisted by the insurer, while original respondents No.1 and 2 i.e. the owner and the driver were set ex-parte. The insurer has specifically pleaded that the vehicle was being driven in breach of the terms and conditions of the insurance policy.

5. On the pleadings of the parties, the Tribunal framed the following issues:-

"1. Whether the deceased Heera Lal died in an accident on account of rash and negligent driving of respondent No.2? …OPP.

2. If issue No.1 is proved in affirmative, to what amount and from whom the petitioners are entitled for compensation? ….OPP.

3. Whether the petition is not maintainable? …OPR.

4. Whether the vehicle in question was driven in breach of terms and conditions of policy? OPR-3.

5. Relief."

6. The claimants, in order to prove their case, have examined three witnesses, namely, PW-1 Surat Ram, PW-2 Narinder Kumar and PW-3 Sukh Ram. On the other hand, the insurer did not lead any evidence.

7. Heard the learned counsel for the parties and gone through the record.

8. The Tribunal, after scanning the pleadings of the parties and the evidence, held that the claimants have been able to prove issue No.1. There is no quarrel about the findings recorded on this issue. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

9. The Tribunal, while deciding issue No.2, came to the conclusion that the claimants were entitled to compensation to the tune of Rs.3,34,000/- and saddled the owner and the driver of the offending vehicle with liability. The adequacy of compensation is not in dispute. Therefore, the findings returned by the Tribunal, relating to assessing of compensation under issue No.2, are also upheld.

10. Now, the only question remains to be determined under issue No.2 is - Whether the Tribunal has fallen into an error in saddling the owner and the driver of the offending vehicle with liability. Before answering the said question, I deem it proper to decide issue No.3.

11. Issue No.3 pertains to the maintainability of the claim petition. It was for the insurer to plead and prove that the claim petition was not maintainable, has not led any evidence. Accordingly, it is held that issue No.3 was rightly decided by the Tribunal in favour of the claimants and against the insurer. Moreover, the insurer has not questioned the findings returned by the Tribunal on issue No.3 and the same have attained finality.

12. As far as part of issue No.2, as discussed above, and issue No.4 are concerned, the learned counsel for the insurer argued that the insurer could not prove whether the driving licence of the driver was valid and effective at the time of accident or otherwise for the simple reason that the same was never placed on record either by the owner of the offending vehicle or by the driver. Had the driver and the owner contested the claim petition and placed on record the copy of the driving licence, the insurer would have been able to prove whether the driving licence was valid and effective at the relevant point of time or otherwise. Since the driver and the owner opted not to join proceedings before the Tribunal, the insurer had no opportunity to prove the said factum.

13. The learned counsel for the appellants (the owner and the driver) submitted that the appellants have moved an application i.e. CMP No.510 of 2011 under Order 41 Rule 27 of the Code of Civil Procedure for placing on record copy of the insurance policy and the copy of the driving licence.

14. In the facts of the case, I deem it proper to allow the application. The documents, detailed above, are ordered to be taken on the record of the Claim Petition.

15. Having glance of the above discussion, the findings recorded by the Tribunal on issue No.2 partly and issue No.4 are set aside and the case is remanded to the Tribunal below for

recording findings afresh on the aforesaid issues. Needless to say, in order to prove issue No.2 (partly) and issue No.4, the Tribunal shall afford opportunity to the driver and the owner to file replies and lead evidence. The insurer shall also be afforded opportunity to lead evidence. The Tribunal is directed to conclude the case, as above, within three months from **1st July, 2016**, on which date, the parties through their respective counsel are directed to cause appearance before the Tribunal. The Registry is directed to send down the records forthwith so as to reach the Tribunal below well before the date fixed.

16. The appeal is disposed of accordingly.

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

Sh. Sajjal Kumar . .....Appellant.

Versus

Sh. Baldev Singh and others .....Respondents

FAO (MVA) No. 54 of 2010
Date of decision: 17th June, 2016.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in the accident- he remained admitted in the hospital for 12 days- Tribunal had awarded compensation of Rs. 35,000/-, which on the face of it is not legally correct- claimant is entitled to Rs. 50,000/- under the head 'pain and suffering', Rs. 10,000/- under the head 'Attendant Charges" and Rs. 10,000 under the head 'Medical Expenses'- claimant was not in position to earn for at least four months- he is entitled to Rs. 25,000/- under the head "Loss of Income" and Rs. 25,000/- for "Loss of Amenities of Life"- claimant had sustained 50% disability and is entitled to Rs. 50,000/- under the head 'loss of future income'- claimant is held entitled to Rs. 1,70,000/- along with interest @ 7.5% per annum from the date of claim petition till realization. (Para-5 to 10)

For the appellant: Mr.Ashwani Kaundal, Advocate.
For the respondents: Ms. Leena Guleria, Advocate, for respondents No. 1 and 2.
Mr. J.S. Bagga, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 20.11.2009, made by the Motor Accident Claims Tribunal, Una, H.P. in MAC Petition No. 2 of 2009, titled *Sh. Sajjal Kumar versus Sh. Baldev singh and others*, for short "the Tribunal", whereby compensation to the tune of Rs.35,000/- alongwith interest @ 9% per annum, with costs of Rs.3000/-, came to be awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

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

3. The claimant has questioned the impugned award so far as it relates to the quantum of compensation.

4. Thus, the only question to be determined in this appeal is whether the amount awarded is adequate or otherwise? The answer is in negative for the following reasons.

5. The fact that the claimant is victim of a vehicular accident which was allegedly caused by the driver Baldev Singh on 12.9.2008 at about 3. 30 p.m., at Bangana, while driving vehicle No. HP-55-6639, rashly and negligently, is not in dispute. The discharge slip issued by the

Zonal Hospital, Una, H.P. Ext. PW1/A do disclose that the claimant remained admitted in the hospital w.e.f. 12.9.2008 to 23.9.2008. Thus he remained admitted for 12 days in the hospital. He was also put on medicine.

6. The claimant examined Dr. Shiv Pal Singh as PW1 who has proved the vouchers which are on the file as Ext. P1 to Ext. P4. He has also deposed that the claimant was fixed plaster for six weeks and he had suffered permanent injury.

7. The Tribunal has fallen in an error in not awarding compensation under the head "Pain and Sufferings", Attendant Charges" for 12.9.2008 to 23.9.2008 and diet charges. The only amount of Rs.35,000/- was awarded in terms of para 11 of the impugned award, which on the face of it is not legally correct. The clamant is entitled to Rs.50,000/- under the head "Pain and Suffering", Rs. 10,000/- under the head "Attendant Charges" and Rs.10,000 under the head "Medical Expenses".

8. The claimant was not in a position to earn, at least for four months, as discussed by the learned Tribunal in para 11 of the impugned award. He is also entitled to Rs.25000/- under the head "Loss of Income" and Rs.25000/- for "Loss of Amenities of Life" for the said period.

9. The claimant has also placed on record application being CMP No.70 of 2010 under Order 41 Rule 27 of the CPC for proving the disability certificate which do disclose that the claimant has suffered 50% disability. The disability certificate is a public document, needs not to be proved and is taken on record. Thus, the claimant is also entitled to Rs.50,000/- under the head "Loss of future Income".

10. Accordingly, it is held that the claimant is entitled to Rs.1,70,000/- in toto alongwith 7.5% interest from the date of claim petition till its realization.

11. Having said, the appeal is allowed alongwith CMP No. 70 of 2010, the impugned award is modified, and the amount of compensation is enhanced as indicated hereinabove.

12. The insurer is directed to deposit the amount within eight weeks from today in the Registry and 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.

13. 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.

Sarita Devi & others .....Appellants

Versus

Ashok Kumar Nagar & others .....Respondents

FAO No.448 of 2011
Date of decision: 17.06.2016

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 6% per annum- rate of interest should be awarded as per prevailing rate - hence, rate of interest enhanced to 7.5% per annum from the date of filing the claim petition till realization of amount. (Para-54 and 55)

Motor Vehicles Act, 1988- Section 173- It was contended that Appellate Court cannot set aside the findings recorded against the owner and driver who had not preferred any appeal- held, that the Court is under an obligation to decide all issues of facts and law after appreciating the evidence- Appellate Court can pass an order which ought to have been passed by the Tribunal even if there is no appeal or cross-objections. (Para-18 to 52)

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 844
National Insurance Company vs. Smt.Sundri Devi and another, I L R 2015 (IV) HP 290
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
U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 Supreme Court 948
Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation, (2013) 11 SCC 517
Giani Ram vs. Ramjilal, 1969 (1) SCC 813
Narayanarao (dead) through LRs and others vs. Sudarshan, 1995 Supp.(4) SCC 463
Mahant Dhangir and another vs. Madan Mohan and others, 1987 (Supp.) SCC 528
T.N. Rajasekar vs. N. Kasiviswanathan and others, AIR 2005 SC 3794
Delhi Electric Supply Undertaking vs. Basanti Devi and another, JT 1999 (7) SC 486,
H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc., AIR 1980 Himachal Pradesh 16
United India Insurance Co. Ltd. vs. Dama Ram and others, 1994 ACJ 692
M. Adu Ama vs. Inja Bangaru Raja and another, 1995 ACJ, 670
Himachal Road Transport Corporation vs. Saroj Devi and others, 2002 ACJ 1146
National Insurance Co. Ltd. vs. Mast Ram and others, 2004 ACJ 1039
LAC Solan and another vs. Bhoop Ram, 1997(2) Sim.L.C. 229
State Bank of India vs. M/s Sharma Provision Store and another, AIR 1999 J&K 128
Nati Devi and another vs. Maya Devi and others, I L R 2016 (III) HP 1074
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) H.P. 1149

For the appellants:	Mr.Ashwani Pathak, Senior Advocate, with Mr. Sandeep K. Sharma, Advocate.
For the respondents:	Ms.Anu Tuli Azta, Advocate, for respondent No.1. Mr.Jagdish Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 31st August, 2011, passed by the Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P., (for short, "the Tribunal") in Claim Petition No.50 of 2005, titled Sarita Devi & others vs. Ashok Kumar Nagar & others, whereby a sum of Rs.15,50,000/- alongwith interest at the rate of 6% per annum came to be

awarded as compensation in favour of the claimants and against the owner and the driver (for short the "impugned award").

2. The claimants have questioned the impugned award on the ground that the Tribunal has fallen into an error in assessing the compensation and saddling the owner and the driver with liability, on the grounds taken in the memo of appeal.

3. Ms.Anu Tuli Azta, learned counsel appearing for the owner stated that she has been engaged recently and prayed for adjournment to file cross objections. The prayer is declined since the instant appeal is pending on the docket of this Court since the year 2011 and is permitted to raise all the grounds which are available in the armory of the owner/insured.

4. Following two questions emerge for determination in the instant appeal:

1. Whether the Tribunal has rightly assessed the compensation?
2. Whether the Tribunal has rightly discharged the insurer from liability?

5. In order to determine both these questions, it is necessary to give brief facts of the case, the womb of which has given birth to the present appeal. The claimants invoked the jurisdiction of the Tribunal on the ground that Mohinder Kumar, on 16th July, 2005, while going from Mandi to Jaipur in the vehicle bearing registration No.HR-38-L-5668 met with an accident, at about 4.30 A.M. at Panipat near Karnal Chungi, as a result of which the said Mohinder Kumar sustained injuries and succumbed to the same. It was alleged that the accident was the outcome of rash and negligent driving of the driver of the offending vehicle, namely, Kuldeep. It was further alleged that the deceased had hired the offending vehicle in order to bring goats as he was a meat seller. Thus, the claimants filed the claim petition for grant of compensation to the tune of Rs.25 lacs as per the break-ups given in the claim petition.

6. The claim petition was resisted by the respondents and following issues came to be framed:-

"1. Whether deceased Mohinder Kumar died due to rash and negligent driving of respondent No.2 as alleged? OPP

2. If issue No.1 is proved in affirmative, whether petitioners are entitled for compensation, if so, to what amount and from whom? OPP

3. Whether the deceased was a gratuitous passenger as alleged, if so, to what effect? OPR-3

4. Whether driver was not having valid and effective driving license at the time of accident as alleged? OPR-3

5. Relief."

7. Claimants have examined PW-1 Bhagat Ram, PW-2 Raghubir Singh, PW-3 Gautam alias Boby, PW-4 Sarita Devi (claimant), PW-5 Bhim Singh, PW-6 Vinod Kumar and PW-7 Mohinder Gautham. On the other hand, the driver, namely, Kuldeep, has stepped into the witness box as RW-1 and the insurer as examined RW-2 Sanjeev Singh.

8. After scanning the evidence, the Tribunal held that the claimants have proved that the driver Kuldeep had driven the vehicle rashly and negligent and accordingly, decided issue No.1 in their favour. The findings returned on issue No.1 are not in dispute and therefore, the same are upheld.

9. Before I deal with issue No.2, I deem it proper to take up issues No.3 and 4.

Issue No.3

10. The issue is whether the deceased was traveling in the offending vehicle as gratuitous passenger. The onus to prove the said issue was on the insurer, has not led any evidence. Thus, as per the mandate of law, the insurer has failed to discharge the onus. However, the Tribunal has gone astray in deciding the said issue in favour of the insurer and

holding that the deceased was traveling in the offending vehicle as gratuitous passenger. The discussion made by the Tribunal in paragraphs 20 and 21 of the impugned award are not legally tenable and thus, the findings recorded on this issue are liable to be set aside for the following reasons.

11. I have gone through the pleadings of the parties and scanned the evidence led by the parties. In the Claim Petition, the positive case put forth by the claimants is that the deceased had hired the offending vehicle in order to load goats from Jaipur, but before reaching the said destination, the offending vehicle met with the accident. It is apt to reproduce paragraph 10 of the claim petition hereunder:

> *"The deceased boarded the vehicle No.HR: 38-L-5668, from Mandi and was going to bring goats, and when the said vehicle reached at place Karnal Chungi, Panipt (Haryana) all of sudden met with an accident."*

12. The owner and the driver have admitted that the deceased had hired the offending vehicle and was going to bring the goats, as is evident from their reply, which is reproduced hereinbelow:

> *"8 to 11. These paras of the claim petition are admitted to be correct."*

13. Having said so, the owner and the driver have admitted that on the fateful day, the offending vehicle was hired by the deceased for carrying goats, which he had to purchase from Jaipur and bring the same to Mandi, but unfortunately before reaching Jaipur, the offending vehicle met with an accident.

14. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that the person, who had hired the vehicle for transporting goods, was returning in the same vehicle, met with the accident, cannot be said to be an unauthorised/gratuitous passenger.

15. 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."

16. The same principle has been laid down by this Court in a bunch of two appeals, **FAO No. 9 of 2007**, titled as **National Insurance Company Limited versus Smt. Teji Devi & others,** being the lead case, decided on 22nd August, 2014; **FAO No. 22 of 2007,** titled as **Naresh Verma versus The New India Assurance Company Ltd. & others,** decided on 26th September, 2014, **FAO No. 77 of 2010,** titled as **NHPC versus Smt. Sharda Devi & others,** decided on 17th October, 2014 and **FAO No.638 of 2008, titled National Insurance Company vs. Smt.Sundri Devi and another, decided on 3rd July, 2015**.

17. Having said so, it is held that the deceased was not traveling in the offending vehicle was gratuitous passenger, but had hired the vehicle and thus, his risk can be said to be covered. Accordingly, issue No.3 is decided against the insurer.

Issue No.4

18. The Tribunal, while deciding this issue has mentioned the said issue to be as issue No.3, is suggestive of the cursory approach adopted by the Tribunal while deciding the claim petition.

19. The issue is whether the driver of the offending vehicle was having a valid and effective driving licence. To determine the said issue, I have gone through the licence proved on record as Ext.R-1, which does disclose that on the day of accident, the same was valid and effective. Moreover, 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, has not led any evidence.

20. It is settled proposition of law that it is the duty of the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 to 149 of the Act, has not led any evidence and has failed to discharge the onus.

21. 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."

22. 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 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."

23. I may also place on record herein that the learned counsel for the insurer has not pressed issue No.4. Accordingly, the said issue is decided against the insurer.

24. The learned counsel for the insurer argued that in the instant appeal, the claimants cannot challenge the impugned award so far as it relates to fastening of the liability. The learned counsel for the appellant further argued that this Court, in an appeal filed by the claimants, cannot set aside the findings which have been recorded against the owner and the driver, who have not filed any appeal.

25. The argument advanced by the learned counsel for the appellant, though attractive, is devoid of any force for the reason that proceedings instituted under Section 166 of the Act are to be taken to the logical end by following a summary procedure. Section 173 of the Act also provides for remedy of appeal.

26. The appeal under Section 173 of the Act is alike the appeal under Section 96 of the Code of Civil Procedure, (for short, the CPC). Therefore, the Court is under obligation to decide all issues arising in case both on facts and law after appreciating the entire evidence.

27. The Apex Court in **U.P.S.R.T.C. vs. Km. Mamta and others,** reported in **AIR 2016 Supreme Court 948**, held that Section 173 of the Act and the first appeal under Section 96 of the CPC are alike and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case. It is apt to reproduce paragraph 24 of the said judgment hereunder:

> *"24. An appeal under Section 173 of the M.V.Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence."*

28. It is apt to record herein that Part VII of the Code of Civil Procedure (for short, CPC) provides for filing of appeals arising out of decrees and orders. Section 96 provides for appeals from original decree. It is apt to reproduce Section 96 of the CPC hereunder:

> *"1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.*
>
> *(2) An appeal may lie from an original decree passed ex parte.*
>
> *(3) No appeal shall lie from a decree passed by the Court with the consent of parties.*
>
> *(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees."*

29. Section 107 of the CPC deals with the "Powers of the Appellate Court" and sub-section (2) thereof, provides specifically that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed on the trial Court. It is apt to reproduce Section 107(2) of the CPC, as under:

> ***"107. Powers of appellate court.-***
>
> *(1) xxxxx xxxxxxx xxxxxxxxx*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."*

30. Section 176 of the Act empowers the State Government to make rules for the purpose of implementing the provisions contained in Sections 165 to 174 of the MV Act. It is apt to reproduce Section 176 of the Act, hereunder:

> ***"176. Power of State Government to make rules.***
>
> *A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:--*
>
> *a. The form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;*
>
> *b. The procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;*

c. *The powers vested in a Civil Court which may be exercised by a Claims Tribunal;*

d. *The form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal; and*

e. *Any other matter which is to be, or may be, prescribed."*

31. In terms of the mandate of Section 176(c) of the Act, the Claims Tribunals are vested with the powers of Civil Court.

32. In a Claim Petition, summary procedure is to be adopted and all provisions of Civil Procedure Code are not applicable, rather only some provisions have been made applicable in terms of Section 169 of the Motor Vehicles Act, 1988 (for short, the Act), read with Rule 232 of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short, the Rules of 1999). It is apt to reproduce Rule 232 of the Rules of 1999, hereunder:

> ***"232. The Code of Civil Procedure to apply in certain cases:-***
>
> *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."*

33. Now, the question is whether the Appellate Court while hearing an appeal under Section 173 of the Act can pass such an order which ought to have been passed by the Tribunal, without there being any appeal or cross objections from the person against whom the order has been made. The answer is in the affirmative for the reasons given hereinabove, read with the mandate of the Apex Court and of the High Courts.

34. Part VII and Order 41 of the CPC deal with the powers and the scope of the Appellate Court in appeal proceedings.

35. The Apex Court in **Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation, (2013) 11 SCC 517,** has held that there are no fetters on the powers of the appellate Court to consider the entire case on facts and law, while hearing an appeal under Section 173 of the Act. It is apt to reproduce paragraphs 10, 11 and 12 of the said decision hereunder:

> *"10. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the 'Act'), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively. A bare reading of Section 173 of the Act also reflects that there is no curtailment or limitations on the powers of the Appellate Court to consider the entire case on facts and law.*
>
> *11. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective.*
>
> *12. Generally, finding of fact recorded by Tribunal should not be interfered with in an Appeal until and unless it is proved that glaring discrepancy or mistake has taken place. If the assessment of compensation by the Tribunal was fair and reasonable and the award of the Tribunal was neither contrary nor inconsistent with the relevant facts as per the evidence available on record then as mentioned hereinabove, the High Court would not interfere in the Appeal. In the case in hand, nothing could be pointed out to us as to what were the glaring discrepancies or mistakes in the impugned Award of the Tribunal, which necessitated the Appellate Court to take a different view in the matter."*

36. The Apex Court in **Giani Ram vs. Ramjilal, 1969 (1) SCC 813,** held that Order 41 Rule 33 CPC empowers the appellate Court to pass any decree which justice may require. It is apt to reproduce paragraphs 8 and 9 of the said decision hereunder:

> *"8. Order 41, Rule 33 of the CPC was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides:*
>
> > *"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.*
> >
> > *The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.*
>
> *9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating gave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, CPC ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed."*

37. The Apex Court in the cases in **Narayanarao (dead) through LRs and others vs. Sudarshan, 1995 Supp.(4) SCC 463, Mahant Dhangir and another vs. Madan Mohan and others, 1987 (Supp.) SCC 528** and in **T.N. Rajasekar vs. N. Kasiviswanathan and others, AIR 2005 SC 3794** held that the High Court, in order to do complete justice to the parties, can invoke the powers under Order 41 Rule 33 of the CPC and pass orders accordingly.

38. The Apex Court in **Delhi Electric Supply Undertaking vs. Basanti Devi and another, JT 1999 (7) SC 486,** while replying upon its earlier decision in Mahant Dhangir (supra), it was held as under in paragraph 19:

> *"19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers."*

39. This Court in **H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc., AIR 1980 Himachal Pradesh 16,** held that under Order 41 Rule 33 of the CPC, wide powers have been given to the appellate Court and once it is seized of a matter in its appellate jurisdiction, it is within its power to do complete justice between all the concerned parties. It is apt to reproduce relevant portion of paragraph No.39 and paragraph 40 of the said decision hereunder:

> *".....Moreover, theme of Order 41 and especially the wide powers given to the Court under Rule 33 of Order 41 suggests that the intention of the Legislature is to see that 'once the Court is seized of a matter in its appellate jurisdiction, it is able to do complete justice between all the concerned parties. To us, therefore, it is very clear that the provision enabling a respondent to file cross-objections made in Rule 22 is a procedural provision under which even if a respondent has not preferred any appeal, the Court is enabled to do complete justice to the parties by allowing the respondent concerned to prefer cross-objections within the period of limitation. Under these circumstances, with great respect to the learned Judges of the Allahabad High Court, we find ourselves unable to accept their view that provision enabling a respondent to file cross-objections is a substantive provision and not a procedural one.*

40. In view of our finding that provision for filing cross-objections contemplated by Order 41, Rule 22 is a procedural provision, the ratio of the above referred two decisions of the Supreme Court would at once be attracted, and this Court being seized of an appellate jurisdiction conferred by Section 110-D of the Motor Vehicles Act, It has to exercise that jurisdiction in the same manner in which it exercises its other appellate jurisdiction allowing the respondents in such appeals to prefer cross-objections."

40. Keeping in view the ratio of the judgment supra, it can safely be held that the appellate Court is competent to pass any order in the interest of justice.

41. The High Court of Rajasthan, while dilating upon the powers of the Appellate Court under Order 41 Rule 33, held in **United India Insurance Co. Ltd. vs. Dama Ram and others, 1994 ACJ 692,** that the appellate Court can rectify the error invoking Order 41, Rule 33 even in the absence of Cross Objections or appeal by the claimants. It is apt to reproduce paragraph 7 of the said decision hereunder:

"7. The Tribunal has not passed award in any case against the owner (insured) of the vehicle. It has passed awards against the appellant insurance company only. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver. As such his employer, namely, Mohd. Rafiq, owner of the said truck, was liable for his negligent act. Thus the Tribunal committed a serious error in not making liable the owner and driver of the offending truck to pay the said amounts of compensation. This error can well be corrected by this court by invoking the provisions of Order 41, Rule 33, Civil Procedure Code, even if no cross-objection or appeal has been filed by the claimants-respondents. It has been observed in Kok Singh v. Deokabai AIR 1976 SC 634, paras 6 and 7, as follows:

In Giani Ram v. Ramji Lal AIR 1969 SC 1144, the court said that in Order 41, Rule 33, the expression 'which ought to have been passed' means 'what ought in law to have been passed' and if an appellate court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

(7) Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge.

Reference of Murari Lal v. Gomati Devi 1986 ACJ 316 (Rajasthan), may also be made here. Similar view has been taken by me while deciding United India Ins. Co. Ltd. v. Dhali 1992 ACJ 1057 (Rajasthan)."

42. The High Court of Orissa at Cuttack, in **M. Adu Ama vs. Inja Bangaru Raja and another, 1995 ACJ, 670,** has laid down the same principle of law.

43. This High Court in **Himachal Road Transport Corporation vs. Saroj Devi and others, 2002 ACJ 1146,** held that appellate Court is not precluded from passing order which it considers just in the facts of the case, without there being any cross objection or cross appeal. It is profitable to reproduce paragraph 15 of the said decision hereunder:

"15. Keeping in view the aforesaid decisions of Supreme Court and different High Courts including this Court , we feel that there being no prohibition in law, i.e., either under Motor Vehicles Act or under the provisions of Civil Procedure Code, this Court is not precluded from passing order which it considers just in the circumstances of a case without there being either cross-objection or cross-appeal. As such we are further of the view that Order 41, Rule 33 is fully applicable to the appeals under the Motor Vehicles Act."

44. In **National Insurance Co. Ltd. vs. Mast Ram and others, 2004 ACJ 1039,** the question arose before this High Court was – Whether the appellate Court can modify the award in

the absence of cross-appeal. This High Court answered in the affirmative. It is apt to reproduce paragraph 13 of the said judgment hereunder:

> *"13. Because of what has been held in this judgment, it is felt necessary to exercise power vested in this court under Order 41, Rule 33 of the Civil Procedure Code to set aside the findings in the operative portion of the award requiring the appellant to pay the amount and then to recover it from the 'insurer' (it should have been 'insured'?). This is a direction in the impugned award that needs to be set aside. On this aspect, Mr. Sharma had argued that there is no cross-appeal by the owner of the vehicle. To meet such a situation, legislature had enacted Order 41, Rule 33 in the Civil Procedure Code even in cases where an appeal is not filed by a party, like the owner in the present appeal. As such, this plea cannot be accepted."*

45. This High Court in **LAC Solan and another vs. Bhoop Ram, 1997(2) Sim.L.C. 229,** modified the awards in exercise of powers under Order 41 Rule 33 of the CPC.

46. Faced with the similar situation, the Jammu and Kashmir High Court, in **State Bank of India vs. M/s Sharma Provision Store and another, AIR 1999 J&K 128,** held that a High Court can pass a decree which ought to have been passed by the trial Court. It is apt to reproduce relevant portion of paragraph 7 of the said decision hereunder:

> *"7. .....This is an exceptional situation which authorises this Court in the present appeal to pass such decree as ought to have been passed or as the nature of the case demands. Similarly discretion vested in this Court under the aforesaid provision of law will not be refused to be exercised simply because respondents have not either filed an appeal or cross-objections."*

47. This Court in **FAO No.203 of 2010,** titled **Nati Devi and another vs. Maya Devi and others,** decided on **20th May, 2016,** alongwith connected matters, has taken the similar view.

48. Thus, it can easily be deduced that the mandate of Section 96, Section 107(2) and order 41 Rule 33 of the CPC is just to rectify the errors and achieve the aim and object of the legislation. The purpose of Order 41, as discussed hereinabove, is to enable the appellate Court to do complete justice between the parties and to pass order which ought to have been passed while keeping in view the facts and circumstances of the case.

49. Accordingly, keeping in view the mandate of Section 146 of the Act and aim and object of granting compensation read with above discussion, it is held that this Court has the power to examine the question whether the Tribunal has rightly saddled the owner with the liability, even if the owner has not questioned the impugned award.

50. In the instant case, the factum of insurance is admitted.

51. Having glance of the above discussion, it is clear that the insurer has failed to prove that the owner had committed any breach, what to talk of willful breach.

52. Having said so, the findings returned by the Tribunal are set aside and the insurer is saddled with the liability.

Issue No.2:

53. Coming to this issue, I have gone through the assessment made by the Tribunal, appears to be on the material placed on record. Accordingly, it is held that the amount of compensation awarded by the Tribunal is adequate and requires no enhancement.

54 However, the Tribunal has awarded interest at the rate of 6%, which is on the lower side. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd.***

and others, **reported in** ***2012 AIR SCW 2892****; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,* **reported in** *(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,* **reported in** *2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,* **reported in** *2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,* **reported in** *(2015) 4 Supreme Court Cases 433,* **and** *Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another*, reported in *(2015) 4 Supreme Court Cases 434*, and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others****,* being the lead case, decided on **19.06.2015**.

55. Accordingly, 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 realization.

56. The insurer is directed to deposit the entire amount, alongwith up-to-date interest, within a period of eight weeks from today and on deposit, the Registry is directed to release the same in favour of the claimants through their bank accounts, strictly in terms of the impugned award.

57. The appeal stands disposed of accordingly.

****

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

Savitri Devi ....Appellant

Versus

National Insurance Company & another ...Respondents

FAO No. 407 of 2010
Decided on : 17.06.2016.

Motor Vehicles Act, 1988- Section 166- Compensation is to be awarded for pecuniary as well as non-pecuniary damages - claimant remained admitted in the hospital w.e.f. 27th September, 2005 to 27th October, 2005- she had to go for follow-up after one and half month- she suffered spinal injury and plates were inserted- she had suffered 40% temporary disablement- she was unable to work for one year- taking the income of the deceased as Rs. 5,000/- claimant is entitled to Rs. 5000 x 12 = Rs. 60,000/-- she had suffered 25% permanent disability and her loss of income is Rs. 1,250/- per month- she is entitled to Rs. 1250/- x 12 x15 = Rs.2,25,000/- under the head 'loss of future income'- she is entitled to Rs.50,000/- under the head 'pain and suffering', Rs.25,000/- under the head 'loss of amenities of life'- she is entitled to Rs.16,221/- under the head 'expenditure on medical treatment', Rs.8,000/- under the head expenditure on attendant and transportation charges- thus, she is entitled to total amount of Rs.3,84,221/-.

(Para-13 to 23)

Cases referred:

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

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

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

Kavita versus Deepak and others, 2012 AIR SCW 4771

For the Appellant: Mr. Digvijay Singh, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondent No. 1.
Mr. Hamender Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 29th July, 2009, passed by the Motor Accident Claims Tribunal, Mandi, (hereinafter referred to as 'the Tribunal'), in Claim Petition No. 55 of 2006, whereby compensation to the tune of Rs.45,221/- 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-appellant and the insurer-respondent No. 1 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 claimant has questioned the impugned award on the ground of adequacy of compensation.

4. The only dispute in this appeal is relating to the adequacy of compensation. No other issue is involved in this appeal.

5. In view of the above, the findings returned by the Tribunal on issues No. 1, 3 & 4 are upheld.

6. The factum of insurance is admitted. The insurer has failed to prove that the owner-insured has committed any willful breach. Accordingly, it is held that the Tribunal has rightly saddled the insurer with liability.

7. The compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work, as held by the Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755**.

8. The Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085** in para-7 of the judgment has held as under:

> *"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."*

9. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation in injury cases. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of*

such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.

9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

10. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation.

11. Admittedly, the claimant remained admitted in the hospital w.e.f. 27th September, 2005 to 27th October, 2005. Thereafter, she had to go for follow-up every after one and half month as per Mark-B. She suffered spinal injury and plates were inserted, the details of which are given in the Discharge Slip (Mark-B).

12. She appeared before the concerned doctor on 13th December, 2005 and 9th February, 2006 and ultimately, Disability Certificate (Mark-A) was issued by the Board of Doctors, at Civil Hospital Sundernagar, District Mandi, which does disclose that the injured has suffered 40% temporary disablement.

13. The Tribunal has fallen in an error in not awarding compensation under the head 'loss of income' for the following reason.

14. Admittedly, the claimant was admitted in the hospital for about one month and thereafter, she was not in a position to perform her personal jobs and other vocations for about one year. Thus, the claimant is held entitled to compensation under the head 'loss of income for one year'.

15. While exercising the guess work, it can be safely held that the monthly income of the deceased would not have been less than Rs.5,000/- at the relevant time because even a labour would not have been earning Rs.5,000/- per month, at the relevant time. Accordingly, it is held that the claimant is entitled to Rs.5,000/- x 12 = 60,000/- under the head 'loss of income for one year'.

16. The Tribunal has fallen in an error in awarding compensation to the tune of Rs. 3,000/- under the head 'loss of future income'.

17. The appellant has moved CMP No. 826 of 2010 for taking on record the Disability Certificate issued by the Civil Hospital, Sundernagar. Taken on record. The Disability Certificate does disclose that the claimant-injured has suffered 25% permanent disability. Thus, it can safely be said and held that her disability has affected her earning capacity to the tune of Rs. 1250/- per month.

18. Having said so, the claimant-injured is entitled to compensation to the tune of Rs.1250/- x 12 x15 = Rs.2,25,000/- under the head 'loss of future income'.

19. The Tribunal has also fallen an error in awarding compensation to the tune of ` 8,000/- under the head 'pain and sufferings'. The claimant-injured has suffered spinal injury, which she has to suffer through out her life. She also remained admitted in the hospital for about one month and had to visit the hospital for follow-ups. Accordingly, I deem it proper to held the claimant-injured entitled to Rs.50,000/- under the head 'pain and sufferings'.

20. She is also held entitled to Rs.25,000/- under the head 'loss of amenities of life'.

21. The Tribunal has rightly awarded compensation to the tune of Rs.16,221.00 under the head 'expenditure on medical treatment', Rs.8,000/- under the head 'expenditure on attendant and transportation', is maintained.

22. Accordingly, the claimant-injured is entitled to compensation under the following heads:

i)	Expenditure on Medical treatment =	Rs.16,221/-
ii)	Expenditure of attendant and transportation =	Rs. 8,000/-
iii)	Pain and suffering	Rs. 50,000/-
iv)	Amenities of life	Rs. 25,000/-
v)	Loss of income for one year	Rs. 60,000/-
vi)	Loss of future income	Rs. 2,25,000
Total	:	Rs. 3,84,221

23. The insurer-Insurance Company is directed to deposit the enhanced awarded amount within eight weeks from today. On deposit, the same be released in favour of the claimant-injured, strictly as per the terms and conditions contained in the impugned award, through payees' account cheque or by depositing the same in her account.

24. 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 VIVEK SINGH THAKUR, J.

State of Himachal Pradesh ...Appellant
Versus
Devu Rai ...Respondent

Criminal Appeal No. 324 of 2010
Judgment Reserved on : 27.05.2016
Date of Decision: 17.06.2016

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix had left her Village informing her sister that she was going to Village D- however, she did not return in the evening- accused was also found absent from the work- matter was reported to the police- prosecutrix was recovered from the native place of the accused in West Bengal- prosecutrix revealed on inquiry that she was subjected to sexual intercourse- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix was aged 16 years on the date of incident- prosecutrix had voluntarily accompanied the accused to his native place- no efforts were made by her to contact her parents – this shows that she had voluntarily married the accused- however, she was taken out of the custody of her parents without their consent- she was less than 18 years on the date of incident and her consent was immaterial –accused was wrongly acquitted of the commission of offence punishable under Section 363 of I.P.C- appeal partly allowed and accused convicted of the commission of offence punishable under Section 363 of I.P.C. (Para-11 to 38)

Cases referred:
S. Varadarajan Versus State of Madras AIR (1965) Supreme Court 942
Thakorlal D. Vadgama Versus the State of Gujarat 1973) 2 Supreme Court Cases 413
Maniram Hazarika Versus State of Assam(2004) 5 Supreme Court Cases 120
Paramjit Singh V. State of H.P. AIR 1965, SC 942 (1965) 2 Cri LJ 33,
Paramjit Singh V. State of H.P 1987
Sachindra Nath Mazumder vs. Bistupada Das Cri LJ 1266 (H) 1978 Cri. LJ 1494(Cal)
Sajjan Kapar Versus State of Bihar(2005) 9 Supreme Court Cases 426
Ashok Debbarma Alias Achak Debbarma Vs. State of Tripura (2014) 4 Supreme Court Cases 747

For the appellant : Mr. M.A.Khan Additional Advocate General.
For the respondent : Mr. T.S. Chauhan, Advocate

The following judgment of the Court was deliverd:

Vivek Singh Thakur, J.

This appeal has been filed by the State assailing judgment dated 29.12.2009, passed by learned Additional Sessions Judge, Ghumarwin, District Bilaspur, Himachal Pradesh (Camp at Bilaspur) in Sessions Trial No.5/7 of 2009 of 2010 in FIR No. 94/2006, dated 28.07.2006 under Sections 363, 366 IPC, Police Station, Bharari, acquitting respondent-accused of charges under Sections 363, 366 and 376 of Indian Penal Code.

2. As per the prosecution, on 25.7.2006 at about 12.00 (noon) or 1.00 PM, prosecutrix had left her village Dangar informing her sister that she was going to another house of family in village Dakhut. Prosecutrix did not return in evening. Next day, she was not found by her father in village Dakhut. After inquiring from other relatives, prosecutrix was not traceable, therefore, on 27.07.2006 complainant PW-1 Shamsher Singh, father of prosecutrix, had lodged a report Ex. PW-14/A stating therein that his daughter is not traceable and accused Devu Rai who was labourer with complainant is also absent from work since 25th July, 2006. It was suspected in the report that his daughter might have gone with accused.

3. On 28.07.2006, PW-6 Ashutosh Kapil, Contractor had informed complaint PW-1 Shamsher Singh that Devu Rai has telephonically informed him that prosecutrix was with him in Rajasthan. Thereafter complainant has lodged FIR Ex. PA bearing No. 94/2006 under Sections 363 & 366 IPC.

4. Police party headed by PW-10 Tilak Chand accompanied by PW-1 Shamsher Singh and PW-7 Harcharan Singh had recovered prosecutrix from Shishwabari in West Bengal native place of accused on 08.09.2006. Prosecutrix was handed over to PW-1 Shamsher Singh and produced before JMIC Court No.2, Ghumarwin on 12.09.2006. Statement of Saroj Kumari was also recorded and she was medically examined by PW-9 Dr. Bharti Ranaut.

5. It was revealed in the statement of prosecutrix that she had been subjected to sexual intercourse 15 days prior to 25.07.2006 and also after solemnizing marriage with accused at Shishwabari. As per medical opinion rendered by PW-9 Dr. Bharti Ranaut vide MLC certificate Ex. PW-9/B there were signs of vaginal penetration but not of recent penetration and victim appeared to be habitual of vaginal penetration. As per chemical examiners' report Ex.PW-9/A received from State FSL Junga, there was no semen or blood on post Carnic Slide, vaginal Smear slide and pubic hair of prosecutrix.

6. After ascertaining age of prosecutrix, recoding her statement and receiving opinion of PW-9 Dr. Bharti Ranaut, offence under Section 376 was also added in the FIR.

7. Accused was not traceable and was declared proclaimed offender and challan was put up in court under Section 299 of Code of Criminal Procedure on 09.05.2008.

8. Accused contacted prosecutrix on 23.01.2009 by calling her on mobile when she was alone in house and asked prosecutrix to come to Bilaspur to accompany him back to Shishwabari. Prosecutrix had informed her parents and on fixed date 25.01.2009 prosecutrix alongwith her father PW-1 Shamsher Singh and police went to Bilaspur at about 1.30 PM. Accused was apprehended by police on his arrival in a bus from Chandigarh side at Bus Stand, Bilaspur. Thereafter trial was conducted and accused has been acquitted of charges framed against respondent-accused.

9. Mr. M.A. Khan, learned Additional Advocate General has argued that there are sufficient grounds and evidence on record to punish respondent-accused under Sections 363, 366 and 376 of Indian Penal Code and learned trial Court has failed to appreciate and consider evidence on record in its right perspective.

10. On the contrary, learned counsel defending respondent-accused has supported the Judgment passed by learned Additional Sessions Judge, Ghumarwin (Camp at Bilaspur) and has argued that no grounds have been made out in appeal warranting interference of this court and prayed for dismissal of the appeal.

11. Prosecution has examined 14 witnesses and thereafter statement of accused under Section 313 of Code of Criminal Procedure was recorded. No defence witness has been examined, however, photographs of marriage Ex. DA to DF were placed on record during cross-examination of prosecution witnesses.

12. PW-2 Ramesh Chand, Panchayat Secretary has proved Ex. PC date of birth certificate of prosecutrix on the basis of birth register maintained by Panchayat under Birth and Death Registration Act, 1969. As per this certificate, date of birth of prosecutrix is 12.07.1990. This witness has not been cross examined despite opportunity to do so. PW-5 Subhash Chand, Senior Assistant G.S.S.S., Dangar has issued certificate Ex.PD on the basis of admission and withdrawal register of Government Senior Secondary School, Dangar. In this certificate also date of birth of prosecutrix is 12.07.1990. Though this witness has been cross examined on behalf of respondent, however, nothing has been extracted to discredit certificate issued by him. Therefore, it is duly proved on record that date of Birth of prosecutrix is 12.07.1990. She had completed 16 years on 12.07.2006.

13. PW-9 Dr. Bharti Ranaut has proved MLC Ex. PW-9/B establishing that prosecutrix was subjected to vaginal penetration. PW-11 Dr. Sunil Kumar has examined respondent-accused and has proved medical certificate Ex. PW-1/A opining that on examination of patient, there was nothing to suggest that person was incapable of doing intercourse meaning thereby, he was capable of doing sexual intercourse.

14. PW-1 Shamsher Singh has corroborated report Ex. PW-14/A and FIR Ex. PA and has further stated that he had accompanied police to bring his daughter from native place of accused Shishwabari (West Bengal) with the help of local police of West Bengal. Prosecutrix was taken into custody from house of accused and was handed over to him vide Memo Ex. PB. He has further stated that on inquiry, his daughter informed him that accused had come to his house 15 days prior to incident and had violated her and had threatened with dire consequences on revealing incident to any body. It has further stated that accused had threatened to kill prosecutrix and to commit suicide on disclosure of incident. As per his statement in the month of July 2009 his daughter (prosecutrix) had informed him that accused has contacted her on mobile for calling her to Bilaspur so as to take prosecutrix alongwith him. This fact was informed to police and thereafter accused was called on fixed date at Bilaspur to trap him and was apprehended at Bus stand Bilaspur when he reached from Chandīgarh side. This witness has stated that accused stayed for a night at his house on two or three occasions. He had denied that

accused used to talk his daughter frequently and used to meet her outside house. He has also denied that he had beaten his daughter on 25.07.2006 due to suspicion of relationship with accused. He has admitted that photographs mark DA to mark DF is of his daughter. It is denied by him that prosecutrix after returning from Shishwabari was having frequent telephonic conversation with accused and observing frequent talks of daughter with the accused, his daughter was forced to call accused at Bilaspur and on her refusal to do so she was beaten many times and thereafter accused Devu Rai was called at Bilaspur at their instance through his daughter.

15. PW-3 Satya Kumari mother of prosecutrix in her statement has supported prosecution case. She has stated in her cross examination that whenever accused had stayed for night in her house he was given room in ground floor and their three daughters also used to sleep in ground floor. She has denied that prosecutrix had threatened family to run away with accused in case she was not allowed to marry with accused. She has stated that after four-five days of incident prosecutrix had called them and had informed that she had been taken by accused and has reached at the house of accused. She has stated that accused had challenged to dare to take prosecutrix back.

16. PW-4 prosecutrix has stated that she is eldest amongst three sisters and studying in +1 in Government Senior Secondary School Dangar. Her father is a contractor. In the year 2006, accused was labourer with her father and used to visit their house with her father. Accused has expressed his love with her but she had not accepted his proposal. Upon this, accused had threatened to consume poison putting entire blame on her. She has further stated that about fifteen days prior to 25.07.2006 accused had stayed in their house and during night accused had called her with the help of stick when she was sleeping alongwith her sisters. Accused had asked her to come out side with threat to consume poison for not acceding to his request. She had come out side and accused had forcibly taken her to room where he was staying and had sexual intercourse with her without her consent. She returned back to her room but could not tell incident to anybody due to shame. On 22.07.2006, accused had come to her house and offered Rs.20/- to elope with him with threatening of consuming poison for not accepting the proposal. The accused had told her that he was owner of big house and have landed property and prosecutrix will remain happy with him. She had not accepted Rs.20/- but accused had thrown Rs.20/- on her bed and went away. On 25.07.2006 accused had called her asking to come at Dangar, failing which he had threatened to consume poison. Upon this, prosecutrix put her clothes in polythene bag and informed her sisters that she was going to Dakhyut. When she reached Dangar accused was already there and from Dangar they went to Ghumarwin, Bilaspur and Rajasthan via Chandigarh. Thereafter they went to Silliguri via Kanpur and on 30.07.2006 stayed in house of maternal grandmother of accused. As per prosecutrix, she had insisted to make a call to her home but the accused did not allow to her. From Silliguri they went to native place of accused Shishbawari from where accused had rung parents of prosecutrix and had informed that prosecutrix has been kidnapped by him and they may take her back if dared to do so. The prosecutrix was not allowed to speak her father despite her requests. The accused has forcibly married her and on her refusal to marry she was threatened to be killed by evils. Thereafter accused had violated her six-seven times at Shishwabari against her will. Both of them stayed together at Shishwabari for one month and on 02.09.2006 the accused went to Sikkim with assurance to take her there after arranging house. On 7th September, 2006 police alongwith her father had reached Shishwabari and she was brought back. She has stated that as and when she tried to contact her family from Shishwabari, accused had threatened her with dire consequences. She had stated that accused was in her contact and was asking to come to Bilaspur to accompanying him to Shishwabari and was also threatening that he will not allow anybody to marry her. She had informed her parents and consequently on fixed date i.e. 25.01.2009, the respondent was apprehended at Bilaspur. In cross examination, she has admitted solemnization of marriage with accused. She has stated that she did not disclose to her parents that accused was in deep love with her. She has stated that accused pushed her with Danda in such a manner that only she was waken up and her sisters were sleeping. She has

further stated that she had come out of room without talking with accused to avoid waking up of her sisters. She has stated that she did not cry because of threatening of committing suicide already extended by accused. She admitted that no injury was caused to her in room but she has denied that sexual intercourse was with her consent. She has stated that call of accused asking her to come to Dangar was received by her only and her sisters were watching television in another room. After reaching at Dangar, accused had signaled her to sit in a bus without talking to her. She has stated that accused had not threatened or beaten her in Dangar. She has admitted that there are many shops in Dangar. She has also stated that she was weeping at the time of her marriage but not frequently, however, she was not happy with her marriage. She stated that she did not try to make a call to her house at Dangar because she was living at unknown place and was not allowed to go out side. She has denied that she deposed under pressure of her parents and still wanted to go alongwith accused. She admitted her photographs Mark-DA to Mark-DF.

17. PW-6 Ashutosh Kapil has deposed that on 25.07.2006, on contacting accused telephonically, he had informed that he had committed a blunder by running away with daughter of PW-1 Shamsher Singh. He has further stated that Devu Rai had refused to come back on his advice and had informed him that he was going to his home. This information was transmitted by this witness to PW-1 Shamsher Singh.

18. PW-7 Harcharan Singh had accompanied police party and father of prosecutrix to Shishwabari (West Bengal) to bring prosecutrix back.

19. PW-10 Tilak Chand had conducted investigation and has recovered prosecutrix from Shishwabari and after completion of investigation accused was declared as proclaimed offender and challan was presented in the court under Section 299 of the Code of Criminal procedure. PW-13 SI Iqwal Mohammad was SHO at Police Station Bharari from 2007 to 2008 and during his tenure, accused was not traceable and was declared as a proclaimed offender. PW-14/A HC Hem Raj has recorded Ex. PW-14/A missing report dated 27.07.2006. PW-12 SI Mool Raj has apprehended accused on Bus Station, Bilaspur.

20. After prosecution evidence, statement of accused under Section 313 of the Code of Criminal Procedure was recorded. It would be relevant to refer questions No. 5, 7, 9, 15, 25, 26, 32, 42 and 43.

> "Q. No.5. It has further come in prosecution evidence against you that you accused were having acquaintance with Shamsher Singh having worked him with labour and some time you used to visit his house and occasionally stayed for night. What have you to say about this?
>
> Ans. It is correct.
>
> Q. No.7. It has further come in prosecution evidence against you that on 3.9.2006 the police alongwith Shamsher Singh and Harcharan Singh went to your native place Shishwabari in District Jalpaiguri, West Bengal, where Saroj Kumari was found in your house and you were reported to have gone to Sikkim. What have you to say about this?
>
> Ans. It is correct. However, I was not present in my house.
>
> Q. No.9. It has further come in prosecution evidence against you that on inquiry from Saroj Kumari by her father she disclosed to him that the accused had come to their house 15 days prior to 25.07.2006 and raped her. What have you to say about this.
>
> Ans. It is correct. However, the girl came willingly to my room.
>
> Q. No.15. It has further come in prosecution evidence against you accused used to have talk with the prosecutrix and expressed your love feeling towards her. What have you to say about this?
>
> Ans. It is correct.

Q. No.25. It has further come in prosecution evidence against you that at Dangar you accused met the prosecutrix and from Dangar you went to Silliguri on 30.7.2006 via Ghumarwin, Bilaspur, Rajasthan and Kanpur. What have you to say about this?

Ans. It is wrong. However, she called me at Ghumarwin.

Q. No.26. It has further come in prosecution evidence against you that at Saleuguri you accused had stayed in the house of her maternal grand mother alongwith the prosecutrix. What have you to say about this?

Ans. It is correct.

Q. No.32. It has further come in prosecution evidence against you that you accused were working as a labourer with PW-6 Ashutosh Kapil, Contractor, What have you to say about this?

Ans. It is correct

Q. No.42. Why the witnesses have deposed against you?

Ans. I don't know. The girl used to come willingly in my room. She forced me to elope with me and then asked to marry me. She telephoned me 10-12 times from Ghumarwin to come so that we can go together.

Q. No.43. Do you to say anything more in this Case?

Ans. I am innocent. She developed sexual relation and then forced to marry. I did not play any active role.

21. On the basis of evidence, it can be safely held that learned trial Court has rightly concluded that offence under Sections 366 and 376 is not made out against accused. However, for the reasons stated hereinafter coupled with ratio laid down by the Apex Court, accused is certainly guilty of kidnapping prosecutrix as defined under Section 361 IPC and liable to be convicted under Section 363 of Indian Penal Code.

22. It is evident from statement of prosecutrix that she had submitted herself with her consent to accused to accompany him to visit his room, to travel alongwith him from Dangar to Ghumarwin, to Bilaspur, to Chandigarh, to Rajasthan, to Silliguri and to Shishwabari and to marry with him and thereafter she was waiting arrangement of house at Silliguri by accused to accompany accused to Silliguri. From the conduct of prosecutrix it is evident that on calling of accused from her room she did not inform her sisters and parents and came out from her room, went to room of accused and submitted herself to him and came back quietly and during this episode, prosecutrix had ensured that her sisters should not wake up and she had not disclosed this fact to any one. Rather, she remained in contact with accused and on his calling left her house taking spare clothes and accompanied accused to his native place Shishwabari. She was well conversant with mobile numbers, user of mobile phones but she did not make any efforts at any point of time till her recovery from house of accused to inform police or her parents or someone else.

23. The allegation of violating prosecutrix 15 days prior to 25.07.2006 means that the said incident had occurred probably on 10.07.2006. Prosecutrix has categorically stated that prior to that day accused has not committed any sexual intercourse with her. Prosecutrix has attained age of 16 years on 12.07.2006. From the statement of prosecutrix and answers of certain questions put to accused under Section 313 of Code of Criminal Procedure, it can be easily inferred that this incident was result of their mutual consent. Having sexual intercourse with prosecutrix with her consent two days prior to attaining age of 16 years in such circumstances cannot be made basis for convicting accused under Section 376 of Indian Penal Code. No specific dates or time have been assigned to other alleged 6-7 incidents of violating prosecutrix. It is not clear that whether these incidents are of prior to solemnization of marriage or after solemnization of marriage on the basis of evidence it can be said with certainty that these incidents are of after

25.07.2006. If these incidents are after solemnization of marriage. then Sections 376 and 375 IPC are not attracted. Exception (ii) of Section 375 IPC provides that 'Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape'. In case these incidents are of prior to solemnization of marriage and after 25.07.2006 then also Sections 375 and 376 IPC is not attracted as by that time prosecutrix had attained age of 16 years and at the time of alleged sexual intercourse, age of consent for woman under Section 375 IPC was 16 years. In the present case consent of prosecutrix is writ large. In these circumstances, offence under Section 375 IPC is not made out against accused and accused is not liable to be punished under Section 376 IPC.

24. For committing offence under Section 366 IPC, there must be kidnapping or abduction of prosecutrix with intent that she may be compelled or knowing it to be illegal that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. In the present case prosecutrix was not forced or seduced to illicit intercourse after kidnapping her, she was not compelled to marry any person against her will. As discussed hereinabove, she had left her house accompanying accused and married him and her consent is explicit from her conduct. Therefore, accused has rightly been acquitted under Section 366 IPC. However, in our opinion trial court has committed mistake by acquitting accused under Section 363 IPC.

25. Hon'ble Supreme Court in case S. Varadarajan Versus State of Madras AIR (1965) Supreme Court 942 has held as under:

> *"9.* It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.
>
> *"10.* It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our, opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

26. Hon'ble Supreme Court in case Thakorlal D. Vadgama Versus the State of Gujarat 1973) 2 Supreme Court Cases 413 has held as under:

> *"10.* The legal, position with respect to an offence under s. 366, I.P.C. is not in doubt. In State of Haryana v. Raja Ram (1), this Court considered the meaning and scope of s. 361, I.P.C. It was said there:

"The object of this section seems as much to protect the minor children from being seduced for improper purposes as. to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this--Section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor..... out of the keeping of the lawful guardian of such minor" in s. 361, are, significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control : further the guardian's charge and control appears to be. compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would: be sufficient to attract the section".

In the case cited reference has been made to some English decisions in which it has been stated that forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary. Inducement by previous promise or persuasion was held in some' English decision to be sufficient to bring the case within the mischief of the statute. Broadly, the same seems to us to be the position under our law. The expression used in s. 361, I.P.C. is "whoever takes or entices any minor The word "takes" does not necessarily connote taking by force and'-it is not confined only to use of force, actual or constructive. 'This word merely means, "to cause to go9", "to escorts' or "to get into possession'. No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement, by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to ,operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices', as 'used in s. 361, I.P.C. are, in our opinion, intended to be read together so that each takes to some extent its colour ,and content from the other. The statutory language suggests that if the minor leaves her parental home, completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in s. 3 6 1, I.P.C. But if the, 'guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed: with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be, difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case. In the case before us, we cannot ignore

the circumstances in which the appellant and Mohini came close to each other and the manner in which he is stated to have given her presents and tried to be intimate with her. The letters written by her to the appellant mainly in November, 1966 (Exhibit p. 20) and in December, 1966 (Exhibit p. 16) and- also the letter written by Mohini's mother to the appellant in September, 1966 (Exhibit p. 27) furnish very important and essential background in which the culminating incident of January 16th and 17th, 1967 has to be examined. These letters were taken into consideration by the High Court and in our opinion rightly. The suspicion entertained by Mohini's mother is also, in our opinion, relevant in considering the truth of the story as narrated by the prosecutrix. In fact, this letter indicates how the mother of the girl belonging to a comparatively poorer family felt when confronted with a rich man's dishonourable behaviour towards her young, impressionable, immature daughter; a man who also suggested to render financial help to her husband in time of need. These circumstances, among others, show that the main substratum of the story as revealed by Mohini in her evidence, is probable and trustworthy and it admits of no reasonable doubt as to its truthfulness. We have, therefore, no hesitation in holding that the conclusions of the two courts below with respect to the offence under s. 3 66, 1. P.C. are unexceptionable. There is absolutely no ground for interference under Article 136 of the Constitution".

27. Hon'ble Supreme Court in case Maniram Hazarika Versus State of Assam(2004) 5 Supreme Court Cases 120 after considering case S. Varadarajan V. State of Madras, Paramjit Singh V. State of H.P. AIR 1965, SC 942 (1965) 2 Cri LJ 33, Paramjit Singh V. State of H.P 1987 and Sachindra Nath Mazumder vs. Bistupada Das Cri LJ 1266 (H) 1978 Cri. LJ 1494(Cal) has held as under:

"7. It is on the basis of the said finding that the minor in that case walked out of the house of her guardian without any inducement from the accused, this Court came to the conclusion that the accused in that case was not guilty of the offence. It is also worthwhile to notice what this Court said about the act of accused in such cases which amounts to enticement which is found in paragraph 10 of the said judgment and which reads thus:

"It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so."

"8. It is clear from the above observations of this Court that if the accused played some role at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship, it would be sufficient to hold such person guilty of kidnapping".

"9. In the instant case, we have noticed rom the evidence that appellant who was a regular visitor to the house of PW-1, took undue advantage of his friendship and persuaded the minor to abandon the guardianship with a promise of marriage which on facts of this case is sufficient to uphold the judgments of the courts below".

"10. We having considered two other judgments cited before us by the learned counsel for the appellant, are satisfied that it is not necessary for us to deal with the same elaborately since on facts of this case it is established that the appellant had taken the minor by enticing her and hence had committed the offence of kidnapping which kidnapping was for the purpose of marrying the said minor. In our opinion, courts below were justified in convicting the appellant for an offence punishable under Section 366 IPC.

28. Hon'ble Supreme Court in case Sajjan Kapar Versus State of Bihar(2005) 9 Supreme Court Cases 426 has held as under:

> *"4.* Reverting now to the offences under Section 363 and Section 368 IPC, it was contended by learned counsel appearing as amicus curiae on behalf of the appellant that the evidence shows that PW 6 had on her own decided to abandon her parents and accompany the appellant. It is pointed out that they traveled for three days and covered a long distance from Samastipur in the State of Bihar and ultimately reached Dhubri in Assam after travelling through West Bengal and changing a number of buses. All through the journey, it is submitted that there were various persons in the bus. It may be so but at the same tune we cannot ignore the statement of PW 6 that on realizing that she was not being taken to the hospital but elsewhere, she asked the appellant about it but he gave her a threat and on that account she did not raise any alarm. We, under these circumstances, are unable to accept the contention that on this count the offence of kidnapping against the appellant has not been made out. Section 361 of the Indian Penal Code, inter alia, provides, whoever takes or entices any minor under eighteen years of age in case of a female, out of the keeping of the lawful guardian of such minor, without the consent of such guardian, is said to kidnap such minor from lawful guardianship. Explanation to Section361 provides that the words "lawful guardian" include any person lawfully entrusted with the care or custody of such minor or other person. From the testimony of PW 3, PW 6 and PW 8, the Court of Session and the High Court have reached a finding of fact that the appellant took away PW 6 from her school in the manner the prosecution alleges. The school had been lawfully entrusted with the care or custody of PW 6 and the appellant took her from that custody. We see no reason to disturb the finings of fact reached by two courts on appreciation of evidence. The offence of kidnapping was complete when the appellant took away PW 6 from the school. The fact that the appellant gave food to PW 6 on the way to Assam or she was fairy well looked after in Assam will have no relevance insofar as the commission of offence of kidnapping is concerned. We may note that the case sought to be put forth by the appellant was that the two of them were in love. In cross-examination of PW 6 some letters were sought to be put to her as also a diary. These documents were, however, denied by PW 6. Further, it cannot be ignored that she was a minor and could not be taken away from the custody of the school in the manner the appellant is found to have taken her away".

29. It is settled law that statement of accused recorded under Section 313 Cr.P.C. cannot be made basis of conviction of accused but the same can either be relied as a whole or in par to corroborate prosecution evidence and to take aid to lend credence to the evidence led by prosecution.

30. Hon'ble Apex Court in case Ashok Debbarma Alias Achak Debbarma Versus State of Tripura (2014)4 Supreme Court Cases 747 has held as under:

> *"24* We are of the view that, under Section 313 statement, if the accused admits that, from the evidence of various witnesses, four persons sustained severe bullet injuries by the firing by the accused and his associates, that admission of guilt in Section 313 statement cannot be brushed aside. This Court in State of Maharashtra v. Sukhdev Singh and another (1992) 3 SCC 700 held that since no oath is administered to the accused, the statement made by the accused under Section 313 CrPC will not be evidence stricto sensu and the accused, of course, shall not render himself liable to punishment merely on the basis of answers given while he was being examined under Section 313 CrPC. But, Sub-section (4) says that the answers given by the accused in response to his examination under Section 313 CrPC can be taken into consideration in such

> an inquiry or trial. This Court in Hate Singh Bhagat Singh (supra) held that the answers given by the accused under Section 313 examination can be used for proving his guilt as much as the evidence given by the prosecution witness. In Narain Singh v. State of Punjab (1963) 3 SCR 678, this Court held that when the accused confesses to the commission of the offence with which he is charged, the Court may rely upon the confession and proceed to convict him".
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> "*25.* This Court in Mohan Singh v. Prem Singh held that the statement made in defence by accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 CrPC cannot be made the sole basis of his conviction". In this connection, reference may also be made to the judgment of this Court in Devender Kumar Singla v. Baldev Krishan Singla (2004) 9 SCC 15 and Bishnu Prasad Sinha and another v. State of Assam (2007) 11 SCC 467. The above-mentioned decisions would indicate that the statement of the accused under Section 313 CrPC for the admission of his guilt or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution".

31. In the light of aforesaid ratio laid down by the Hon'ble Supreme Court of India, evidence of prosecution is to be considered to determine whether respondent has committed an offence under Section 363 IPC as defined under Section 361 IPC or not.

32. Section 361 IPC provides that taking away or enticing any minor under 18 years of age out of the keeping of the lawful guardian of such minor without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Section 363 IPC provides punishment for kidnapping.

33. It is admitted and duly proved on record that on the date of incident, prosecutrix was 16 years of age and she had left her house to accompany accused to his native place to marry him. Evidence of active role and participation of accused in persuading prosecutrix to leave her house is also corroborated by statement of accused recorded under Section 313 Cr.P.C.

34. On the basis of evidence on record, it can be easily inferred that respondent was known to and visiting terms with family of prosecutrix. His explanation that both of them were in love with each other and admission of sexual intercourse with prosecutrix at her home 15 days prior to 25.07.2006 indicates that he had developed intimacy with prosecutrix and it is also in his explanation that prosecutrix had made 10 to 12 calls to him with request to take her away. Accused had taken prosecutrix to his native place with assurance to marry her and had married her. There is sufficient material on record showing that respondent had allured and threatened prosecutrix and on account of such threatening and allurement, prosecutrix had left her house to elope with him. Accused had pressurized prosecutrix extending threatening to commit suicide to have her consent according to his wish and expressing his feeling of love so as to compel her to act accordingly which resulted into intimacy between respondent and prosecutrix.

35. It has come in evidence that respondent had also allured prosecutrix showing that he has a big landed property and also is having big house at his native place Shishbawari. It indicates active role of respondent to persuade or solicit minor prosecutrix to abandon legal guardianship.

36. It is clear from evidence on record that respondent has played a vital role in either preparing or soliciting or persuading the minor to abandon her house illegally by taking undue advantage of his relations with promise to marry with her. Therefore, there is sufficient evidence to hold respondent guilty of kidnapping prosecutrix.

37. Trial Court has failed to appreciate provisions of Section 361 IPC and ratio laid down by Hon'ble Supreme Court of India. Consent of female minor under 18 years of age is irrelevant for determining guilt of accused under Section 363 of Indian Penal Code. Therefore, impugned judgment deserves to be interfered on this count.

38. In view of above discussion, appeal filed by the State is partly allowed and judgment dated 29.12.2009, passed by Additional Sessions Judge, Ghumarwin, District Bilaspur, Himachal Pradesh (Camp at Bilaspur) in Sessions trial No. 5/7 of 2009 is modified to the extent that accused is liable to be punished under Section 363 of Indian penal Code.

39. The incident is of the year 2006, respondent was arrested on 28.01.2008 and remained in judicial custody till decision of learned Additional Sessions Judge, Ghumarwin, District Bilaspur dated 29.12.2009. In peculiar facts and circumstances of present case, it would be sufficient to sentence respondent for a period of imprisonment already undergone during trial.

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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

Neeraj Sharma & others. ......Respondents.

Cr. Appeal No. 37 of 2013
Reserved on: 25.05.2016
Decided on: 17.06.2016

N.D.P.S. Act, 1985- Section 20- Two accused were seen exchanging the bags and the third one was helping them with a torch - accused were searched during which 4 kgs. charas was recovered - 56 currency notes in the denomination of Rs. 500/- and 200 currency notes in the denomination of Rs. 100/-, total Rs.48,000/- were also recovered- accused were acquitted by the trial Court- held, in appeal that police had not given option to the accused under Section 50 of the N.D.P.S. Act - no torch was recovered- trial Court had taken a view, which was reasonable while acquitting the accused- appeal dismissed. (Para-11 to 18)

Cases referred:

Sunil vs. State, 2010 (1) Shimla Law Cases 192
Aman Kumar vs. State of H.P., : I L R 2015 (IV) HP 1711 (D.B.)
State of Rajasthan vs. Parmanand, (2014) 5 SCC 345
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, Addl. AG.
For the respondents: Mr. N.K. Thakur, Sr. Advocate, with Mr. Jagdish Thakur, Advocate, for respondent No. 1.
Mr. Praveen Chauhan, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The State has maintained the present appeal against the judgment of acquittal of the respondents (hereinafter referred to as 'the accused'), dated 14.09.2012, rendered by the

learned Special Judge, Fast Track Court, Chamba, District Chamba, H.P., in Sessions Trial No. 7 of 2012, for offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. The prosecution story, in brief, is that, on 10.02.2012 at about 3:30 a.m., HC Deva Nand (PW-10) alongwith HC Shaukat Ali No. 25, IO/HHC Subhash Chand No. 26, Constable Sandeep Kumar No. 269 and SPO Sanjeev Kumar proceeded to Zero point, Jassourgarh, in relation of picketing pursuant to Rapat No. 12, Ex. PW-4/A. At Zero Point, Jassourgarh, on the pedestrian path, HC Deva Nand (PW-10) noticed torch light and switching off the same thrice. In the meantime, one person was also noticed with torch light pointing towards pedestrian path standing at the curve at a little distance from Zero Point towards Chamba and the person who was pointing towards Chamba walked on foot to Zero Point. After reaching Zero Point that person was again seen pointing with torch light towards pedestrian path. In the meanwhile, two persons, one wearing red coloured sweater and another wearing jacket, were seen walking towards Zero Point, Jassourgarh. Person wearing red coloured sweater was noticed carrying yellow green coloured bag and the person following him was having torch. The person carrying yellow green bag handed over the same to the person wearing jacket and took the torch from him. The person allegedly carrying yellow green bag opened it in order to show to the person, who was already standing at the curve at a little distance from Zero Point, Jassourgarh, and the person who had been shown the bag took possession of the same by holding it tightly between his knees and handed over one packet containing currency notes to the person wearing black jacket.

3. It is further alleged that the police officials, including HC Deva Nand (PW-10) caught hold the accused and the person to whom packet containing currency notes was handed over threw the same on the road. PW-10, HC Deva Nand, inquired about the credentials of those three persons held at Zero Point. On suspicion, accused were interrogated and they disclosed their names as Neeraj, Santan and Mahesh. All the police officials offered their personal search as well as search of Investigating Officer's kit before the accused and memo, Ex. PW-1/A, to this effect was prepared and signed by HC Shaukat Ali (PW-1) and SPO Sanjeev Kumar (PW-2) as witnesses. Investigating Officer/HC Deva Nand (PW-10) apprised the accused of their right to be searched before a Magistrate or Gazetted Officer, however, accused consented to be searched by the police officials on the spot. Their consent, Ex. PW-1/B, in writing, was signed by witnesses HC Sahukat Ali (PW-1) and SPO Sanjeev Kumar (PW-2) and accused also signed the same. During search, a green bag was recovered which was checked up by IO/HC Deva Nand (PW-10) and on opening the same, one polythene bag containing hard substance in the shape of slides was recovered, which on smelling and burning and also on the basis of experience, was found to be 'charas'. The charas, on weighing, was found to be 4 kilograms. The contraband was put in the polythene bag and then polythene bag was put into yellow green coloured bag. Thereafter, yellow green bag was stitched and sealed with five impressions of seal 'W'. Specimen impression of seal 'W' was taken on a separate piece of cloth, Ex. PW-1/C, and recovery memo, Ex. PW-1/E, was prepared. NCB forms, Ex. PW-3/B, was filled in by HC/IO Deva Nand. Currency notes, contained in a packet, were also lifted by HC Deva Nand (PW-10) and on counting, 56 currency notes in the denomination of Rs.500/- and 200 currency notes in the denomination of Rs.100/-, totaling Rs.48000/- (rupees forty eight thousand), were found. All the currency notes, after wrapping in a paper, were sealed in the parcel, Ex. P-5 with impressions of seal 'W'. Specimen impression of 'W' was also taken on separate piece of cloth, Ex. PW-1/D. The seal impression 'W' was also taken on NCB forms. Both parcels, sealed with impressions each of 'W' were taken into possession vide memo, Ex. PW-1/E, in presence of HC Shaukat Ali (PW-1) and Sanjeev Kumar (PW-2), who signed the same. PW-10 also appended his signatures on the same.

4. MHC handed over the case file to HC Shaukat Ali (PW-1), after registration of FIR, who delivered the same to HC Deva Nand (PW-10). Rukka, Ex. PW-10/A, was sent to Police Station, Tissa, through HC Shaukat Ali (PW-1) for registration of FIR and on the basis of *rukka*, FIR Ex. PW-3/E, was registered. A copy of *rukka*, Ex. PW-5/A, was handed over to SPO Sanjeev

Kumar (PW-2) to deliver the same in the office of S.P. Chamba on 10.02.2012, who handed over the same to Constable Chain Singh (PW-5), Assistant Reader to SP, Chamba. Constable Chain Singh delivered the copy of *rukka*, Ex. PW-5/A, to SP, Chamba, who after perusal appended his signatures on the same and returned it to PW-5 to keep the same on record. On 11.02.2011, HC Deva Nand (PW-10) prepared special report, Ex. PW-6/A, and handed over the same to SPO Sanjeev Kumar (PW-2) to deliver the same to SP, Chamba, who delivered the same to HC Subhash Chand (PW-6), Assistant Reader to SP, Chamba. PW-6 Subhash Chand, placed the same before SP, Chamba, who after perusing it appended his signatures and returned the same to PW-6 for keeping the same on record.

5. Spot map, Ex. PW-10/B, was prepared and accused were arrested on 10.02.2012 at around 11:15 a.m. vide memo, Ex. PW-10/C, and vide memo, Ex.PW-10/D, personal search of the accused was conducted in presence of witnesses HHC Subhash Singh No. 226 and Constable Sandeep Kumar No. 269, who appended their signatures. All the accused appended their signatures on the same. PW-10 Deva Nand, Investigating Officer, recorded the statement of HC Shaukat Ali. Accused were got medically examined at CHC, Tissa, and accused persons alongwith case property were brought to Police Station, Tissa. Investigating Officer (PW-10) produced the case property, NCB forms in triplicate alongwith case file, specimen impressions of seal 'W' before Inspector Jagdish Chand (PW-8), Police Station, Tissa for resealing of the case property. Investigating Officer, HC Deva Nand, deposited the parcel containing currency notes of Rs.48000/- as referred above and articles taken during personal search of accused before MHC, Police Station, Tissa. Inspector Jagdish Chand (PW-8) resealed the parcel, Ex. P-1, in presence of HC Avinder and Constable Sunil Kumar by affixing five seals of impression 'H' and embossed seal 'H' on NCB forms , Ex. PW-3/B, and took specimen, Ex. PW-3/A, of seal 'H' on a piece of cloth and prepared reseal memo, Ex. PW-3/C, and handed over the seal after use to MHC, Police Station, Tissa vide daily diary No 20, Ex. PW-8/C. Photographs, Ex. PW-10/E, were also taken.

6. On 12.02.2012, MHC Avinder Singh handed over one parcel, Ex. P-1, duly sealed with impressions of seal 'H' and 'W' alongwith specimen impressions of aforesaid seals, NCB forms, copy of seizure memo, Ex.PW-1/E, FIR, Ex. PW-3/E, and docket vide RC No. 21/12, dated 12.02.2012, to Constable Yog Raj (PW-7) for depositing the same in FSL, Junga, who accordingly deposited the aforesaid case property on 13.02.2012 in FSL Junga in safe condition and, on return, he handed over the receipt RC No. 21/12 to HC, Police Station, Tissa. DDR No. 10(A), dated 10.12.2012, Ex. PW-8/B, and DDR No. 20(A), dated 10.12.2012, Ex. PW-8/C, were also entered and collected. Entry regarding depositing of the case property was made in *malkhana* register by MHC and copy of abstract of *malkhana* register is Ex. PW-3/D.

7. On analysis of contraband, the Chemical Examiner, as per report, Ex. PX, opined that the substance examined was extract of cannabis and the sample of 'charas' and the quantity of resin found therein was 18.28% w/w. After completion of investigation and on receipt of report of FSL, the case file was presented before SHO, who prepared the challan and filed the same in the Court.

8. The learned Trial Court acquitted the accused, hence the present appeal.

9. We have heard the learned Additional Advocate General for the appellant-State, learned counsel for the accused and have also gone through the judgment and records of the case carefully.

10. The learned Additional Advocate General argued that the Court below has failed to appreciate the fact that the prosecution has proved the guilt of the accused beyond the shadow of doubt and the law, which is overruled, is applied and so the judgment is liable to be set-aside. On the other hand, the learned defence counsel has argued that though the accused have been acquitted after applying the law as laid down in ***Sunil vs. State, 2010 (1) Shimla Law Cases 192,*** and the recovered material cannot be termed as charas as tetrahydrocannabinol is found not only in charas, ganja, leaves, seeds and in stumps of cannabis and presence of resin in various parts of the plant would not make it charas as defined in section 2(iii)(a) of NCPS Act and

he has also argued that the law was wrongly applied, but, in the instant case, the prosecution has otherwise also failed to prove the guilt of the accused, as the option, as required under Section 50 of NDPS Act, was not given to the accused.

11. As far as report of FSL is concerned, the recovered material is of charas. It has come in evidence that the accused were apprised by the Investigating Officer/ Head Constable Deva Nand (PW-10) of their right to be searched before the Magistrate/Gazetted Officer and accused consented to be searched by the Police officials. Their consent in writing, Ex. PW-1/B, was recorded which was signed by the witnesses. The consent memo prepared on the spot, Ex. PW-1/B, was a joint option given to all the accused persons and it reads as under:

> *"The Police party present has a suspicion that you Mahesh Chand son of Guman Ram, village Kohla, Santan son of Naresh, village Banjal and Neeraj Sharma son of Ashok Kumar VPO Nalsua are possessing some suspicious material or some narcotic substances, therefore, personal search of all of you and your bag is required to be conducted. You give me in writing whether you want your personal search and the search of your bag to be carried before Magistrate or Gazetted Officer as you have a right under Section 50 of the NDPS Act ."*

12. In ***Aman Kumar vs. State of H.P., Criminal Appeal No. 387 of 2014,*** decided on 31.08.2015, this Court, in para No. 15, has held as under:

> ***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."

13. Though the accused were informed that they had right to be searched, but the individual option was not given. The Hon'ble Supreme Court in ***State of Rajasthan vs. Parmanand, (2014) 5 SCC 345,*** has held that *"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."

14. At the same point of time, it has come in evidence that HC Deva Nand (PW-10) noticed torch light and switching off the same thrice. In the meanwhile, one person was also noticed with torch light pointing towards pedestrian path standing at a curve at a little distance from Zero Point towards Chamba and the person who was pointing towards Chamba walked on foot to Zero Point. On reaching at Zero Point that person was again seen pointing towards pedestrian path with torch light. The prosecution has failed to recover any torch from the accused persons and this also cast a shadow of doubt on the prosecution story.

15. 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/misappropriation of evidence on record, reversal thereof by High Court was not justified.

16. 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.

17. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused persons conclusively and beyond a shadow of doubt, as reasonable suspicion has occurred in the prosecution story.

18. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made above, we find no merit in this appeal and the same is accordingly dismissed. All the pending application(s), if any, stand(s) disposed of accordingly.

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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

Ramesh Sharma ...Respondent

Criminal Appeal No. 699 of 2008
Judgment Reserved on : 19.05.2016
Date of Decision : 17.06.2016

Indian Penal Code, 1860- Section 302- PW-4 had purchased a new vehicle- accused was driving the vehicle- PW-4 and deceased were travelling in the vehicle – vehicle met with an accident- deceased slapped the accused and accused threatened to see the deceased- accused called the deceased- deceased was found missing- belongings of the deceased were found in the cowshed of the accused- dead body was recovered from Nalla- accused was arrested - he made a disclosure statement leading to the recovery of buckle and leather strip - one leather belt without buckle was also taken into possession- accused was tried and acquitted by the trial Court- held, in appeal that motive projected by prosecution that deceased had slapped the accused on which accused had murdered the deceased is not sufficient - disclosure statement was also not proved - material witnesses were not examined- 375.2 mgs percent liquor was found present in the viscera- injuries noticed on the person of the deceased could have been caused by way of fall- testimonies of prosecution witnesses were contradicting each other- view taken by trial Court was a reasonable one which could have been taken in the circumstances of the case- appeal dismissed. (Para- 16 to 28)

For the appellant : Mr. P.M. Negi, Deputy Advocate General.
For the respondent : Mr. Manoj Pathak, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Aggrieved by acquittal of respondent-accused vide judgment dated 30.06.2008, passed by learned Additional Sessions Judge, Shimla in Sessions Trial No. 3-S/7 of 2008 acquitting the respondent-accused in FIR No. 225 dated 20.10.2007 under Section 302 of Indian Penal Code at Police Station Boileauganj, Shimla.

2. Mr. P.M. Negi, learned Deputy Advocate General for the appellant-State has advanced arguments that there is sufficient circumstantial evidence on record to prove guilt of respondent-accused under Section 302 of the Indian Penal Code and prayed for allowing appeal and to punish respondent-accused under Section 302 IPC whereas Mr. Manoj Pathak learned counsel for respondent-accused has vehemently submitted that prosecution has failed to prove the case beyond reasonable doubt and there is no circumstance incriminating respondent-accused and has sought dismissal of the appeal by affirming the judgment of Additional Sessions Judge, Shimla.

3. We have heard respective counsel and have also gone through the record.

4. Prosecution has examined 17 witnesses to prove guilt of respondent-accused. Statement of respondent-accused under Section 313 of Code of Criminal Procedure was recorded. No defence witness has been examined on behalf of respondent-accused.

5. Prosecution case is that PW-4 Anand Negi had purchased a vehicle on 04.10.2007 from Mahindra & Mahindra Company, Kachhi Ghati, Shimla. Respondent-accused driven new vehicle to Kinnaur accompanying PW-4 Anand Negi to obtain signature of deceased Sher Singh as guarantor of PW-4 Anand Negi in Kinnaur. During this visit, vehicle met with an accident on 05.10.2007 hitting parapet and deceased Sher Singh had slapped respondent-accused for this mistake and in response, respondent-accused had threatened deceased Sher Singh to see him at Shimla. On refusal to receive damaged vehicle by PW-4 Anand Negi, respondent-accused drove back vehicle to Shimla on next day. PW-4 Anand Negi had visited Shimla to receive his money back. He was asked to come with guarantor. PW-4 had returned back to home on 12.10.2007. It is alleged that respondent-accused had called deceased Sher Singh saying that amount paid by PW-4 Anand Negi will be returned only in presence of guarantor deceased Sher Singh and consequently deceased Sher Singh had gone to Shimla on 12.10.2007.

6. On 18.10.2007 missing report Ex. PW-1/D was lodged by PW-1 Dolma in Police Station Boileauganj, Shimla stating that her husband Sher Singh had left his house from Kinnaur on 12.10.2007 saying that he was going to office of Mahindra & Mahindra Company, Kachi Ghati, Shimla. Since her husband had not contacted her since 4-5 days therefore she alongwith her mother-in-law had come to Shimla in search of her husband and respondent-accused, an employee of Mahindra & Mahindra Company, Kachi Ghati, Shimla had informed that on 13.10.2007 her husband had accompanied him from Kachi Ghati to his house at Tara Devi, however, thereafter her husband had part with respondent at 7.00 PM by saying that he was returning home.

7. On 20.10.2007, at 12.20 PM, PW-1 Dolma has lodged FIR Ex. PW-1/C in Police Station, Boileauganj doubting detention or murder of her husband by respondent-accused.

8. Prosecution case is that on 20.10.2007 bag of deceased Sher Singh containing mobile, chips, bottle of liquor, bathing soap, woolen cap, mobile ear lead, a pen, a pocket diary and one open packet of Chips Lays was found in cow shed of respondent-accused and one

mobile phone belonging to deceased Sher Singh was also produced by respondent-accused from his bed room stating that said mobile was found near his house on 13.10.2007. These articles were taken in possession vide seizure memo Ex. PW-1/A and Ex. PW-1/B.

9. On 22.10.2007 at 5.25 PM dead body of deceased Sher Singh was found in Phyal Jungle Nalla which was taken into possession alongwith hair lying in water and was sent to I.G.M.C. Shimla for postmortem.

10. On 23.10.2007, at 12.35 PM, PW-15 Dr. Piyush Kapila had conducted Postmortem and as per postmortem report Ex.PW-15/B, deceased Sher Singh had died as a result of multiple anti-mortem head injury causing immediate death and time gap between death and postmortem was around 7 to 10 days. After receipt of chemical examination's report, final opinion Ex. PW-15/C was rendered and it was opined that deceased had died as a result of ante-mortem injury in a case of alcohol consumption. As per chemical examiner's report Ex. PX-1 blood alcohol level of deceased was found 375.2 mg percent. As per opinion of the Doctor head injury was possible with a Lathi. In cross-examination this witness has stated that all injuries mentioned in postmortem report are possible with fall and alcohol contents found in the chemical examiner's report indicates stage of 'coma'.

11. It is further case of prosecution that respondent-accused was arrested on 20.10.2007 and was interrogated. on 26.10.2007, respondent-accused had made disclosure statement Ex. PW-3/A in presence of PW-3 Prem Chand and HC Ram Lal leading to recovery of buckle and leather strip of belt from Turburd Maidan, near ITBP Camp Shogi which were taken into possession vide seizure memo Ex. PW-3/B and one leather belt without buckle from his house which was taken into possession vide seizure memo Ex. PW-3/C.

12. After completion of investigation, challan was put up before the Court against respondent-accused. After conclusion of trial, respondent-accused has been acquitted by giving him benefit of doubt.

13. Present case of prosecution is based on circumstantial evidence. Prosecution has relied upon 'last seen together theory', 'motive', recovery of articles from house of respondent-accused at his instance and injuries found on body of deceased.

14. It is a settled law that in case of circumstantial evidence conviction should be recorded only if the chain pointing to the guilt of respondent-accused is firmly established linking accused with crime firmly and not only creating suspicion as suspicion however strong evidence itself may not take place of proof. All circumstances must be consistent only with hypothesis of guilt.

15. Though, murders are also committed even without any pre-emptive motive. In cases based on circumstantial evidence motive, however is an important factor and a strong circumstance.

16. Enmity arisen on account of slapping by deceased Sher Singh to respondent-accused followed by threatening by respondent-accused has been propounded as a cause to commit murder by respondent-accused. However, in the statement of PW-4 Anand Negi it has come that deceased Sher Singh and respondent-accused had gone Dubling and had brought a mechanic on spot for repairs of vehicle and thereafter accused had come back to Shimla. To prove the 'motive', there is no other evidence on record. It is difficult to believe that for a single slap, relations had become so bitter so as to call deceased to Shimla to kill him by accused, particularly when on 05.10.2007 respondent and deceased were together and had arranged mechanic for repair of the vehicle without any quarrel amongst them.

17. Another instance of quarrel has been tried to be propounded through PW-16 Amit Thakur purporting him an being eye witness to fight between deceased Sher Singh and respondent-accused on 13.10.2007. However, this witness has abstained lending support to prosecution story and had turned hostile. This witness was subjected to lengthy cross

examination by Public Prosecutor, however, nothing incriminatory was elucidated against respondent-accused.

18. Another circumstance relied by prosecution is disclosure statement Ex. PW-3/A followed by recovery of articles vide seizure memo Ex. PW-3/B and Ex. PW-3/C in presence of PW-3 Prem Chand, HC Ram Lal and Smt. Tarawati. Only PW-3 Prem Chand has been examined. HC Ram Lal and Smt. Tarawati had not been examined by the prosecution. Best course available to prosecution was to examine witness in Court and cross examine in case of turning hostile.

19. PW Tarawati had been given up alleging that she had been won over by accused. It is beyond imagination to find out reasons and grounds on account of which PW Tarawati had been declared to be won over by accused as at the time of making such statement only her statement under Section 161 of the Code of Criminal Procedure was there and she had not entered witness box and had not uttered a single word either in favour of or against respondent-accused or prosecution.

20. Examination of PW Ram Lal was necessary for corroboration of statement of PW-3 so as to prove disclosure statement Ex. PW-3/A and recovery memo Ex. PW-3/B. However PW Ram Lal was also given up on account of repetition.

21. PWs Ram Lal and Tarawati were second witnesses to disclosure statement and seizure memo. Necessary evidence was kept behind which has prejudiced a fair trial.

22. Now, there is only one witness PW-3 Prem Chand examined to prove Ex. PW-3/A to Ex. PW-3/C. Veracity of story of prosecution is under cloud as in cross-examination, PW-3 Prem Chand has admitted that when he had entered in room of SI Chaman Lal, PW-3 was asked to accompany him to ITBP Camp. It indicates that disclosure statement and recovery in pursuance to said statement, was already managed and police was knowing about contents of disclosure statement as well as place of recovery of articles and PW-3 Prem Chand was only an instrument to complete codal formality to establish concocted story of prosecution. Therefore, disclosure statement Ex. PW-3/A and recovery memo Ex. PW-3/B and Ex. PW-3/C cannot be relied upon to convict respondent-accused.

23. Prosecution has also relied upon recovery of bag and mobile from the house and at the instance of respondent-accused vide memo Ex. PW-1/A and PW-1/B. Recovery of articles of deceased vide this memo is also not beyond doubt as PW-1 Dolma had stated that on 18.10.2007 after inquiring from respondent-accused about deceased Sher Singh missing report was lodged and before their leaving Police Station sister of respondent-accused had come to Police Station and bag and mobile of deceased were recovered at her instance. It is evident from perusal of memo Ex. PW-1/A and PW-1/B that these memos are of 20th October, 2007 whereas PW-1 and her mother-in-law had inquired from respondent-accused on 18.10.2007 and had reported to police on the same day. Ex.PW-3/B and PW-3/C reflected that recovery of bag was done by police during investigation and Mobile was produced by respondent-accused. Therefore, reliance cannot be placed on memo Ex. PW-1/A and Ex. PW-1/B.

24. As per chemical examination report Ex. PX-1 hair sample of Sher Singh and hair lifted from spot were found similar with each other and ethyl alcohol was detected in Stomach, Small Intestines, Liver, Inner Spleen Kidneys and Bladder of deceased. Quantity of same in blood was 375.2 mg percent. No other poison was detected. PW-15 Dr. Piyush Kapila has unambiguously stated that all injuries found on the body of deceased were possible with fall and alcohol contents in blood 375.2 mgs percent is a stage of coma. Whereas PW-2 Lachhman Singh has stated that deceased Sher Singh never used to drink. He has also stated that deceased had drink at the time of marriage of this witness. Tone and tenor of statement of PW-1 Dolma no where suggests that deceased was tea-totaller and have used to have drinks. Further prosecution itself had tried to prove by examining PW-5 Ashwani Sharma, owner of a 'dhaba' at Kachhi Ghatti that deceased Sher Singh and respondent had consumed liquor in his 'dhaba'. It is prosecution story that after taking liquor, both of them had gone towards house of respondent-

accused and on the way they quarrelled and on account of injuries caused by respondent, deceased Sher Singh had expired. It shakes the credibility of prosecution story.

25. Deposition of other witnesses including Investigating Officer PW-17 SI Chaman is of no help of prosecution.

26. There are material contradictions and improvements in testimonial of material witnesses indicating that true version has been withheld and witnesses have produced in a manner suitable to frame respondent-accused at any cost.

27. It is evident from the aforesaid discussion that Chain of circumstantial evidence to prove guilt of accused is not complete and prosecution evidence cannot be treated as cogent, reliable, credible and sufficient to prove guilt of accused-respondent beyond reasonable doubt.

28. Thus, having perused the testimonies of prosecution witnesses on record, it cannot be said that prosecution has been able to prove its case that respondent-accused has committed offence under Section 302 of the IPC. It cannot be said that learned trial court has not appreciated the evidence correctly and completely and acquittal of the accused has resulted into travesty of justice or has caused mis-carriage of justice.

29. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon prosecution. The accused has been acquitted by trial Court. No case for interference is made out.

30 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.

Versus

Sanjay Kumar ... Respondent.

Cr. Appeal No 296 of 2009.
Reserved on 23.5.2016.
Decided on: 17.6.2016.

N.D.P.S. Act, 1985- Section 20- Accused came from Larji side and on seeing the police, he took out a poly bag from the pocket of his jacket and threw it towards Beas River- poly bag was found to be containing 1 kilogram charas- accused was tried and acquitted by the trial Court- held, that personal search of the accused was carried in the presence of J and T- T was a part of the police party and J was associated as an independent witness who was resident of Padiun village situated at a distance of 40 KM from the spot- it is not the case of the prosecution that the place of incident was a secluded place where no independent witness could have been associated- non-association of independent witnesses by the police raises serious doubts about the truthfulness of the prosecution version - quantity of charas was not mentioned in the NCB form and there is interpolation- NCB form is a basic document to prove the authenticity of the case and failure to fill the NCB at the spot is fatal to the prosecution case- spot map shows that the poly bag was lying on the edge of the middle of the road which belies the story of the prosecution that accused threw the poly bag towards River Beas- therefore, there is discrepancy regarding the place of recovery as well - prosecution case was not proved- in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. (Para-16 to 23)

For the appellant. : Mr. V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, Dy. Advocate General & Mr. J.S. Guleria, Asstt. Advocate General.
For respondent.: Mr. Keshav Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

The present appeal has been filed by the State against judgment dated 6.4.2009 passed by the Court of learned Special Judge, Mandi in Sessions Trial No. 2 of 2006, vide which the learned Trial Court has acquitted the accused for the commission of offence under Section 20 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (in short the 'Act').

2. The case of the prosecution, in brief, was that on 4.3.2005 HC Ram Lal, CIA staff Mandi, accompanied by Constables Sant Ram, Tara Chand and Vidya Sagar and Bhagmal Constable of Security Branch, Mandi were present, near under construction power bridge at Larji. A person came from Larji side and on noticing police, he took out a poly bag from the pocket of his jacket and threw the same towards Beas River. However, the poly bag fell on the bridge and he fled towards Larji. He was chased and apprehended. The poly bag which was carried out by him was checked in the presence of witnesses Jagdish Kumar and Tara Chand. From the said bag, charas was recovered and on weighing, it was found to be 1Kg. Out of the recovered charas, two samples of 25 grams each were separated and sealed with six seals of 'T' and bulk charas was sealed in a separate parcel with six seals of 'T'. NCB form in triplicate was prepared and specimen seal impression was drawn and seal after use was handed over to Jagdish Kumar. The case property was taken into possession as per memo Ext. PJ and Rukka Ext. PC was prepared and forwarded to the Police Station through Tara Chand Constable for recording the FIR. Accused was arrested as per memo Ext. PK and search memo of his personal search Ext. PL was prepared. The case property and accused were handed over by Ram Lal HC to SHO Dabe Ram, who resealed the case property with five seal impression of H. The case property was thereafter deposited with Raj Kumar MHC and special report Ext. PE was sent by HC, Balak Ram, through Constable Chandermani to Addl. Superintendent of Police, Mandi. The sample on analysis was found to be that of charas by the chemical analyzer as per his report Ext. PJ. Investigation was carried out and thereafter challan was filed in the Court and the accused was charged for the commission of offence punishable under Section 20 of the Act.

3. In order to substantiate its case, the prosecution, in all, examined ten witnesses.

4. PW1, HC Malkiat Singh, who was posted as Constable at Police Station Aut during the year 2005 stated that on 5.3.2005 MHC Raj Kumar had handed over him one sample parcel sealed with seal H and T, NCB form, copy of FIR, recovery memo along with RC No. 147/04/05 dated 5.3.2005 for depositing the same at CTL, Kandaghat which was deposited by him and copy of RC vide memo Ext. PA was handed over to Raj Kumar MHC.

5. PW2, HC Raj Kumar, has stated that he was posted as Investigating Officer at Police Station Aut during the year 2005 and he recorded FIR Ext. PB after receipt of Rukka, Ext. PC and on the same day, SI/SHO, Dabe Ram, deposited with him case property sealed with seal H at five places on each parcel and seal T at six places on each parcel. He further stated that sample parcels were marked as A1 and A2 and bulk parcel was marked as A. NCB form, sample seals along with other documents were also deposited with him. One sample parcel mark A1 was sent to CTL, Kandaghat through Constable Malkiat Singh, PW1, who after depositing the same had handed over the receipt to him. Abstract of Malkhana Register was Ext. PD.

6. PW3, Constable Jagdish Chand, proved Ext. PE copy of Rapat No. 29 dated 3.3.2005. PW4, HC Man Singh, deposed that he was posted as Assistant Reader to SP Mandi and on 5.3.2005 Addl. SP, Sh. Sunil Kumar had handed over to him special report, Ext. PF.

7. PW5, Constable Chandermani, has stated that on 5.3.2005 HC Balak Ram handed over special report Ext. PF to him which he delivered to Addl. SP, Mandi at 4:30 p.m.

8. PW6, Inspector Shamsher Singh, stated that he was posted as SHO, PS, Aut in the year 2005. After receipt of the report of Chemical Examiner Ext. PG, challan was prepared by him. PW7, HC Balak Ram, who was also posted at Police Station Aut stated that the case file was handed over by SHO to him for further investigation and he prepared the special report which was sent through Constable Chandermani to SP Mandi and special report was signed by Sunil Chaudhary, ASP, Mandi.

9. PW8, HC Tara Chand, has deposed that on 4.3.2005 he along with HC Ram Lal, Constable Sant Ram, Constable Vidya Sagar and Constable Bhagmal were present at Larji Dam in order to trace accused of FIR No. 28 of 2005. In the meanwhile, a person, (later on identified as the accused) came from Larji side and when he saw the police, he threw a poly bag from his pocket towards Beas River which bag fell on the bridge. The accused was apprehended by the police and the poly bag was lifted by HC Ram Lal. On search of the bag, charas in the shape of sticks and chapaties was recovered which weighed 1Kg. Two samples of 25 grams each separated from the recovered charas and sealed with seal T at six places. The sample parcels were marked as A1 and A2 and thereafter bulk charas was put in the same bag and sealed with seal T at six places. The specimen of seal T was Ext. PH. The parcels were signed by him, Jagdish Kumar and accused. The charas was taken into possession as per memo Ext. PJ and search and seizure memo was also prepared which is Ext. PJ/1. Copy of said memo was given to the accused. The accused was appraised about the grounds of his arrest as per memo Ext. PK and formal search of the accused was taken as per memo Ext. PL. In his cross-examination, PW8 has feigned ignorance about the place as well as the name of the accused in the matter/case of FIR No. 28 of 2005, in the tracing of accused of which he was present at Larji Dam along with other police personnel on 4.3.2005. He also stated that officials and labourers were present near the bridge. He has further stated that when accused saw police, he got nervous and ran backwards after throwing the poly bag in hurry. PW8 could not disclose the distance between Thalaut and Larji and the length of the bridge or the approximate labourers engaged at Thalaut.

10. PW9, Inspector Dabe Ram, who was posted as SHO, PS, Aut in the year 2005 stated that on 4.3.2005, HC Ram Lal handed over to him three parcels marked A, A1 and A2 alongwith recovery memo, NCB form in triplicate, sample seal T at 5:30 p.m and he resealed the same with seal H at five places and obtained the specimen seal impression Ext. PM. He further deposed that he filled up column No. 7A and B of NCB form Ext. PN and also affixed specimen of seal H and put his signatures therein. According to him, all parcels, NCB form, Sample seal T and H, search and seizure form were handed over to MHC Raj Kumar.

11. PW10, HC Ram Lal, who was posted as investigating officer with CIA Staff, Mandi during the year 2005, stated that on 4.3.2005 he along with Constable Sant Ram, Constable Tara Chand, Constable Vidya Sagar and Constable Bhagmal were present near Dam site at Larji Bridge in search of accused in case FIR No. 28 of 2005 towards Thalaut on the instructions of Inspector Narender Kumar CIA, Mandi. The police party noticed one person who was later on identified as accused coming towards Thalaut. The said person on noticing the police took out one brown coloured packet from the pocket of his jacket and threw the same in River Beas and thereafter the said person attempted to flee towards Larji. The bag so thrown by the accused fell on the bridge itself. This bag was picked up him and the accused was apprehended with the help of Jagdish Kumar. After ascertaining the identity of the accused, the poly bag was checked from which charas in the shape of sticks and chapaties weighing 1 Kg was recovered. From the said recovered charas, 2 samples of 25 grams each separated and sealed with seal T at six places. Bulk parcel was also sealed with seal T and marked as A1 and A2. Specimen was taken and the same was signed by witnesses and the accused. NCB form in triplicate was filled and the seal was handed over to witness Jagdish. Thereafter, case property along with search and seizure from, NCB form were taken into possession. Copy of memo Ext. PJ was given to accused free of cost. Search and seizure form Ext.PJ/1 and Rukka Ext. PC was sent to Police Station, Aut through

Constable Tara Chand at 1:30 p.m. Spot map Ext. PO was prepared and personal search of accused was carried out in the presence of Jagdish and Tara Chand vide Ext. PL and the accused was arrested as per memo Ext. PK and the intimation of arrest was given to his brother. The case property along with NCB form, sample seal, search and seizure form along with case file were handed over by him to SHO Dabe Ram. In his cross-examination, he has stated that Nepali and Bihari labourers were present at the construction site and Jagdish was resident of village Padiun which was at a distance of 45 KM from the spot where the accused was nabbed and that he i.e. PW10 was also resident of same area.

12. On the basis of the material so produced on record by the prosecution, the learned trial court came to the conclusion that the prosecution had failed to prove that the accused was found in conscious possession of the charas and accordingly it acquitted the accused of the charge(s) alleged against him.

13. Mr. V.S. Chauhan, learned Addl. Advocate General has argued that the judgment passed by the learned trial court vide which it has acquitted the accused is not sustainable in law. According to him, the findings returned by the learned trial court are based on surmises and conjectures and not the records of the case. According to Mr. Chauhan, the reasoning returned by the learned trial court in disbelieving the version of the prosecution was manifestly unsustainable both on facts and on law and there was, in fact, no reason to discard the consistent testimony of the prosecution witnesses on all material points by the learned trial court. According to Mr. Chauhan, the learned trial court had brushed aside the truthful testimony of the official witnesses on assumptions and presumptions which had no relevance in the facts and circumstances of the present case and the findings of acquittal returned by the learned trial court were, in fact, not sustainable in law. He further contended that 1 Kg charas was recovered from the accused and there was no material on record to suggest that the accused was falsely implicated by the prosecution in the case and this fact itself warranted setting aside of findings of acquittal returned by the learned trial court especially when the testimony of the official witnesses on material particulars had fully corroborated the case of the prosecution beyond any reasonable doubt. Therefore, Mr. Chauhan submitted that the findings returned by the learned trial court required interference and the accused deserved to be convicted for commission of offence under Section 20 of the NDPS Act.

14. On the other hand, Mr. Keshav Thakur, learned counsel appearing for the respondent submitted that there was no merit in the appeal filed by the State. He submitted that the findings of acquittal returned by the learned trial court were based on material produced on record by the prosecution, on the basis of which, the prosecution had not been able to prove beyond reasonable doubt that the accused was guilty of offence alleged against him. According to Mr. Thakur, the learned trial court had rightly acquitted the accused because the prosecution had not been able to bring home the guilt of the accused. Mr. Thakur submitted that, in fact, the story put forth by the prosecution was a concocted story which had no element of truth in it. According to him, the accused was falsely implicated in the case which was amply clear and evident from the fact that there were major contradictions in the testimonies of PW8, PW9 and PW10 coupled with the fact that no independent witness was associated by the police at the time of search and seizure, though the alleged incident has not taken place in a secluded area. Accordingly, he contended that the judgment passed by the learned trial court was a well reasoned judgment and the conclusions contained therein were borne out from the records of the case and the same did not require any interference.

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

16. As per the prosecution, on 4.3.2005 when police party was present at Larji Dam, accused came from Larji side towards Thalaut and when he noticed the police party, he took out a poly bag from his jacket which he threw it towards Beas River and then he tried to run away. Further, as per the prosecution, while the accused was trying to run away, he was nabbed by the

police party with the assistance of one Sh. Jagdish Kumar and the bag which he tried to throw in River Beas incidentally fell on the bridge which was lifted by investigating officer Ram Lal from the bridge. Personal search of the accused was carried in the presence of Jagdish and Tara Chand. Incidentally, Tara Chand, PW8, was a part of the police party and Jagdish who was associated as an independent witness happens to be resident of Padiun village situated at a distance of 40 KM from the spot. It has come in the cross-examination of PW10, Investigating Officer Ram Lal that he is also resident of the same area to which Jagdish belong. It is not the case of the prosecution that the place of incident was a secluded place where no independent witness could have been associated. On the contrary, it has come in the cross-examination of PW8 that Bihari labourers were engaged in the construction of Larji Project near the bridge and officials are also present in the office normally. PW10 has also mentioned in his cross-examination that the construction work was going on and many labourers were engaged in the construction work. In these circumstances, the non-association of independent witnesses by the police raises serious doubts about the truthfulness of the version of the story of the prosecution. The prosecution otherwise also has not been able to give any cogent explanation as to why no independent witness was associated by the police at the spot. The so-called independent witness Jagidh has not even been examined by the prosecution.

17. Further, the testimony of PW8 and PW10 also does not inspire confidence and the truthfulness of these witnesses is also highly doubtful. In his cross-examination, PW8, Tara Chand, has stated that they left police lines Mandi on 3.3.2005 and searched for the accused in respect of FIR No. 28 of 2005. He further stated that he does not remember the date of said FIR nor does he remembers from where the said accused was nabbed. He has further stated that he did not remember the distance from Larji and Thalaut. He stated that the bridge at Larji was under construction at that time and in the same breath he further mentioned that he did not remember the number of labourers engaged in the construction of bridge. He has further mentioned that Bihari labourers were engaged in the construction work and there were offices of Larji Project near the bridge and officials are present in the office normally. He further states that he does not remember as to who nabbed the accused first. He further showed ignorance to the suggestion that Jagdish was a stock witness of the police and he was facing criminal cases. Incidentally, this so-called independent witness who was associated with the search and seizure by the police was not produced by the prosecution as their witness.

18. PW10 has admitted in his cross-examination that nearby Thaulat, construction work of the new bridge was going on and many labourers from UP and Nepal were doing the construction work. Thereafter, he has stated that the accused was nabbed in the centre of the bridge and at that time no labourer was present. He has also stated that Jagdish is resident of village Padiun and he (PW10) was also resident of same area from which Jagdish belonged.

19. Ext. PC is the copy of Rukka, a perusal of which demonstrates that there is overwriting carried in the same qua mentioning of case No. 28 of 2005. Further, there is interpolation even in the figure of '950' which figure has been used to describe the remaining bulk quantity of charas i.e. 950 gram. According to HC Ram Lal (PW10) the case property along with NCB form, sample seal, search and seizure memo along with case file was deposited by him with PW9, SHO Dabe Ram. According to PW9, the case property was resealed by him in the presence of HC Ram Lal PW10 and MHC Raj Kumar PW2. However, this fact is not corroborated either by the statement of PW10 or by the statement of PW2.

20. Another glaring infirmity in the prosecution case is that copy of Rapat No. 29 Ext. PE dated 3.3.2005 refers to Inspector Narinder Kumar accompanied by ASI Yog Raj, HC Ram Lal and Constable Sant Ram leaving for patrolling towards Aut side at 5:45 p.m. In case said Narinder Kumar and other police officials were patrolling in the aforesaid area to trace the culprit of FIR No. 28 of 2005, then there is no plausible explanation coming from the prosecution as to why this fact has not been mentioned in the above mentioned Rapat No. 29. Now, when we peruse the contents of FIR No. 29 of 2005 dated 4.3.2005 which pertains to present case, it is mentioned therein that the police party was near the under construction bridge adjacent to

Thaulat on the basis of the orders of Inspector Narinder Kumar. Where the said Inspector was, is also not clear, whereas had he really been in search of the accused in the matter pertaining to FIR No. 28 of 2005, then he also ought to have been at the spot along with other police officials when they nabbed the accused. The factum of said Inspector and ASI Yog Raj not being along with other police officials raises very-very serious doubt about the factum of recovery of charas and the apprehension of the accused by the police party as per the version of the prosecution.

21. One very important factor which has heavily weighed with the learned trial court is qua tampering with the NCB form. The learned trial court has categorically taken note of the fact that the discrepancy mentioned in the NCB form Ext. PN makes a reference that the case property was 25 gram each sample with date of seizure dated 4.3.2005 at Larji Dam and date of dispatch of sample as 5.3.2005, description of two samples 25-25 grams each mark A1 and A2, description of seal as T and H, number of seals put on samples as six seals T and resealed with seal H five numbers. The quantity of charas recovered has not been mentioned in the said form and there is interpolation with figure '5' of the date 4.3.2005 and place of seizure and there is also interference with figure '5' of date 5.3.2005 which appears to have been changed from '4'. PW10, HC Ram Lal, who was to update the NCB form, has not admitted the overwriting in his hand. The learned trial court has further held that NCB form is a basic document to prove the authenticity of the case and failure to complete the NCB form at the spot is a breach which is fatal to the prosecution case.

22. Another relevant aspect of the matter is that according to the prosecution after the accused saw the police official he took out poly bag from his jacket and tried to throw out in the River Beas but the said bag fell on the bridge and the accused fled towards Larji. Ext. PO spot map shows that the poly bag is shown lying on the edge of the middle of the road which belies the story of the prosecution that accused threw the poly bag towards River Beas.

23. From all the above narrated facts, it cannot be said with certainty that the prosecution indeed was able to bring home the guilt of the accused. There are too many inconsistencies and contradictions in the testimony of police officials and no independent witness worth its name was associated by the police to corroborate its case. On the other hand, the material on record gives a looming impression that the testimony of police officials is neither cogent nor it is trustworthy. The prosecution has miserably failed to prove beyond reasonable doubt that the accused in fact was guilty of the offence with which he was charged. All these aspects of the matter have also been gone into by the learned trial court while it returned the findings of the acquittal in favour of the accused. We are of the considered view that the findings so arrived at by the learned trial court are neither perverse nor it can be said that the reasoning given by the learned trial court are not borne out from the records of the case.

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.

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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

Uttam Chand and others .....Respondents.

Cr. Appeal No.373 of 2010
Reserved on : 25.5.2016
Decided on: 17th June, 2016.

Indian Penal Code, 1860- Section 367 read with Section 34- Complainant, his family members and one S were taking lunch in the residence- accused U came along with other co-accused and asked the complainant and his mother to pay Rs. 6,200/- for Karyana articles supplied 2 ½ years ago - complainant and his mother requested the accused to give sometime for arranging the money - accused U insisted on making the payment - accused forcibly took members of the complainant party except S in a jeep – D, S, R and P were kept in confinement- matter was reported to police on which police recovered the family members of the complainant- accused were tried and acquitted by the trial Court- held, in appeal that there are contradictions regarding the names of the person who came to the residence of the complainant and the role played by each of the accused- identities of the accused except U were not established- PW-6 stated that some person had requested for shelter on which they were adjusted in the 'Janjghar' – witnesses are interested as they owe money to accused U- view taken by the trial Court was reasonable- appeal dismissed. (Para- 6 to 10)

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 respondents : Mr. Sanjay Dutt Vasudeva, 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 persons in a case under Section 367 read with Section 34 of the Indian Penal Code, passed by the learned Additional Sessions Judge-II, Kangra at Dharamshala dated 25.3.2010, in Session trial No.7/09,

2. Briefly stating facts giving rise to the present appeal, as per the prosecution story, are that the complainant and his other family members, namely, Dharmi Devi, Sumna Devi, Relma and Prem Singh were doing the labour work under one Munna Thakur at Kholi. Those persons were residing in the building of Panchayat Bhawan. On 11th or 12th June, 2005, one more relative of those persons, namely, Shesh Ram also came to meet them. All of them were taking lunch on 15.6.2005 at about 12:00 noon, when accused Uttam Chand came alongwith co-accused at their residence. Accused Uttam Chand asked the complainant and his mother Dharmi Devi to pay back the costs of 'Karyana' articles, which he had supplied nearly 2 ½ years back to them and the value of which was Rs.6,200/-. When Uttam Chand supplied the articles to the complainant and others, they were working under the contractor, Shri Sanjeev. They were under the impression that the entire payment had already been made by the said contractor. Accused Uttam Chand told them that said debt has not been cleared. Then, Dharmi Devi and complainant asked him to give some time, so that the money can be arranged. However, accused Uttam Chand insisted on making the payment at the same time otherwise he threatened them with dire consequences. Then the complainant went on foot to Nagrota Bagwan to take money from Munna Thakur. In the meanwhile, accused Uttam Chand with the help of other co-accused forcibly took all of them except Shesh Ram in a Jeep bearing No. HP-39-7182 to Kandi. When accused alongwith abducted persons reached at Kandi, Pardhan of the Panchayat, Jatinder Kumar was intimated about this. Jatinder Kumar arranged a room in the house of Vimla Devi, Ward Panch, where Dharmi Devi, Sumna Devi, Relma and Prem Singh were kept in confinement. In the meanwhile, complainant could not contact Munna Thakur and therefore, he returned back to Kholi, where he was told by Shesh Ram that accused had forcibly taken away his family members in a vehicle. Then, the complainant went to Police Station, Kangra, to report the matter and on the way he met Inspector Sanjiv Chauhan to whom he gave complaint Ex.PW7/A. On the

basis of which, FIR Ex.PW8/F was registered against the accused. Police alongwith complainant went to Kholi and from there they associated Shesh Ram and went to Kandi, from the house of Vimla Devi and family members of complainant were recovered. Memo Ex.PW6/A was prepared to that effect in the presence of Vimla Devi and Jatinder Kumar and these persons were handed over to complainant. Map of the said place is Ex.PW8/B. Site plan of the place from where the family members of the complainant were abducted is Ex.PW8/A. Jeep bearing No.HP-39-7182 alongwith Registration Certificate and Driving licence was taken into possession vide memo Ex.PW4/B, in the presence of Jatinder Kumar and HHC Ramesh Chand. Similarly, scooter on which accused Uttam Chand came was also taken into possession vide memo Ex.PW4/A, in the presence of Jatinder Kumar and HHC Ramesh Chand. After the completion of investigation, police came to the conclusion that accused in furtherance of their common intention, have abducted Dharmi Devi, Sumna Devi, Relma and Prem Singh with a view to subject them to slavery or knowing that such act is likely to subject them to slavery.

3. The prosecution in order to prove its case has examined as many as 08 witnesses. Statement of accused persons were recorded under Section 313 Cr.P.C, wherein accused persons denied the prosecution case and claimed innocence. No defence evidence was led by the accused persons.

4. Heard.

5. PW-1, PW-2 and PW-7 admitted that accused persons have supplied them 'Karyana' articles and there was a debt of Rs.6200/-. PW-7 also admitted that he purchased 'Karyana' articles from accused Uttam Chand about 2 ½ years back on credit basis. PW-2, PW-3 and PW-7 further admitted that accused Uttam Chand asked to pay back the costs of the articles. This was the cause, which led to forcibly taking away PW-1, Dharmi Devi, PW-2, Sumna Devi and Prem Singh from their residence because money was not paid back to accused Uttam Chand. As per PW-7, when accused Uttam Chand insisted on paying back the said amount in any circumstance on 15.6.2005, he went on foot to Nagrota Bagwan to meet Munna Thakur, contractor and when he returned back in the evening, he found his family members missing and then it was told by PW-3 that accused forcibly took them away. When accused came at the residence of abducted persons, which include PW-1 and PW-2 also, PW-3 and PW-7 were present there. However, all these four persons have different thing to say as how many persons came at Kholi.

6. As per the evidence on record accused Uttam Chand and Ram Parshad came on a Scooter and two other persons came on foot. As per the statement of PW-1, all the persons, were present at the spot. PW-2 also stated on the similar line except that five persons came and one of them was accused Uttam Chand. PW-3 stated that accused Uttam Chand and one person came on a Scooter. He failed to identity those persons by face. As per PW-7, Uttam Chand and some other person who is Ram Parshad came at their residence. Therefore, all four persons have named at least one common person i.e. accused Uttam Chand. However, there are material contradictions in the statements of all the four witnesses regarding the names of persons who came at their residence. PW-2 has stated about coming of five persons. However, she could identify only Uttam Chand. No doubt, PW-1 has stated that all the accused were present there, but she has not stated anything against at least three persons. She stated that she was pushed into the jeep only by accused Uttam Chand. She has not stated anything that the remaining three persons have done any act in abducting them. PW-3 has identified only one person i.e. accused Uttam Chand. According to him, it is accused Uttam Chand, who had pushed Dharma Devi and Relma Devi in the vehicle. He totally exonerated the other persons by saying that no other person had taken any active step in this regard. Even, PW-2 has contradicted PW-1 by saying that Uttam Chand and other pushed them in the vehicle. The statement of PW-7 is limited to the extent, as who came to their residence at about 12:00 noon and when accused Uttam Chand asked him to pay back the money, he went to collect the same from Munna Thakur. Therefore, he was not present when PW-1 and PW-2 were allegedly abducted by the accused. However, he has also only named two persons i.e. Uttam Chand and Ram Parshad who had come to their residence. He

could not identify other two persons. Hence, at the most it can be said that Ram Parshad also came, but from the statements of PW-1 to PW-3, it can be deduced that only Uttam Chand took an active role. PW-1 to PW-3 could not say as what was done by the other three persons. Not to speak of the fact that their identity has not been established, even PW-1 to PW-3 are also not certain as what exact role was played by accused Uttam Chand. They differed even on the point as who pushed Dharma Devi etc. into the vehicle, which took them to Kandi. Therefore, there are material contradictions in the statements of PW-1 to PW-3 and PW-7.

7. When PW-1 and PW-2 reached at Kandi, PW-5 and PW-6 are the persons, who arranged their lodging. However, it also not made clear as where those persons were kept. In the site plan Ex.PW8/B, it is shown that those persons were kept in the house of PW-5. However, PW-6 stated that those persons came and sought his help for getting a room for their residence as they wanted to work at Kandi. He then got a room of 'Janjghar' (community hall) which was under his control but the key was with PW-5. Therefore, he has totally denied that it was accused Uttam Chand, who brought those persons to him. Whatsoever, this witness has stated that those four persons were kept in the 'Janjghar' while the case of prosecution is that they were forced to live in the house of PW-5. However, no question has been asked from PW-5, as who brought those persons. PW-5 is the most important witness because the place where labour was kept was under her control. However, no question has been asked from this witness as to whether they were kept under the supervision of anybody or the door was locked from outside. Due to this, an adverse inference is to be drawn against the prosecution and it can be said that they were not kept under the supervision of anybody or forced to live in the 'Janjghar' or the house of this witness. This has become further clear from the statement of PW-6, who denied that Uttam Chand had brought some persons to him. On the other hand, he has stated that those persons approached him for some residence because they wanted to work at Kandi. Being Pardhan of the Panchayat, it can be presumed that labour may have contacted him. PW-6 has stuck to his stand despite the fact that he was declared hostile and cross-examined at length by the prosecution. Therefore, there is no evidence suggesting that PW-1, PW-2 and others were forcibly kept at the residence of Vimla Devi or 'Janjghar' of the Panchayat.

8. PW-6 stated that those persons came and sought his help for getting a room for their residence, as they wanted to work at Kandi. He then got a room of 'Janjghar' (marriage party hall), which was under his control. Therefore, he has totally denied that it was accused Uttam Chand, who brought those persons to him. There is nothing on record that those persons were kept under the supervision of anybody or under the custody of anyone. On the other hand, PW-6 has stated that those persons approached him for some residence, because they wanted to work at Kandi. He has not supported the prosecution case at all. PW-3 has admitted about the coming of many persons to the spot. He has further stated that names of the accused were told by the persons, who came there. No independent witness has been associated by the police in the investigation. The witnesses, which have been examined are interested in the manner that they as per their own admission, owe a sum of Rs.6200/- to accused Uttam Chand, as they have purchased 'Karyana' articles, which he has supplied about 2 ½ years back on debt basis.

9. 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.

10. 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.

11. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made above, we 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 MANSOOR AHMAD MIR, C.J.

United Indian Assurance Co. Ltd. .....Appellant.

Versus

Sh. Tikkam Ram and others .....Respondents

FAO (MVA) No. 477 of 2009
Date of decision: 17th June, 2016.

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased had hired the vehicle for carrying the rice and wheat seed bags- vehicle met with an accident due to rash and negligent driving of the driver, who had also died in the said accident- owner of the vehicle had not denied the facts- held, that it is beaten law of the land that the evasive denial is an admission as per the mandate of Order 8 of C.P.C.- Tribunal had rightly recorded the findings in the award- Award upheld and appeal dismissed. (Para-5 to 11)

For the appellant: Mr.G.D. Sharma, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No.1 and 2.
Mr. Dheeraj Vashisht, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 17.7.2009, made by the Motor Accident Claims Tribunal, Kullu, H.P. in Claim Petition No. 3 of 2008, titled *Sh. Tikkam Ram and another versus Ghungarmal and another*, for short "the Tribunal", whereby compensation to the tune of Rs.3,87,500/- alongwith interest @ 7.5% per annum, came to be awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Owner and claimants have not questioned the impugned award on any ground, has attained the finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the ground that the tribunal has fallen in an error in saddling it with the liability.

4. The arguments though attractive, is devoid of any force for the following reasons.

5. The claimants being the victims of vehicular accident, which was allegedly caused by driver, namely, Prem Lal, who also died in the said accident while driving Bolero Camper No. HP-34-A5834 on 25.10.2007 at about 9.00 AM near village Fagla Suma, Tehsil and District Kullu, H.P. It is specifically pleaded by the claimants in the claim petition that the deceased was traveling in the said vehicle alonwith rice bag and wheat seed bags and he had hired the vehicle. The said averment has not been denied by the owner.

6. It is beaten law of the land that the evasive denial is an admission as per the mandate of Order 8 of the Code of Civil Procedure, for short "CPC".

7. The Tribunal has made the discussions from paras 38 to 41 of the impugned award. I am of the considered view that the Tribunal has rightly recorded the said findings.

8. The claimants Tikkam Ram appeared as PW3 in the witness-box and examined Tek Singh PW4, who have given the details that how the vehicle was hired by the deceased. The deceased was carrying rice bag and wheat seed bags and was sitting in the vehicle as owner of the goods. The learned counsel for the insurer has cross-examined them but nothing material could be extracted from them in favour of the insurer. It is apt to reproduce paras 39 and 40 of the impugned award herein.

"39.The petitioners when the petition was filed before the Tribunal have very specifically pleaded that jeep was hired for carrying the rice bag and wheat seed and the deceased was sitting along with his goods. This fact has neither been denied specifically by the respondent when they filed reply. In the rebuttal evidence of the respondent, the petitioner No.1 Tikam Ram himself appeared in the witness box as PW3. It has come in his evidence that they had loaded bags of what seed and rice in the jeep and they were proceeding to Fagla from Sainj. In cross-examination he has specifically denied that the above said articles were not loaded in the jeep. He also explained the reason for not attaching the bills since it was local seed. He has admitted the suggestion of the respondent that he was traveling after paying the requisite fare. As such, he has tried to prove it on record that his son was traveling in the jeep along with goods as owner or representative of the goods.

40. The version of PW3 the petitioner has further been corroborated and supported by Tek Singh PW-4. He has very specifically stated that deceased was sitting in the vehicle. The bags of what seed and rice had fallen on the place from where the vehicle fell to the downward hill side. He has denied the suggestion of the respondent that the rice and what bags were not in the vehicle. He has explained that he had not seen the bag inside the vehicle but those were lying outside the place of accident. The presence of this witness at the spot is not disputed as it is at his instance the FIR Ext. PW2/A was registered on the basis of his statement recorded under Sec. 154 Cr.PC and he has seen the accident. This witness is not related to the petitioners nor he has any enmity with the respondent and there was no reason for him to state against or in favour of the parties but since the accident has taken place in his presence as such he recorded the FIR with the police. Nothing has come in his evidence which could support the case of the respondent that the vehicle was not carrying the goods that of the deceased. Though the I.O. has stated that when he went to the spot he did not find any bag of rice or what but he has further clarified in the cross-examination that when he reached at the spot dead body and injured had already been removed from the spot and since the accident has snot taken place in his presence, as such, he is unable to tell whether goods were loaded in the jeep or not. It is just possible that before he reached at the spot, after 4 or 5 hours of the accident the goods had already been removed from the place of occurrence either by the claimants or by the other persons and only this inference can be drawn. The accident has taken place on 25.10.2007 and the petition was presented on 1.1.2008, i.e. within a period of 60-65 days and right from the day one the petitioners are maintaining that their goods were loaded and deceased was accompanying those goods to the destination. Therefore, the plea of the petitioners appears to be genuine and supported by trustworthy and reliable evidence.

9. Having said so, the Tribunal has rightly recorded the findings on issue No.6.

10. The learned counsel for the insurer/appellant has not questioned the findings on other issues, are upheld.

11. Viewed thus, the impugned award is upheld and the appeal is dismissed.

12. 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.

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

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

Asif Beg and another ...Petitioners.
Versus
Estate Officer/Station Commander ...Respondent.

CWP No. 3084 of 2015
Reserved on: 16.05.2016
Date of order: 20.06.2016

Constitution of India, 1950- Article 226- **Public Premises (Eviction of Unauthorized Occupants) Act, 1971-** Section 4- **H.P. Tenancy and Land Reforms Act, 1972-** Section 104- Notice was issued to petitioners to show cause as to why they be not evicted- they replied that land was in possession of their forefathers as non-occupancy tenants- mutation was not attested inadvertently regarding the land- possession of the petitioners was lawful- order was passed to evict petitioners and all other persons within 15 days from the date of passing of the order- an appeal was filed, which was dismissed- held, that H, the person recorded to be in possession as non-occupancy tenant had executed a will - he had a right to execute a Will regarding the property in his possession- the person in possession of the land as non-occupancy tenant becomes owner automatically on the date of commencement of H.P. Tenancy and Land Reforms Act- aim of land laws is to protect the tillers/farmers/cultivators and to put an end to absentee landowners- land laws have to be examined with reference to dominant purpose of the Act- writ petitioners are in possession as non-occupancy tenants- they are to be evicted in accordance with the mandate of H.P. Tenancy Act - writ petitioners have raised many questions including question of title and they could not have been evicted summarily without adjudicating upon the questions raised by them- matter referred to Large Bench to determine the question of constitutionality of the proviso to Section 104 (9) of H.P. Tenancy and Land Reforms Act - operation of the order passed by the Collector stayed till further orders. (Para-11 to 95)

Cases referred:

Charno Devi and others versus Dali Mal (deceased) through his L.Rs. Shamsher Singh and others, 1994 (2) Sim. L.C. 279
Daulat Ram and ors. Versus State of Himachal Pradesh and ors., 1979 Shim. L.C. 215
Bishambhar Nath versus Shri Hari Chand and others, 1993 (3) S.L.J. 2906
Sant Ram versus Jash Ram, 1995 (3) S.L.J. 2510
Jethu through K. Guddi and others versus Gobind Singh, 1995 (4) S.L.J. 3031
Mohar Singh versus Manju Devi & others, 1997 (1) S.L.J. 304
Tarsem Lal and others versus Ram Sarup and others, 2014 AIR SCW 2886
Sudarshna Devi versus Union of India and another, 1978 Shim. L.C. 330
Dinesh Kumar versus State of H.P. and others, 1994 (Suppl.) Shim. L.C. 385
Devi Chand versus State, 1994 (4) S.L.J. 2926,
Durma Devi versus State of H.P. & others, 2007 (2) S.L.J. (H.P.) 1133
Kh. Fida Ali and others versus State of Jammu and Kashmir, (1974) 2 Supreme Court Cases 253
Prem Nath Raina and others versus State of Jammu and Kashmir and others, (1983) 4 Supreme Court Cases 616
Dy. Collector and another versus S. Venkata Ramanaiah and another, (1995) 6 Supreme Court Cases 545
Utkal Contractor and Joinery Pvt. Ltd. and others versus State of Orissa and others, (1987) 3 Supreme Court Cases 279
M.S. Hussain vs VII Addl. District and Sessions Judge, Kanpur and others, 1989 (2) R.C.J. 287
Govt. of Andhra Pradesh vs Thummala Krishna Rao and another, AIR 1982 Supreme Court 1081

Suhas H. Pophale versus Oriental Insurance Company Limited and its Estate Officer, (2014) 4 Supreme Court Cases 657
Narasamma & Ors. versus State of Karnataka & Ors., 2009 AIR SCW 2653
Anamallai Club vesus Government of T.N. and others, (1997) 3 Supreme Court Cases 169
State of H.P. versus Chander Dev and others, 2007 (2) Shim. LC 7
State of Gujarat and another versus Raman Lal Keshav Lal Soni and others, (1983) 2 Supreme Court Cases 33,
Ex-Capt. K.C. Arora and another versus State of Haryana and others, (1984) 3 SCC 281
T.R. Kapur and others versus State of Haryana and others, 1986 (Supp) SCC 584
Union of India and others versus Tushar Ranjan Mohanty and others, (1994) 5 SCC 450

For the petitioners:	Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, Advocate.
For the respondent:	Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Writ petitioners have invoked the jurisdiction of this Court by the medium of the instant writ petition for grant of the following reliefs on the grounds taken in the memo of the writ petition:

> *"i) For quashing and setting aside impugned orders at annexure P-5 passed by respondent on 23.9.2014 and P-6 dated 20.6.2015 ordering eviction of the petitioners from khasra number 559 old number 356 min measuring 4-3 bighas in estate Shasherpur Chhawni Tehsil Nahan District Sirmour.*
>
> *ii) Respondents may kindly be directed to produce the record of the case before the Hon'ble Court.*
>
> *iii) Any other writ, order or direction as deemed fit in the facts and circumstances of the case may also be granted in favour of the petitioners."*

2. The respondent-Estate Officer issued a show cause notice on 16th April, 2014, while invoking the provisions of Section 4 of The Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (for short "Act of 1971") and asked writ petitioner No. 1-Asif Beg to show cause on or before 28th April, 2014, as to why eviction orders in terms of the mandate of the Act of 1971 be not made and also to appear for personal hearing on the said date. Writ petitioner No. 1 filed reply on 26th May, 2014, wherein it has specifically been averred that khasra No. 559 was in fact khasra No. 356 min in terms of the revenue record right from the year 1945 till the time it was re-numbered and was in possession of his forefathers as non-occupancy tenant and is in his possession alongwith others as such. It has specifically been averred that late Shri Haider Beg was a non-occupancy tenant, who was in possession of the said khasra number alongwith other khasra numbers and his name is reflected in jamabandis and all revenue records, the copies/extracts of which are annexed as Annexure P-3 from pages No. 17 to 30 and 32 to 39 of the paper book. Photo copy of mutation No. 162 attested on 23rd April, 1976, finds place at page No. 31 of the paper book.

3. It is also pleaded in the reply to the notice that the said mutation contains the details of all the khasra numbers including khasra No. 356 min entered in column No. 6, but, inadvertently, khasra No. 356 min was not recorded in column No. 11 of the said mutation, constraining writ petitioner No. 2 to file an application on 19th May, 2008, for rectifying the error, but no order was made. It has specifically been pleaded by writ petitioner No. 1 before the Estate Officer that the khasra number in question is not only in his possession but also is in the

possession of writ petitioner No. 2-Yakub Beg and his family members. Further averred that they are not unauthorized occupants, but are in lawful possession even prior to 1944 and are cultivating the same. The land in question is *'obar land'* and they have constructed a cowshed and a motor repair shop over a portion of the land, which is being run under the name and style 'Baig Auto Workshop' (for short "workshop").

4. The writ petitioners have also placed on record the interim orders (Annexure P-4) made by the officer concerned before passing the order of eviction, dated 23rd September, 2014 in order to demonstrate that the writ petitioners were not heard. Order, dated 16th April, 2014 relates to issuance of show cause notice and the file was placed on 28th April, 2014, when writ petitioner No. 1-Asif Beg appeared in person and filed an application seeking one month's time to file reply, which was granted. On 26th May, 2014, reply was filed alongwith the documentary evidence and the case was fixed for hearing the arguments on 11th June, 2016. Thereafter, writ petitioner No. 1 filed an application through his counsel for allowing him to examine revenue officials, who were maintaining the revenue record in order to show that he was not an unauthorized occupant. It appears that the said application was not granted and order, dated 23rd September, 2014, came to be made.

5. In terms of impugned order, dated 23rd September, 2014 (Annexure P-5), direction was issued to the writ petitioners and all persons in occupation of the said premises or part thereof to evict the same within fifteen days from the date of publication of the order, i.e. by or before 9th October, 2014, in default, the said persons were to be evicted.

6. Feeling aggrieved, the writ petitioners filed Civil Appeal No. 0000019-N/14 of 2014, titled as Shri Asif Beg and another versus Station Commander/Estate Officer before the Additional District Judge, Sirmaur District at Nahan, H.P., which too met with the same fate and was dismissed vide impugned order, dated 20th June, 2015. This is how the writ petitioners are before this Court.

7. The writ petitioners have pleaded in the writ petition that their forefathers were non-occupancy tenant and enjoying the possession and usufructs of the land in question, which has been classified as *'obar doem'*, even before 1950s till the time the impugned orders came to be made. Further averred that all the persons, who were in possession of the said land, have not been arrayed as party, only writ petitioner No. 1-Asif Beg was made a party, the mention of which has been made in para 2 (b) (v) of the writ petition. In para 3 (e) of the writ petition, it has been recorded that the orders suffer from non-application of mind as in one breath, it is recorded that the writ petitioners are not in possession and in the second breath it is recorded that they are unauthorized possessors/occupants.

8. The respondent has filed the reply and resisted the writ petition. In preliminary objections, it is stated that the Will made by late Shri Haider Beg is not valid. On merits, it is stated that mutation made was legal, the writ petitioners are unauthorized occupants and the entries relating to non-occupancy tenant in favour of late Shri Haider Beg was not in accordance with law, was a wrong entry and no clerical error had crept-in while recording mutation No. 162. In terms of the mandate of The Himachal Pradesh Tenancy and Land Reforms Act, 1972 (for short "HP Tenancy Act"), Will is not valid.

9. In reply to para 3 (e), it is stated that late Shri Haider Beg was not found in possession of the land in question at the time of the mutation and, thus, the writ petitioners are encroachers rather unauthorized occupants. The land in question is a 'public premises' as per the mandate of Act of 1971.

10. The writ petitioners have filed rejoinder and have specifically denied all these averments.

11. The lis in question has far reaching consequences. In one breath, it is pleaded by the respondents that no mutation can be effected viz-a-viz said land, Section 104 of HP Tenancy

Act is not governing the land which is owned by or vested in Government under any law, in view of the amendment made in the year 1987 by adding proviso to sub-section (9) of Section 104 and in the second breath, it is stated that at the time of making the mutation, the concerned officer had come to the conclusion that late Shri Haider Beg was not in possession of khasra 356 min, presently khasra No. 559 and late Shri Haider Beg had not questioned the same, is suggestive of the fact that they are blowing hot and cold.

12. Mutation No. 162 was not the subject matter before the respondent and no lis was pending before any Court/Tribunal viz-a-viz Mutation No. 162. The writ petitioners have stated in their reply to the notice issued by the Estate Officer that their forefathers were in possession of big chunk of land including old khasra No. 356 min. Though, the said khasra number finds place in column No. 5 of the mutation relating to the possession and in column No. 6, besides other khasra numbers, khasra No. 356 min was duly recorded, but does not find place in column No. 11 of the mutation. But, at the same time, it is recorded in the marginal note that the entries in all columns i.e. columns No. 1 to 7 were verified and attested. Meaning thereby, it was verified/accepted that late Shri Haider Beg was also in possession of khasra No. 356 min as non-occupancy tenant.

13. It has been recorded by the Estate Officer and the Additional District Judge in their orders that late Shri Haider Beg was not found in possession of the said khasra number while passing mutation No. 162, is proof of the fact that they are relying upon the entries made in mutation No. 162, then, how can it lie in their mouth that mutation is not legally correct. If it is so, the attesting authority has attested the tenancy of late Shri Haider Beg as non-occupancy tenant and the rate of rent, which he was paying, in the relevant columns of mutation No. 162, has attained finality.

14. The Estate Officer and the Additional District Judge have recorded the findings to the effect that the Will executed by late Shri Haider Beg on 7th July, 1972, which was registered on 10th July, 1972, was not valid. We wonder how they have drawn said conclusion. The Will is in Hindi and its English translation has been placed on record. While going through, it is crystal clear that the Will is a registered document and it is not viz-a-viz any khasra number or any building, it relates to entire estate of late Shri Haider Beg. Late Shri Haider Beg had only one daughter-Reham Bibi, who died during the life-time of late Shri Haider Beg. Thereafter, Will came to be executed in favour of the sons of Reham Bibi, wife of Mustafa Beg, i.e. Yakub Beg, Pashwar Beg and Ayyub Beg. As per the *'shajra nasab',* i.e. pedigree table, Mustafa Beg is nephew of late Shri Haider Beg and husband of Reham Bibi.

15. A Muslim, as per the mandate of Muslim Law, can execute a Will. Otherwise, if a son dies during life-time of his father, his grand sons/daughters cannot inherit the same as per the Muslim Law. Perhaps that has necessitated for execution of Will, which is not specifically for any tenancy land.

16. The HP Tenancy Act was promulgated in the year 1974. Section 104 (3) of the HP Tenancy Act confers the ownership rights to a person, who is non-occupancy tenant, of the land. Section 104 (3) of the HP Tenancy Act reads as under:

> ***"104. Right of tenant other than occupancy tenant to acquire interests of landowners. -***
>
> *(1). .....*
>
> *(2) .....*
>
> *(3). All rights, title and interest (including a contingent interest, if any) of a landowner other than a landowner entitled to resume land under sub-section (1), shall be extinguished and all such rights, title and interest shall with effect from the date to be notified by the State Government in the Official Gazette vest in the tenant free from all encumbrances:*

Provided that if a tenancy is created after the commencement of this Act, the provision of this sub-section shall apply immediately after the creation of such tenancy."

17. Section 104 (3) (supra) mandates that the ownership rights are conferred upon a person who was in possession as a non-occupancy tenant and rights of all those owners, who were shown as landowners have extinguished.

18. The question is – whether conferment of proprietary rights under Section 104 (3) of the HP Tenancy Act has an automatic application or follow-up order is to be made? This question will be determined hereinafter.

19. In 1987, the HP Tenancy Act was amended and proviso to sub-section (9) of Section 104 came to be added in terms of Section 2 of the H.P. Tenancy and Land Reforms (Amendment) Act, 1987, which came into force on 25th March, 1988. The proviso to sub-section (9) of Section 104 of the HP Tenancy Act reads as under:

"Provided that nothing contained in this section shall apply to such land which is either owned by or is vested in Government under any law, whether before or after the commencement of this Act, and is leased out to any person."

20. It mandates that Section 104 of the HP Tenancy Act shall have no application to such land which is either owned by or is vested in Government under any law, whether before or after the commencement of the HP Tenancy Act and is leased out to any person.

21. The question is– what is the effect of this proviso? (i) Whether it has retrospective effect? (ii) Whether it will take away the rights of the parties, which have accrued to them and crystallized by effecting mutation after following the procedure provided by The Himachal Pradesh Tenancy and Land Reforms Rules, 1975 (for short "Tenancy Rules")? These questions will also be dealt with hereinafter.

22. In the case in hand, mutation has already been effected, nobody has raised any finger so far and was not subject matter of the lis before the Estate Officer, Additional District Judge or before this Court. But, its implication has an effect on this lis also for the reasons to be recorded hereinafter.

23. The fact of the matter is that all the khasra numbers except old khasra No. 356 min have been recorded in the name of late Shri Haider Beg as owner in the relevant column of the said mutation. Thereafter, mutation/succession has been attested and the writ petitioners alongwith others have been recorded as owners in possession of the said khasra numbers. Late Shri Haider Beg was shown as non-occupancy tenant paying rent of the said khasra numbers. Thereafter, the writ petitioners and others have been shown as such.

24. Whether the person, in whose favour Will is made, can step into the shoes of a tenant, as per the HP Tenancy Act?

25. A question arose before this Court whether a daughter, who is governed by Hindu Law, is deprived of rights under HP Tenancy Act in terms of the mandate of Section 45 of the HP Tenancy Act. While applying the rigour, it was held by the Courts below that a daughter is not entitled, constraining her to invoke the jurisdiction of this Court and this Court in the case titled as **Smt. Charno Devi and others versus Dali Mal (deceased) through his L.Rs. Shamsher Singh and others,** reported in **1994 (2) Sim. L.C. 279,** held that a daughter under Hindu Law is entitled to inherit and she cannot be deprived of her rights in terms of rigours of Section 45 of the HP Tenancy Act.

26. Thus, how can it be said that Will is invalid. It is a registered Will, governs the entire estate of late Shri Haider Beg, which is not in dispute. The Estate Officer and the Additional District Judge have travelled beyond the pleadings and the relief sought and came to the conclusion that the Will is invalid, which was not subject matter of the lis.

27. Virtually, both the officers have deprived the persons in whose favour Will has been executed of their legitimate rights. It is for the Civil Court to determine as to whether the Will is valid or otherwise.

28. It is apt to record herein that the Estate Officer has passed an order, which is trash for the reason that he has directed to evict the writ petitioners and all those persons who may be found in possession of the land in question. Can it be done without hearing all the affected parties, is suggestive of the fact that he has not made a positive finding as to who was in possession and whether he is unauthorized occupant. It is apt to record operative portion of impugned order, dated 23rd September, 2014, herein:

> *"Now, therefore, in exercise of the powers conferred on me under sub-section (1) of Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, I hereby order the said Sh. Yaqub Beg and Asif Beg and all persons who may be in occupation of the said premises or any part thereof to vacate the said premises comprising No Khasra 559 measuring 0-58-26 Hect situated at Chhawani Shamsherpur, Nahan within 15 days of the date of publication of this order i.e., on or before 09 Oct 2014. In the event of refusal or failure to comply with this order within the period specified above, the said Sh. Yaqub Beg and Asif Beg and all other persons concerned are liable to be evicted from the said premises, if need be, by the use of such force as may be necessary."* *(Emphasis added)*

29. In the same fashion, the Additional District Judge has also fallen in the same error.

30. The question framed in para 18 (supra) is determined as under:

31. It appears that mandate of Section 104 (3) of the HP Tenancy Act is that the moment the Act has come into force, all rights of the landowners are extinguished and a person who is in possession of the land as non-occupancy tenant, steps into the shoes of an owner and becomes the owner. Thus, it is automatic and there is no question of following any mechanism. May be the Tenancy Rules provide for following any mechanism, but that is only for making entries in the revenue records. It does not mean that in case an entry is not made or mutation is not effected/recorded, the said person is not the owner.

32. This Court in a case titled as **Daulat Ram and ors. Versus State of Himachal Pradesh and ors.,** reported in **1979 Shim. L.C. 215,** held that a person recorded as a non-occupancy tenant has to reap the fruits. Further held that the State cannot take a plea that the writ petitioners were not tenants and the revenue record is wrong because once the tenants are so recorded, by operation of law, they become the owner of the land. It is apt to reproduce relevant portions of paras 15 and 23 of the judgment herein:

> *"15. .....Therefore, from that date the ownership rights vested free from all encumbrances on the persons who were so recorded as tenants under the landowners or for the matter of that the State Government in that land. Therefore, the plea taken up by the Respondents that they were not the tenants is wholly incorrect because they cannot set up this case when they are so recorded, and once they are so recorded they become the owner of the land by virtue of the operation of law and they actually became owners with effect from the date of the publication of the rules.*
>
> *xxx xxx xxx*
>
> *23. I have already quoted Sub-section (3) of Section 104 of the Act. Under the provision of this Sub-section, the rights of the landowner in the land held by a tenant shall stand extinguished and his such rights, title and interest shall vest in the tenant free from all encumbrances created by the landowner with effect from 1-10-1973 on payment of compensation. Therefore, the provision of law does not*

leave any room for doubt that a person who is entered as a tenant he is to become the owner of the land with effect from 1-10-1973 on payment of compensation or from the date of the publication of the rules, as already stated above. So, there is no question of laying any condition or imposing a letter on the rights of ownership. The lights which are to vest they are without any fetters and law enjoins to confer absolute ownership in the land. Therefore, if any fetter is laid that would be in contravention of this statutory provision, and any such condition which is against the statutory provision would be void. ...."

33. In the cases titled as **Shri Bishambhar Nath versus Shri Hari Chand and others,** reported in **1993 (3) S.L.J. 2906; Sant Ram versus Jash Ram,** reported in **1995 (3) S.L.J. 2510;** and **Jethu through K. Guddi and others versus Gobind Singh,** reported in **1995 (4) S.L.J. 3031,** it has been held that the proprietary rights stand conferred upon the tenants by operation of law. It is apt to reproduce para 27 of the judgment in **Jethu's case (supra)** herein:

"27. Thus, on the basis of the aforesaid circumstances examined during the trial both the Courts below acted illegally in ignoring the legally competent evidence supporting the defendants' plea of tenancy as claimed by them. The defendants having been held to be in occupation of the suit land as tenants since 1954-55, till date, accordingly, under Section 104 of the H.P. Tenancy and Land Reforms Act the proprietary rights in respect of the suit land stood conferred upon them and they have become owners of the same by operation of law."

34. In the case titled as **Mohar Singh versus Manju Devi & others,** reported in **1997 (1) S.L.J. 304,** this Court has held that the conferment of proprietary rights under HP Tenancy Act is automatic and by operation of law. It is apt to reproduce relevant portion of para 11 of the judgment herein:

"11. .....Needless to point out here that after coming into force of the Himachal Pradesh Tenancy and Land Reforms Act, 1972, the conferment of proprietory right is automatic and by operation of law. Rest of the matter is procedural as required under the Act and the rules framed thereunder."

35. This issue stands clinched by the Apex Court in Civil Appeal No. 5424 of 1998, titled as State of Himachal Pradesh versus Chander Dev, wherein it has been held that conferment of the proprietary rights is automatic. It is apt to reproduce relevant portion of the judgment herein:

".....From the above provisions, it is clear that all rights, title and interest of a landowner shall be extinguished and all such rights, title and interest shall, with effect from the date to be notified by the State Government in the Official Gazette, vest in the tenant free from all encumbrances."

36. The Apex Court in the case titled as **Tarsem Lal and others versus Ram Sarup and others,** reported in **2014 AIR SCW 2886,** held that a tenant becomes owner on enforcement of Act. It is apt to reproduce para 13 of the judgment herein:

"13. As per the aforesaid provision, all right, title and interest including a contingent interest of a land owner other than the land owner entitled to resume land under sub-section (1) shall be extinguished and all such rights, title and interest in respect of the land in question vest in the tenant, i.e. original plaintiff, free from all encumbrances from the date the Act came into force. The Act was published in the Official Gazette on 21st February, 1974 vide Act No.8 of 1974. What is not in dispute is that the original plaintiff became owner of the suit land by operation of law and continued to enjoy all the rights including right of irrigation from the common source which was in possession of the original landlord."

37. Thus, it is accordingly held that the conferment of the proprietary rights is automatic, by operation of law.

38. The constitutional validity of Section 104 of the HP Tenancy Act, as it was in 1978, i.e. on the date of the judgment, as at that time, proviso to sub-section (9) of Section 104 of the HP Tenancy Act was not added, was questioned before this Court in the case titled as **Smt. Sudarshna Devi versus Union of India and another,** reported in **1978 Shim. L.C. 330,** wherein it has been held that the provisions of Section 104 of the HP Tenancy Act do not violate Articles 15, 19 or 26 of the Constitution of India and its validity was upheld.

39. The question, as to whether the proviso to sub-section (9) of Section 104 of the HP Tenancy Act is retrospective or otherwise, was subject matter of various cases before this Court and conflicting judgments have been made.

40. In the case titled as **Dinesh Kumar versus State of H.P. and others,** reported in **1994 (Suppl.) Shim. L.C. 385,** it was held by a learned Single Judge of this Court that the proviso is not retrospective and will not take away the rights of those tenants who have been conferred proprietary rights. It is apt to reproduce para 10 of the judgment herein:

> *"10. The proviso in question applied to the leases in existence on the date it stood promulgated and so far retrospectivity is concerned, it is given to the extent that these leases might be created before the coming into force of the Act or thereafter. The tenants over the land belonging to the Government cannot claim proprietary rights under Section 104 of the Act on the ground that since their tenancy/lease was created before the proviso in question was added, they had already acquired proprietary rights which were not affected by the proviso in question. In view of this interpretation, this Court does not find any substance in the argument of Sh. Kuldip Singh, learned Counsel for the Appellants, that the proviso in question applies only to leases created after the coming into force of the Act. Therefore, in the absence of any specific provision incorporated in the proviso in question for taking away the substantial rights which vested during the period from 21.2.1974 to 14.4.1988 on the tenants/lessees and on others by virtue of legal transfers made by them, the only interpretation possible of the proviso in question is that, by its retrospectivity, it does not take away the rights of those tenants who have been conferred proprietary rights and mutations have been attested in their favour and those persons who have got the said land by way of transfer."*

41. While determining the issue in **Dinesh Kumar's case (supra)**, the learned Single Judge has drawn support from the aim and object of the HP Tenancy Act. But in the case titled as **Devi Chand versus State,** reported in **1994 (4) S.L.J. 2926,** it has been held by another Single Judge of this Court that the proviso is retrospective. Thus, two conflicting judgments were holding the field.

42. A learned Single Judge of this Court in the case titled as **Durma Devi versus State of H.P. & others,** reported in **2007 (2) S.L.J. (H.P.) 1133,** while making reference to the judgments rendered by this Court in **Dinesh Kumar's** and **Devi Chand's cases (supra),** provided that he is persuaded to follow the law laid down in **Dinesh Kumar's case (supra).**

43. It is apt to record herein that the record was perused and after perusal, the photocopies of the relevant orders have been made part of this file. Perusal of the record does disclose that **RSA No. 34 of 1995,** titled as **State of H.P. versus Chander Dev and others** was pending before this Court. The sole plaintiff/respondent, namely Padam Dev, died during the pendency of the appeal and his legal representatives, namely Shri Chander Dev and others, were brought on record. The RSA filed by the State was dismissed on 22nd September, 1997, and it was held that the proviso to sub-section (9) of Section 104 of the HP Tenancy Act is prospective in nature. The State filed Civil Appeal No. 5424 of 1998 before the Apex Court and after discussing the proviso to sub-section (9) of Section 104 of the HP Tenancy Act, the case was remanded for fresh determination with a direction to frame substantial questions of law relating to sub-sections (3), (9) and proviso added to Section 104 of the HP Tenancy Act, vide order, dated 12th February, 2004. The Apex Court has only remitted the case to this Court for framing substantial questions

of law and to decide the Regular Second Appeal on merits. It is apt to reproduce relevant portion of order, dated 12th February, 2004, made by the Apex Court in Civil Appeal No. 5424 of 1998 herein:

> *".....Having regard to these provisions, certain substantial questions of law do arise for consideration between the parties, looking to the facts of the case and the contentions raised. What is the effect of the amended provision deemed to have come into force from the date of commencement of the Act? Whether any substantive rights accrued to the plaintiff on the date of the commencement of the Act if read with the amended provision which is also deemed to have come into force from the date of commencement of the Act itself? It may also to be considered whether sub-section (3) of Section 104 of the Act and the proviso added by way of amendment at the end of sub-section (9) of Section 104 of the Act should be read independently and their effect is to be considered on the rights of the plaintiff in relation to the conferment of the proprietary rights on the plaintiff."*

44. The substantial question of law was framed by the learned Single Judge and the matter was placed before the then Chief Justice for placing the matter before the larger Bench vide order, dated 20th May, 2004, in view of the conflicting judgments referred hereinabove. The Division Bench of this Court, vide order, dated 16th May, 2007, held that proviso to sub-section (9) of Section 104 of the HP Tenancy Act has retrospective effect and the case was sent back to the learned Single Judge for deciding RSA No. 34 of 1995.

45. Chander Dev and others filed SLP No. 449 of 2008 against order, dated 16th May, 2007, made by the Division Bench, was allowed on 25th November, 2008 and Civil Appeal No. 6887 of 2008 came to be registered, which is still pending.

46. It is apt to record herein that RSA No. 34 of 1995 is still pending, as on today and the judgment questioned in the Regular Second Appeal is in favour of the plaintiff/non-occupancy tenants.

47. During pendency of Civil Appeal No. 6887 of 2008, another Single Judge of this Court decided RSA No. 278 of 1998, titled as **State of H.P. versus Dhani Ram & others,** on 27th December, 2007, and held that the judgment in **Chander Dev's case (supra)** is applicable. The respondents in RSA No. 278 of 1998 filed SLP No. 8101 of 2009 before the Apex Court, was granted on 17th April, 2009, Civil Appeal No. 2665 of 2009 came to be registered, the parties were directed to maintain status quo with regard to the possession and was tagged with Civil Appeal No. 6887 of 2008.

48. The question, whether the operation of the proviso is retrospective or prospective and whether it can take away the accrued rights, is still sub judice before the Apex Court. The Apex Court has directed the parties to maintain status quo, is suggestive of the fact that the possession of the non-occupancy tenants stand protected.

49. While going through the mandate of land laws, it appears that the aim and object of the land laws is to promote the tillers/farmers/cultivators, who are cultivating the lands and to put an end to absentee landowners.

50. The Apex Court in the case titled as **Kh. Fida Ali and others versus State of Jammu and Kashmir,** reported in **(1974) 2 Supreme Court Cases 253,** has discussed the aim, object and purpose of the land laws. It is apt to reproduce paras 12 and 14 of the judgment herein:

> *"12. The golden web, throughout the warp and woof of the Act, is the feature of personal cultivation of the land. The expression 'personal cultivation' which runs through Sections 3, 4, 5, 7 and 8 is defined with care under Section 2 (7) in a detailed manner with a proviso and six explanations.*
>
> *13. .....*

14. The main focus of the Act is to see that the tillers, who form the back-bone of the agricultural economy, are provided with land for the purpose of personal cultivation subject to the ceiling provision even in their case. The Act makes effective provisions for creating a granary of land at the disposal of the State for equitable distribution, subject to the limit, amongst the tillers of the soil and even the owners who would make 'personal cultivation' of the same within the meaning of the Act. In the nature of things it is imperative that a ceiling area has to be fixed and those who have so far enjoyed land in large tracks mostly without personally cultivating the same, are required to share with others who have no land of their own but are genuine tillers of the soil. Even so, no one is allowed to own more than the ceiling area."

51. The Apex Court, again, while examining the validity of J & K Agrarian Reforms Act (17 of 1976), in the case titled as **Prem Nath Raina and others versus State of Jammu and Kashmir and others,** reported in **(1983) 4 Supreme Court Cases 616,** discussed the purpose of the said Act, upheld the constitutionality of the same and held that any reform made under the land laws, particularly agricultural reforms, has to be examined by considering the dominant purpose of the Act. It is apt to reproduce para 5 of the judgment herein:

"5. It is urged by learned counsel led by Shri Tarkunde and by Shri Sanjay Kaul who appeared in person, that certain provisions of the impugned Act have no bearing upon agrarian reform and those provisions cannot have the protection of Article 31A. Section 7 of the Act is said to be one such provision. It provides by sub-section (1) for the resumption of lands for bona fide personal cultivation by the ex-landlords but by sub-section (2) it imposes certain conditions on the right of resumption. One of those conditions is that the applicant for resumption, other than a member of the Defence Forces, must, within six months of the commencement of the Act, take up normal residence in the village in which the land sought to be resumed is situated or in an adjoining village, for the purpose of cultivating the land personally. The other provision of the Act on which special stress was laid by counsel for the petitioners is the one contained in clause (f) of Section 7 (2) which lays down certain criteria for determining the extent of land which may be resumed. Stated briefly, where a person was entitled to rent in kind from the tiller during Kharif 1971, the extent of land resumable by such person has to bear the same proportion to the total land comprised in the tenancy as the rent in kind bears to the total produce; and where a person was entitled to rent in cash during Kharif 1971, the extent of land resumable by him has to be regulated by the extent of rent in kind to which such rent in cash can be commuted in accordance with the provisions of sub-sections (3) and (8) of Section 9. We are unable to hold that these and connected provisions of the impugned Act show that the Act is not a measure of agrarian reform. The question as to whether any particular Act is a measure of agrarian reform has to be decided by looking at the dominant purpose of that Act. In Ranjit Singh v. State of Punjab, (1965) 1 SCR 82 : (AIR 1965 SC 632), it was held on a review of authorities that a large and liberal meaning must be given to the several expressions like 'estate', 'rights in an estate' and 'extinguishment and modification' of such rights which occur in Article 31A. The decision in Kochuni (1960) 3 SCR 887: (AIR 1960 SC 1080) to which our attention was drawn by Shri Tarkunde, was treated in Ranjit Singh as a special case which cannot apply to cases where the general scheme of legislation is definitely agrarian reform and under its provisions, something ancillary thereto in the interests of rural economy has to be undertaken to give full effect to those reforms. In our case the dominant purpose of the statute is to bring about a just and equitable redistribution of lands, which is achieved by making the tiller of the soil the owner of the land which he cultivates and by imposing a ceiling on the extent of the land which any person, whether landlord or tenant, can hold. Considering the scheme and purpose of the

Act, we cannot but hold that the Act is a measure of agrarian reform and is saved by Article 31A from the challenge under Articles 14, 19 or 31 of the Constitution. Article 31 has been repealed by the 44th Amendment with effect from June 20, 1979 and for future purposes it ceases to have relevance. Reduced to a constitutional premise, the argument of the petitioners is that the particular provisions of the Act are discriminatory and are therefore violative of Article 14; that those provisions impose unreasonable restrictions on their fundamental rights and are therefore violative of Article 19. This argument is not open to them by reason of Article 31A."

52. In another case titled as **Dy. Collector and another versus S. Venkata Ramanaiah and another,** reported in **(1995) 6 Supreme Court Cases 545,** the Apex Court, while examining the Andhra Pradesh (Scheduled Area) Land Transfer Regulation, 1959, held that retrospective operation of the Act cannot take away of the vested rights.

53. The Apex Court in the case titled as **Utkal Contractor and Joinery Pvt. Ltd. and others versus State of Orissa and others,** reported in **(1987) 3 Supreme Court Cases 279,** has held that while examining or interpreting the statute, the language used in the same should be construed constructively and the wide or general words should be given a restrictive meaning. It has further been held that in order to come to the conclusion that what is the effect of an Act, its aim and objects are to be kept in mind.

54. The writ petitioners are in possession as per the revenue record as non-occupancy tenants and if, at all, they were to be evicted, the action was to be drawn as per the mandate of the HP Tenancy Act.

55. As discussed hereinabove, whether the writ petitioners can be declared as unauthorized occupants because their possession is lawful?

56. Another important question arises in this writ petition is – whether a person, who is in possession of any land prior to 1944 till today, is a non-occupancy tenant and paying rent at the rate recorded in the revenue records, i.e. *record-of-rights, Misal Haqiat, khasra Girdawari, jamabandies etc.,* can be termed as an unauthorized occupant? In other words, whether a tenant, whose possession is lawful since its very inception, can be termed as trespasser or unauthorized occupant?

57. In order to determine these questions, it is necessary to reproduce the definition of 'unauthorised occupation' given in Section 2 (g) of the Act of 1971, as under:

"2. .....

(g) "unauthorised occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever."

58. The Act of 1971 was, in fact, substitute to The Public Premises (Eviction of Unauthorised Occupants) Act, 1958 (for short "Act of 1958"). The Act of 1958 was questioned and was declared unconstitutional. The said Act was substituted by the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1968 (for short "Act of 1968"), which, too, was challenged and declared as void. Thereafter, after examining all laws applicable, Act of 1971 came to be enacted and came into force with effect from 23rd August, 1971. Sub-section (3) of Section 1 of the Act of 1971 provides that this Act shall be deemed to have come into force on 16th September, 1958, except Sections 11, 19 and 20 and their applicability was from 23rd August, 1971.

59. Meaning thereby, the Act of 1971 has come into force and is applicable right from 16th September, 1958. At that time, as per the revenue record appended with the writ petition and mention of which has also been made in the impugned orders, late Shri Haider Beg was in possession as non-occupancy tenant, paying rent at the prescribed/recorded rates. The writ petitioners have placed on record the documents, the perusal of which does disclose that they were paying the rent even before 1950s. This question has to be gone through and is to be answered after hearing the parties by the competent Court/authority having the jurisdiction.

60. The Allahabad High Court, while dealing with a case of similar facts and circumstances, titled as **M.S. Hussain versus VII Addl. District and Sessions Judge, Kanpur and others,** reported in **1989 (2) R.C.J. 287,** has laid down the same principle.

61. In this case, the writ petitioners have raised so many disputed questions, including the question of title, which can be determined by the authorities under the Act.

62. The Apex Court in the case titled as **Govt. of Andhra Pradesh versus Thummala Krishna Rao and another,** reported in **AIR 1982 Supreme Court 1081,** held that the summary proceedings cannot be resorted to in cases where complicated questions of title arise for decision. It is apt to reproduce paras 7 to 9 of the judgment herein:

> *"7. It seems to us clear from these provisions that the summary remedy for eviction which is provided for by Section 6 of the Act can be resorted to by the Government only against persons who are in unauthorised occupation of any land which is "the property of Government". In regard to property described in sub-sections (1) and (2) of Section 2, there can be no doubt, difficulty or dispute as to the title of the Government and, therefore, in respect of such property, the Government would be free to take recourse to the summary remedy of eviction provided for in Section 6. A person who occupies a part of a public road, street, bridge, the bed of the sea and the like, is in Unauthorised occupation of property which is declared by Sec. 2 to be the property of the Government and, therefore, it is in public interest to evict him expeditiously, which can only be done by resorting to the summary remedy provided by the Act. But Section 6 (1) which confers the power of summary eviction on the Government limits that power to cases in which a person is in unauthorised occupation of a land "for which he is liable to pay assessment under Section 3." Section 3, in turn, refers to unauthorised occupation of any land "which is the property of Government". If there is a bona fide dispute regarding the title of the Government to any property, the Government cannot take a unilateral decision in its own favour that, the property belongs to it, and on the basis of such decision take recourse to the summary remedy provided by Section 6 for evicting the person who is in possession of the property under a bona fide claim or title. In the instant case, there is unquestionably a genuine dispute between the State Government and the respondents as to whether the three plots of land were the subject-matter of acquisition proceedings taken by the then Government of Hyderabad and whether the Osmania University, for whose benefit the plots are alleged to have been acquired, had lost title to the property by operation of the law of limitation. The suit filed by the University was dismissed on the ground of limitation, inter alia, since Nawab Habibuddin was found to have encroached on the property more than twelve years before the date of the suit and the University was not in possession of the property at any time within that period. Having failed in the suit, the University activated the Government to evict the Nawab and his transferees summarily, which seems to us impermissible. The respondents have a bona fide claim to litigate and they cannot be evicted save by the due process of law. The summary remedy prescribed by Section 6 is not the kind of legal process which is suited to an adjudication of complicated questions of title. That procedure is, therefore, not the due process of law for evicting the respondents.*

8. The view of the Division Bench that the summary remedy provided for by S. 6 cannot be resorted to unless the alleged encroachment is of "a very recent origin", cannot be stretched too far. That was also the view taken by the learned single Judge himself in another case which is reported in Mehrunnissa Begum v. State of A. P., (1970) '1 Andh LT 88 which was affirmed by a Division Bench (1971) 1 Andh LT 292: (AIR 1971 Andh Pra 382). It is not the duration, short or long, of encroachment that is conclusive of the question whether the summary remedy prescribed by the Act can be put into operation for evicting a person. What is relevant for the decision of that question is more the nature of the property on which the encroachment is alleged to have been committed and the consideration whether the claim of the occupant is bona fide. Facts which raise a bona fide dispute of title between the Government and the occupant must be adjudicated upon by the ordinary courts of law. The Government cannot decide such questions unilaterally in its own favour and evict any person summarily on the basis of such decision. But duration of occupation is relevant in the sense that a person who is in occupation of a property openly for an appreciable length of time can he taken, prima facie, to have a bona fide claim to the property requiring an impartial adjudication according to the established procedure of law.

9. The conspectus of facts in the instant case justifies the view that the question as to the title to the three plots cannot appropriately be decided in a summary inquiry contemplated by Ss. 6 and 7 of the Act. The long possession of the respondents and their predecessor-in-title of these plots raises a genuine dispute between them and the Government on the question of title, remembering especially that the property, admittedly, belonged originally to the family of Nawab Habibuddin from whom the respondents claim to have purchased it. The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property thereafter and perfected his title by adverse possession must be decided in a properly constituted suit. May be, that the Government may succeed in establishing its title to the property but, until that is done, the respondents cannot be evicted summarily."

63. It is also to be seen as to whether the writ petitioners are unauthorized occupants, who were in possession on the date of the enforcement of the HP Tenancy Act, in view of the law laid down by the Apex Court in the case titled as **Suhas H. Pophale versus Oriental Insurance Company Limited and its Estate Officer,** reported in **(2014) 4 Supreme Court Cases 657.** It is apt to reproduce para 64 of the judgment herein:

"64. As far as the eviction of unauthorised occupants from public premises is concerned, undoubtedly it is covered under the Public Premises Act, but it is so covered from 16.9.1958, or from the later date when the concerned premises become public premises by virtue of the concerned premises vesting into a Government company or a corporation like LIC or the Nationalised Banks or the General Insurance Companies like the respondent no.1. Thus there are two categories of occupants of these public corporations who get excluded from the coverage of the Act itself. Firstly, those who are in occupation since prior to 16.9.1958, i.e. prior to the Act becoming applicable, are clearly outside the coverage of the Act. Secondly, those who come in occupation, thereafter, but prior to the date of the concerned premises belonging to a Government Corporation or a Company, and are covered under a protective provision of the State Rent Act, like the appellant herein, also get excluded. Until such date, the Bombay Rent Act and its successor Maharashtra Rent Control Act will continue to govern the relationship between the occupants of such premises on the one hand, and such government companies and corporations on the other. Hence, with respect to such occupants it will not be open to such companies or corporations to issue notices, and to proceed

against such occupants under the Public Premises Act, and such proceedings will be void and illegal. Similarly, it will be open for such occupants of these premises to seek declaration of their status, and other rights such as transmission of the tenancy to the legal heirs etc. under the Bombay Rent Act or its successor Maharashtra Rent Control Act, and also to seek protective reliefs in the nature of injunctions against unjustified actions or orders of eviction if so passed, by approaching the forum provided under the State Act which alone will have the jurisdiction to entertain such proceedings."

64. In the impugned orders, the Estate Officer and the Additional District Judge, as discussed hereinabove and at the cost of repetition, have held that late Shri Haider Beg and the writ petitioners were not in possession of the land in question. The entries in the revenue records do disclose that late Shri Haider Beg was in possession and the writ petitioners were still in possession. In the impugned orders, it is also recorded that the writ petitioners are in possession, but that is unauthorized/illegal.

65. The Apex Court in various judgments has held that the lawful possession of a person cannot be said to be illegal and revenue record determines who was in possession at the relevant date. The HP Tenancy Act also provides that a person, who is non-occupancy tenant recorded at the time of the enforcement of the HP Tenancy Act, becomes an owner by operation of law. Thus, the revenue record assumes importance.

66. The same principle has been laid down by the Apex Court in the case titled as **Narasamma & Ors. versus State of Karnataka & Ors.,** reported in **2009 AIR SCW 2653.**

67. The next question is–whether the provisions of the Act of 1971 governs the case in hand without determining the tenancy as per the mandate of HP Tenancy Act, as discussed hereinabove? In other words, whether despite the proviso added to sub-section (9) of the HP Tenancy Act, the tenancy is required to be determined in consonance with the provisions contained in Chapter IV of the HP Tenancy Act?

68. Late Shri Haider Beg was holding the land as non-occupancy tenant and thereafter the writ petitoners and other persons, in whose favour the Will was made, were in possession as such. The said possession is lawful and without determining the tenancy as per the mandate of HP Tenancy Act, the provisions of Act of 1971 are not applicable.

69. Our this view is fortified by the judgment rendered by the Apex Court in the case titled as **Anamallai Club vesus Government of T.N. and others,** reported in **(1997) 3 Supreme Court Cases 169.** It is apt to reproduce paras 7 to 9 of the judgment herein:

"7. The reason is obvious that law attempts to preserve order in the society relegating that the jurisprudential perception stood under Section 6 of the Act irrespective of the possession of the person "dispossessed irrespective of the fact whether he has any title to possession or not." In paragraph 29, this Court approved the dictum of the Privy Council in Midnapur Zamindary Co. Ltd. v. Kumar Naresh Narayan Roy, AIR 1924 PC 144, and held that persons are not permitted to take forcible possession. They must obtain such possession as they are entitled to by proper course. In our jurisprudence governed by the rule of law even an unauthorised occupant can be ejected only in the manner provided by law. The remedy under Section 6 is of summary trial and its object is to prevent self-help and to discourage people to adopt any means fair or foul to dispossess a person unless dispossession was in due course of law or with consent.

8. Law makes a distinction between persons in juridical possession and rank trespassers. Law respects possession even if there is no valid title to support it. Law does not permit any person to take law into his hands and to dispossess a person in actual possession without having recourse to a Court. The object thereby is to encourage compliance of the rule of law and to deprive the person who

wanted, a person in lawful possession removed from possession according to proper form and to prevent him from going with a high hand and eject such person. Undoubtedly, the true owner is entitled to retain possession even though he had obtained it by force or by other unlawful means but that would not be a ground to permit the owner to take law into his own hands and eject the person in juridical possession or settled possession without recourse to law.

9. Thus, it could be seen that even after determination of the licence under the Government Grants Act, the Government is entitled to resume possession but resumption of possession does not mean unilaterally taking the possession without recourse to law. The Eviction Act contemplated such a procedure, "Premises" defined under Section 3(d) of the Act means any land or any building or a part of a building or hut or any enclosure appurtenant thereto. Section 4 prescribes procedure of issuance of a notice of show cause before eviction giving an opportunity and thereafter taking action under Section 5 of the Act. Unfortunately, on the facts of the case on hand, the respondent has not adopted the procedure prescribed under Section 4 and 5 of the Eviction Act after determination of the licence granted under the Government Grants Act. The High Court, therefore, was not right in its conclusion that the procedure prescribed under PPE Act is not applicable to the grants made under the Government Grants Act since the appellants remained in settled possession since a long time pursuant to the grant. After determination of the grant, though they have no right to remain in possession, the State cannot take unilateral possession without taking recourse to the procedure provided under the Act. It is, therefore, clear that it would have been open to the respondent to have a notice issued to the appellant and give time to vacate the premises within 10 days or 15 days and, therefore, could leave resumed possession with minimal use of police force. We cannot give any direction in this case since possession was already resumed. We have directed not to create third party right in the property. We are not inclined to interfere with the order."

70. Now, the question is – whether sub-section (3) of Section 104 is to be read independently or is it controlled by the proviso to sub-section (9) of Section 104 of the HP Tenancy Act, particularly, under the circumstances when the conferment of proprietary rights is automatic, by operation of law read with the fact that mutations have been effected or otherwise?

71. This question has not been answered by either of the learned Single Judges or by the Division Bench in **State of H.P. versus Chander Dev and others,** reported in **2007 (2) Shim. LC 7.**

72. It is worthwhile to record herein that the Apex Court has commanded this Court to determine the said question also and when matter came up before the learned Single Judge, who framed the substantial question of law on 20th May, 2004, which is as under:

"What is the effect of proviso added towards the end of sub-section (9) of Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 by the Amendment Act No. 6 of 1988 – whether it takes away the vested rights of persons which had vested in them automatically under the provisions of the Principal Act which was in force till the Amendment Act came to be legislated?"

73. The learned Single Judge has not framed the said question and the Division Bench has also not determined the same.

74. In **Devi Chand's case (supra),** the learned Single Judge of this Court, without discussing the aim and object of the HP Tenancy Act, held that proprietary rights cannot be conferred upon the tenant of the government land, whereas, in **Dinesh Kumar's case (supra),** another learned Single Judge of this Court has recorded the aim and object of the HP Tenancy Act and held that the vested rights cannot be taken away by the amendment.

75. It appears that the judgment rendered by the Apex Court judgment in **Utkal Contractor's case (supra)** was not brought to the notice of the Division Bench of this Court.

76. It is also to be seen as to whether the proviso to sub-section (9) of Section 104 of the HP Tenancy Act violates the mandate of Articles 31B and 300A of the Constitution of India and whether it is liable to be struck down.

77. It appears that so far, the validity and constitutionality of the said proviso was not assailed on the said grounds, but stands interpreted by the Hon'ble Judges, which has resulted in conflicting judgments, as discussed hereinabove.

78. It is apt to reproduce what were the objects and reasons given and recorded before the HP Tenancy Act was brought before the Legislative Assembly vide The Himachal Pradesh Tenancy and Land Reforms Bill, 1972 (32 of 1972) herein:

> *"As a result of the re-organisation of the erstwhile State of Punjab in November, 1966, some areas ere integrated in Himachal Pradesh under section 5 of the Punjab Re-organisation Act, 1966. There are different enactments regarding tenancy and agrarian reforms in force in new and old areas of the Pradesh. In the areas as comprised in Himachal Pradesh immediately before 1st November, 1966, the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953, is in force which is a progressive legislation about the security of tenures of tenants and their other rights. In the areas added to Himachal Pradesh under section 5 of the Punjab Re-organisation Act, 1966, however, occupancy tenants have been vested with proprietary rights under two Acts on the subject namely, the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953 and the Pepsu Occupancy Tenants (Vesting of Proprietary Rights) Act, 1954. In the old areas the occupancy tenants have to apply for ownership under section 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act.*
>
> *It has, therefore, been considered necessary to unify the various laws relating to tenancies as in force in the Pradesh and to provide for a measure of land reforms to remove disparities.*
>
> *Restrictions have been imposed to purchase land by the non-agriculturists to avoid concentration of wealth in the hands of non-agriculturists moneyed class.*
>
> *The Bill is to achieve the above objects."*

79. The said Bill was passed by the Legislative Assembly of Himachal Pradesh on 22nd December, 1972.

80. The statement of object and reasons of the Himachal Pradesh Tenancy and Land Reforms Bill, 1972, is in favour of the tenants. It is a social legislation for the benefit of the tenants. Its aim and object is to confer ownership rights to the non-occupancy tenants. By operation of law and efflux of the time, the ownership rights have accrued to them.

81. The aim and object of the HP Tenancy Act have been discussed by this Court in **Smt. Sudarshna Devi's case (supra).** It is apt to reproduce para 39 of the judgment in **Smt. Sudarshna Devi's case (supra)** herein:

> *"39. As we shall discuss/subsequently, we are of the opinion that the impugned Act is nothing but an agrarian reform. Its principal object is to regulate the relationship between tenant and his landlord with regard to agricultural lands, and to abolish absentee landlordism. The Act wants to establish direct contact between the person who actually, cultivates the land and the ultimate owner of the land, namely the State. By abolition of absentee landlordism the Act obviously wants to give incentive to those who sweat for the improvement of land and thus another object which it seeks to achieve is to increase agricultural production."*

82. It would also be profitable to reproduce the objects and reasons recorded for the amendment of the HP Tenancy Act, which culminated into the Amendment Act of 1987, herein:

> *"Under the existing provisions contained in H.P. Tenancy and Land Reforms Act, 1972, the right, title and interest of the Government in the lands owned by it and leased out to a person vests in tenants. It is imperative that the proprietary rights in Government lands by and large regenerated through public funds, should not pass to private persons. It has, therefore, become necessary to make suitable amendments in section 104 of the said Act."*

83. It appears that the object of the said amendment is that a non-occupancy tenant of a Government land cannot become owner for the reason that it is a Government property and every individual has interest. Is this object reasonable or against the public policy/interest? Can a legislation be made to dislodge a person from accrued/vested rights?

84. The learned Single Judge in **Dinesh Kumar's case (supra)** has taken note of the said fact and has held that the proviso in question may be challenged, but was not challenged in that lis and was also not struck down. It is apt to reproduce paras 10 and 12 of the judgment herein:

> *"10. The proviso in question applied to the leases in existence on the date it stood promulgated and so far retrospectivity is concerned, it is given to the extent that these leases might be created before the coming into force of the Act or thereafter. The tenants over the land belonging to the Government cannot claim proprietary rights under Section 104 of the Act on the ground that since their tenancy/lease was created before the proviso in question was added, they had already acquired proprietary rights which were not affected by the proviso in question. In view of this interpretation, this Court does not find any substance in the argument of Sh. Kuldip Singh, learned Counsel for the Appellants, that the proviso in question applies only to leases created after the coming into force of the Act. Therefore, in the absence of any specific provision incorporated in the proviso in question for taking away the substantial rights which vested during the period from 21.2.1974 to 14.4.1988 on the tenants/lessees and on others by virtue of legal transfers made by them, the only interpretation possible of the proviso in question is that, by its retrospectivity, it does not take away the rights of those tenants who have been conferred proprietary rights and mutations have been attested in their favour and those persons who have got the said land by way of transfer.*
>
> *11. .....*
>
> *12. In the present case, the proviso in question may be challenged on the ground that it is violative of Article 300A of the Constitution of India that no person shall be deprived of his property save by authority of law. The absence of any such provisions to take away the proprietary rights already conferred and rights accrued by transfer thereof further fortifies the interpretation given by this Court to the proviso in question that the vested substantial rights were not taken away. In other words, the proprietary rights already conferred on the tenants of the Government land were not affected."*

85. The Division Bench in **Chander Dev's case (supra)** has categorically recorded that they were only interpreting the Section and not the validity of the said provision. It is apt to reproduce the relevant para of the judgment herein:

> *"We must note that here we are only interpreting the Section. No challenge is made to the validity of the Section. In fact no such challenge can be made in an appeal under Section 100 CPC. We want to make it absolutely clear that we are not expressing any opinion on the question whether the amendment is constitutionally valid or not since that question does not arise for decision. We, therefore, hold that the observations made by Justice Kamlesh Sharma in Dinesh Kumar's case in para*

12 wherein it was held that the proviso in question may be challenged on the ground that it is violative of Article 300-A of the Constitution of India was totally in the nature of obiter. This question did not arise before her and in an appeal under Section 100 CPC, she could not have decided this question."

86. Thus, even the Division Bench has not impliedly or expressly held whether it is constitutionally bad or otherwise. However, the Division Bench, in the said judgment has recorded that the learned Single Judge in **Dinesh Kumar's case (supra)** has decided the validity of the said proviso, which she could not have decided. With respects, while going through the judgment in **Dinesh Kumar's case (supra)** from paras 1 to 14, it is nowhere held that the proviso is violative and has been quashed.

87. It is apt to record herein that the aim and object of the principal Act and that of the amended Act, 1987 are conflicting. The question is – can that stand test of constitutionality and whether it can be struck down?

88. The Constitutional Bench of the Apex Court in the case titled as **State of Gujarat and another versus Raman Lal Keshav Lal Soni and others,** reported in **(1983) 2 Supreme Court Cases 33,** has held that if twenty years ago, the aim, object and reasons have been recorded for making any Act or Legislation, which have conferred rights or created vested rights, that cannot be taken away by other set of reasons and objects, which came to the mind of the Legislature after twenty years. It is apt to reproduce paras 35, 48, 49, 51 and 52 of the judgment herein:

"35. By Section 2 of the Amending Act, original Section 11 (1) which declared that the Gram panchayats, Taluqa panchayats, District panchayats, Gram sabbas, Nagar Panchayats and Conciliation Panchas shall constitute the Panchayat organisation of the State of Gujarat was omitted and original Section 11 (2) which provided for the control of the State Government over panchayats directly or through their officers was made Section 11. It is extremely difficult to understand the omission of old Section 11 (1). The whole object of the Gujarat Panchayats Act is "democratic decentralisation of power and the consequent reorganisation of the administration of Local Government". The object is to decentralise and reorganise. So it was thought that Gram Panchayats, Nagar Panchayats, Taluqa Panchayats, District Panchayats, etc. should constitute the panchayat organisation of the State of Gujarat. The object of the Act is still the same, yet Section 11(1) has been omitted. Does it mean that there is a disbandment of organisation? According to the Statement of objects and Reasons, the amendments were necessitated to get over the judgment of the Gujarat High Court that the Panchayat Service is a State Service. But surely that can't be a reason to go against the object of the Principal Act and to abandon the constitution of a State Panchayat organisation. No wonder it was described as an act of cutting the nose to spite the face. We may mention here that Section 2 is deemed to have come into force on February 24, 1962, the date on which the original Section 11 came into force.

xxx xxx xxx

48. From the summary of the provisions of the Amending Act that has been set out above it requires no perception to recognise the principal target of the amending legislation as the category of ex-municipal employees', who are, so to say, pushed out of the Panchayat Service and are to be denied the status of Government servants and the consequential benefits. The ex-municipal employees are virtually the "poor relations", the castle, the Panchayat Service, is not for them nor the attendant advantages, privileges and perquisites, which are all for the "pedigree descendants" only. For them, only the out-houses. As a result of the amendments they cease to be Government servants with retrospective effect. Their

earlier allocation to the Panchayat Service is cancelled with retrospective effect. They become servants of Gram and Nagar Panchayats with retrospective effect. They are treated differently from those working in taluqa and district panchayats as well as from the talatis and Kotwals working in Gram and Nagar Panchayats. Their conditions of service are to be prescribed by panchayats, by resolution, whereas the conditions of service of others are to be prescribed by the Government. Their promotional prospects are completely wiped out and all advantages which they would derive as a result of the judgments of the courts are taken away.

49. Several grounds were urged before us to attack the constitutional validity of the Amending Act. It was said that the provisions of the Act were violative of Article 311. It was said that the Act was discriminatory. It was urged that the retrospectivity given to the provisions of the Amending Act could not cure the discrimination introduced by the Act and sought to be perpetuated by it. In any case it was said that the benefits acquired could not be taken away with retrospective effect. On the other band, it was argued that there was good reason for the classification and that in the circumstances of the case, the classification was legitimately made with retrospective effect.

50. .....

51. Now, in 1978 before the Amending Act was passed, thanks to the provisions of the Principal Act of 1961, the ex-municipal employees who had been allocated to the Panchayat Service as Secretaries, officers and servants of Gram and Nagar Panchayats, had achieved the status of government servants. Their status as Government servants could not be extinguished, so long as the posts were not abolished and their services were not terminated in accordance with the provisions of Article 311 of the Constitution. Nor was it permissible to single them out for differential treatment. That would offend Article 14 of the Constitution. An attempt was made to justify the purported differentiation on the basis of history and ancestry, as it were. It was said that Talatis and Kotwals who became Secretaries, officers and servants, of Gram and Nagar Panchayats were Government servants, even to start with, while municipal employees who became such secretaries, officers and servants of Gram and Nagar Panchayats were not. Each carried the mark or the 'brand' of his origin and a classification on the basis of the source from which they came into the service, it was claimed, was permissible. We are clear that it is not. Once they had joined the common stream of service to perform the same duties, it is clearly not permissible to make any classification on the basis of their origin. Such a clarification would be unreasonable and entirely irrelevant to the object sought to be achieved. It is to navigate around these two obstacles of Article 311 and Article 14 that the Amending Act is sought to be made retrospective, to bring about an artificial situation as if the erstwhile municipal employees never became members of a service under the State. Can a law be made to be destroy today's accrued constitutional rights by artificially reverting to a situation which existed seventeen years ago? No.

52. The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature-made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking onto account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore,

the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in BS. Yadav and others etc. v. State of Haryana. Chandrachud CJ., speaking for the Court, held: (SCC head-note)

> *"Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate, must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case".*

Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation 3 cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats third Amendment) Act, 1978 is unconstitutional, as it offends Arts. 311 and 14 and is arbitrary and unreasonable. We have considered the question whether any provision of the Gujarat Panchayats (Third Amendment) Act, 1978 might be salvaged. We are afraid that the provisions are so intertwined with one another that it is well-nigh impossible to consider any life saving surgery. The whole of the Third Amendment Act must go. In the result the Writ Petition Nos 4266-70 are allowed with costs quantified at Rs. 15,000. The directions given by the High Court, which we have confirmed, should be complied with before June 30, 1983. In the meanwhile, the employees of the Panchayats covered by the appeal and the Writ Petitions will receive a sum of Rs. 200 per month over and above the emoluments they were receiving before February 1, 1978. This order will be effective from February 1, 1983 The interim order made on February 20, 1978 will be effective upto January 31, 1983. The amounts paid are to be adjusted later."

89. The same principle has been laid down by the Apex Court in the cases titled as **Ex-Capt. K.C. Arora and another versus State of Haryana and others,** reported in **(1984) 3 Supreme Court Cases 281; T.R. Kapur and others versus State of Haryana and others,** reported in **1986 (Supp) Supreme Court Cases 584;** and **Union of India and others versus Tushar Ranjan Mohanty and others,** reported in **(1994) 5 Supreme Court Cases 450.**

90. The validity of the proviso is not questioned by the writ petitioners in the writ petition, but somehow its applicability, rationale and effect is subject matter of the lis.

91. It is worthwhile to mention herein that the State of Himachal Pradesh is not a party to the lis. Accordingly, we deem it proper to array the Principal Secretary (Revenue) to the Government of Himachal Pradesh as party-respondent, shall figure as respondent No. 2 in the array of respondents. Registry to carry out necessary entries in the cause title.

92. Issue notice to newly added respondent No. 2. Mr. J.K. Verma, learned Deputy Advocate General, waives notice on behalf of the said respondent.

93. Having glance of the above discussions, we deem it proper to refer the matter to the larger Bench. But, at the same time, the question is – what interim direction is to be passed at this stage?

94. Admittedly, the writ petitioners are in possession of the said land alongwith the workshop and the cowshed. In terms of the impugned orders, the workshop and the cowshed were put under lock by the respondent, thereafter, this Court, vide order, dated 30th June, 2015, passed in CMP No. 7095 of 2015, directed the writ petitioners to take their belongings and other articles including the vehicles from the said workshop and the cowshed.

95. The writ petitioners have carved out a *prima facie* case, balance of convenience also leans in their favour and they will suffer irreparable loss in case operation of the impugned orders is not stayed for the reason that the said workshop is the only source of the livelihood to the writ petitioners alongwith other workers and mechanics.

96. Accordingly, the operation of the impugned orders is stayed till further orders and the respondent is directed to unlock the workshop and the cowshed.

97. Registry to furnish full paper book to the learned Advocate General and also to reflect the name of learned Advocate General in the cause list henceforth.

98. List this case before the appropriate Bench after two weeks.

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

Shri Shiv Ram son of Shri Hari Singh & others ....Appellants/Defendants

Versus

Shri Mahesh Prashad son of late Shri Jai Dev .....Respondent/Plaintiff

RSA No. 4 of 2005
Judgment reserved on 17th May 2016
Date of Judgment 20th June, 2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking injunction pleading that he is owner in possession of the suit land- defendants started raising shuttering over the house of the plaintiff- they also constructed a shop over the land of the plaintiff- hence, suit was filed for seeking permanent prohibitory and mandatory injunction- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that demarcation report was not placed on record to prove the encroachment- Field Kanungo and patwari are not Revenue Officers - demarcation report does not attain finality unless it is affirmed by the Assistant Collector - no order can be passed by the Court on the basis of unconfirmed report of demarcation- there are material contradictions in the testimonies of Kanungo and Patwari regarding khasra number- appeal accepted - judgment and decree passed by the Appellate Court set aside- Judgment passed by trial Court affirmed. (Para-11 to 18)

Cases referred:

Kamal Dev and another vs. Hans Raj AIR 2000 HP 130
Radha Swami Satsang vs. State of H.P. ILR 1984 HP 317
State of H.P. and others vs. Mangat Ram and others
Amar Singh vs. Narpat Ram AIR 1995 SC 665 (2010)1 HLR 474

For the Appellants: Mr. G.R. Palsara, Advocate.
For the Respondent: Mr.Sunil Chauhan Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present regular second appeal is filed under Section 100 of Code of Civil Procedure 1908 against judgment and decree passed by learned District Judge Mandi in Civil Appeal No. 109 of 2003 title Mahesh Prashad vs. Shiv Ram and others whereby learned District Judge Mandi accepted the appeal and set aside the judgment and decree passed by learned Trial Court.

Brief facts of the case

2. Shri Mahesh Prashad plaintiff filed suit for permanent prohibitory injunction and mandatory injunction pleaded therein that plaintiff is owner in possession of house and land comprised in Khata No. 75, Khatauni No. 124 Khasra Nos. 920, 926 and 928 measuring 206.21 Sq. metres situated in Mohal Purani Mandi Tehsil Sadar District Mandi as per jamabandi for the year 1993-94. It is pleaded that defendants have purchased the suit land adjoining to the suit property and raised construction about 3/4 years back. It is pleaded that defendants raised shuttering over the house of plaintiff and plaintiff requested the defendants to remove the shuttering but defendants threatened the plaintiff. It is pleaded that defendants forcibly constructed slab over land of plaintiff in illegal manner. It is pleaded that plaintiff requested the defendants to remove the encroachment over land of plaintiff but defendants did not accept the request of plaintiff. Prayer for decree of suit sought as mentioned in relief clause of plaint.

3. Per contra written statement filed on behalf of defendants pleaded therein that present suit is not maintainable and plaintiff has no cause of action to file the suit and plaintiff has no locus standi to file the present suit. It is pleaded that plaintiff is estopped from filing the present suit by his act conduct and acquiesance. It is pleaded that suit is not properly valued for purpose of Court fee and jurisdiction. It is pleaded that plaintiff has encroached upon the land of defendants measuring 8.69 sq. metres and defendants have filed the separate suit. It is pleaded that application under Order 39 Rule 2-A CPC also filed against the plaintiff. It is denied that defendants have raised projection over the house of plaintiff. It is pleaded that plaintiff has no cause of action and suit is not valued for the purpose of court fee and jurisdiction. Prayer for dismissal of suit sought.

4. Plaintiff also filed replication and re-asserted allegations mentioned in plaint. As per the pleadings of parties learned Trial Court framed following issues on 15.10.2000:-

1. Whether defendants have created obstructions by construction of projection over the house of plaintiff as alleged if so its effect? OPP
2. Whether plaintiff is entitled to the relief of permanent prohibitory injunction against the defendants from raising further structure over the house of the plaintiff? OPP
3. Whether suit of plaintiff is not maintainable in present form? ……OPD
4. Whether plaintiff has no cause of action and locus standi to file the present suit? …..OPD
5. Whether suit is counter blast to the suit filed by defendants? OPD
6. Whether plaintiff is estopped to file the present suit by his own act and conduct? …OPD
7. Whether the suit is not properly valued for the Court fee and jurisdiction?….ODP
8. Relief

5. Learned Trial Court decided issues Nos. 1, 2, 3, 5, 6 and 7 in negative and decided issues No. 4 partly in affirmative. Learned Trial Court dismissed the suit filed by plaintiff.

6. Feeling aggrieved against judgment and decree passed by learned Trial Court Mahesh Parshad filed appeal before learned District Judge Mandi and learned District Judge Mandi accepted the appeal and set aside the judgment and decree passed by learned Trial Court. Learned District Judge Mandi passed decree for mandatory injunction in favour of the plaintiff and against defendants and directed the defendants to remove about 6 inches of their slab towards the house of plaintiff as shown in field map Ext.PW4/A.

7. Feeling aggrieved against the judgment and decree passed by learned District Judge Mandi appellants filed present RSA which was admitted on following substantial questions of law on 24.4.2006:-

1. Whether learned first Appellate Court has not appreciated the evidence regarding the alleged encroachment correctly and was misled by the spot inspection?

2. Whether looking to the fact that the area of the alleged over-hanging encroachment is insignificant, the first Appellate Court ought not to have passed decree of mandatory injunction directing the demolition of the over-hanging portion?

8. Court heard learned Advocate appearing on behalf of parties and also perused the entire record carefully.

9. Findings upon point No.1 of substantial question of law with reasons:-

9.1 PW1 Mahesh has stated that he has constructed the house in the year 1977. He has stated that adjoining land was owned by Krishna and Rukmani and defendants have purchased the land from Krishna and Rukmani. He has stated that about 5-6 years ago construction was raised in ground floor and in the month of July 1999 defendants raised construction of second storey. He has stated that defendants have extended the projection slab of their house upon the land of plaintiff. He has stated that he and his mother requested the defendants not to extend the projection slab towards the house of plaintiff but defendants did not accept the request of plaintiff and his mother. He has stated that legal notice was also sent to defendants but defendants did not stop the construction and raised the slab. He has stated that illegal construction of slab raised by defendants be removed. He has admitted that defendants have filed another civil suit against him. He has denied suggestion that he has blocked the air of defendants. He has denied suggestion that he has encroached 8.69 sq. metres land owned by defendants. He has denied suggestion that defendants have not extended the slab projection towards the house of plaintiff. He has denied suggestion that defendants have raised slab projection over the land owned by defendants.

9.2 PW2 Pushap Raj has stated that parties are known to him. He has stated that he is residing in the house of Mahesh since July 1988. He has stated that defendants have started construction in the month of July 1999 and further stated that defendants have raised the slab projection towards the land of plaintiff. He has stated that defendants have encroached the land owned by plaintiff by way of slab projection. He has denied suggestion that he is deposing falsely in favour of plaintiff because he is tenant of plaintiff.

9.3 PW3 Kaushlya Devi has stated that parties are known to her. She has stated that Mahesh constructed the house about 24-25 years back. She has stated that Shiv Ram has raised the construction 4-5 years ago. She has stated that co-defendant Shiv Ram has extended the slab projection upon the house of plaintiff. She has stated that plaintiff requested the defendants not to raise slab projection but defendants did not accept the request of plaintiff. She has stated that she does not know that plaintiff has encroached upon land of defendants.

9.4 PW4 Ram Nath Field Kanungo has stated that in the month of August 1999 he was posted as Field Kanungo. He has stated that he conducted the demarcation as per direction of Tehsildar. He has stated that Patwari was also along with him at the time of demarcation. He has stated that field map Ext.PW4/A was prepared. He has stated that as per demarcation slab projection was extended by way of encroachment to the extent of 2.12 sq. metre upon Khasra No.

926/1. He has denied suggestion that he did not demarcate the land at the spot. He has stated that opposite party was not present at the spot despite prior information given by halqua Patwari. He has denied suggestion that he did not visit the spot. He has denied suggestion that field map Ext.PW4/A was prepared in Patwar office.

9.5 PW5 Kehar Singh Patwari has stated that field map Ext.PW4/A was prepared by him as per direction issued by Field Kanungo. He has stated that he has prepared field map as per copy of Musabi. He has stated that due to clerical mistake he has written Khasra No. 926/1 instead of Khasra No.928 in the field map. He has stated that field map Ext.PW4/A was prepared from Musabi and Latha. He has denied suggestion that field map Ext.PW4/A was prepared in Patwar office. Self stated that same was prepared at the spot. He has denied suggestion that field map Ext.PW4/A prepared at the instance of plaintiff.

9.6 DW1 Shiv Ram has stated that he did not raise any slab projection upon land of plaintiff. He has stated that he has raised his entire construction upon land owned by defendants. He has stated that he has also filed separate suit against the plaintiff and further stated that present suit has been filed just to harass the defendants. He has stated that he did not encroach upon any portion of suit land owned by plaintiff. He has denied suggestion that legal notice was also given to him. He has denied suggestion that he has received legal notice.

10. Following documentaries evidence filed by the parties. (1) Ext.PW4/A is Aks Tatima (Field map). (2) Ext.PZ is copy of jamabandi for the year 1993-94 qua Khasra Nos. 920, 926, 928. (3) Ext.PC is the copy of Musabi. (4) Ext.PA is copy of Aks Tatima Sazra (Settlement).

11. Submission of learned Advocate appearing on behalf of appellants that learned first Appellate Court has not appreciated the evidence regarding the alleged encroachment correctly is accepted for the reasons hereinafter mentioned. In present case original demarcation report or certified copy of original demarcation report not placed on record in order to prove encroachment in civil suit. It is well settled law that whenever there is any boundary dispute inter se parties then original demarcation report or certified copy of original demarcation report should be placed on record in Civil Court. There is no evidence on record in order to prove that demarcation conducted by Field Kanungo was affirmed by revenue officer as per H.P. Land Revenue Act 1954. As per Section 107 of H.P. Land Revenue Act 1954 it is only revenue officer i.e. Assistant Collector 1st Grade or Assistant Collector 2nd Grade who could affirm demarcation report submitted by Field Kanungo. Field Kanungo and Patwari are not revenue officers as defined under Section 7 of H.P. Land Revenue Act 1954. As per Section 7 of H.P. Land Revenue Act 1954 revenue officers have been classified as follows. (1) Financial Commissioner. (2) Commissioner. (3) Collector. (4) Assistant Collector 1st Grade. (5) Assistant Collector 2nd Grade. It is held that demarcation conducted by field Kanungo is only intermediate stage of demarcation proceedings. It is held that demarcation becomes final as per Section 107 of H.P. Land Revenue Act 1954 when demarcation conducted by Field Kanungo is affirmed by Assistant Collector 1st Grade or Assistant Collector 2nd Grade. It is held that intermediate report of demarcation is not final demarcation as defined under Section 107 of H.P. Land Revenue Act 1954. It is held that demolition order cannot be passed by Civil Court on the basis of intermediate demarcation report submitted by Field Kanungo.

12. Demarcation of boundary under Section 107 of H.P. Land Revenmue Act 1954 is *quasi judicial* and statutory function. (1) Demarcation should be essentially affirmed by Assistant Collector 1st Grade or Assistant Collector 2nd Grade. (2) Before starting demarcation to locate the boundary fix points should be ascertained from the parties and statements of parties regarding fix points should be recorded. (3) Where triangle system of measurement is adopted then three fix points should be fixed in field map so that disputed land falls within three points and then measurement should be carried out from all three points. (4) Where square system of measurement is adopted then disputed land should be shown in square system in field map and measurement should be carried out from all points in square system. (5) After demarcation boundary should be fixed by erecting the boundary so that there would be no dispute later on. Statements of parties after demarcation is over must be recorded which should form part of

demarcation report. (6) Before going at the spot revenue officer must inform all parties by notice in writing regarding time and date of his visit to the spot and copy of such notice should be retained on record of demarcation report. (7) Copy of musabi shall be used for measurement. ***See AIR 2000 HP 130 title Kamal Dev and another vs. Hans Raj. See ILR 1984 HP 317 title Radha Swami Satsang vs. State of H.P. See AIR 1995 SC 665 title State of H.P. and others vs. Mangat Ram and others. See (2010)1 HLR 474 Amar Singh vs. Narpat Ram.***

13. Even in present case there is material contradiction between testimonies of PW4 Field Kanungo namely Ram Nath and PW5 Kehar Singh Patwari. PW4 Ram Nath Field Kanungo has specifically stated that defendants have encroached upon Khasra No. 926/1 measuring 2.12 Sq. metre owned by plaintiff. PW5 Kehar Singh Patwari has specifically stated that encroachment was done by defendants on Khasra No. 928 measuring 2.12 sq. metre. In view of material contradictions between testimonies of PW4 Field Kanungo and PW5 Patwari regarding Khasra number of encroachment it is not expedient in the ends of justice to rely upon field map Ext.PW4/A placed on record for passing demolition decree of super structure in civil suit.

14. Court has carefully perused the field map relating to encroachment Ext.PW4/A placed on record. Ext.PW4/A is signed by PW4 Field Kanungo and PW5 Patwari. There is no recital in report Ext.PW4/A placed on record that there is clerical mistake relating to khasra number of encroachment mentioned in field map Ext.PW4/A. In field map Ext.PW4/A encroachment has been mentioned in Khasra No. 926/1 measuring 2.12 sq. metre but as per testimony of Halqua Patwari PW5 there is encroachment upon Khasra No. 928 measuring 2.12 sq. metre and there is no encroachment in Khasra Number 926/1. In view of above stated facts it is not expedient in the ends of justice to affirm demolition decree passed by learned District Judge Mandi (H.P.) on the basis of field map Ext.PW4/A which is *ipso facto* defective in nature.

15. Even demolition order cannot be passed on the basis of testimonies of PWs 1 to 3 because PWs 1 to 3 are not revenue expert. Even demolition order cannot be passed on the basis of spot inspection conducted by learned District Judge Mandi (H.P.) because inspection report of learned District Judge Mandi is not on record. Even there is no evidence on record in order to prove that learned District Judge Mandi took assistance of expert i.e. revenue officers for ascertaining encroachment. Point No. 1 is decided in favour of appellants.

Findings upon point No. 2 of substantial question of law with reasons

16. Submission of learned Advocate appearing on behalf of appellants that learned first Appellate Court ought not to have passed decree of mandatory injunction directing the demolition of structure is accepted for the reasons hereinafter mentioned. It is held that learned District Judge was under legal obligation to seek assistance of revenue expert in demolition case in civil suit. In present case learned District Judge did not seek assistance of revenue expert when learned District Judge Mandi visited spot. Learned District Judge Mandi simply relied upon field map Ext.PW4/A which is *ipse facto* defective in nature. In view of material contradictions between field map Ext.PW4/A and testimony of Field Kanungo and Halqua Patwari it is not expedient in the ends of justice to pass any decree of demolition in present case.

17. Submission of learned Advocate appearing on behalf of respondent that demolition order can be passed on the basis of field map Ext.PW4/A is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that no original demarcation report or certified copy of original demarcation report placed on record in present case. It is held that there is no evidence on record in order to prove that demarcation conducted by field Kanungo was affirmed by Assistant Collector 1st Grade or 2nd Grade as required under Section 107 of H.P. Land Revenue Act 1954. Point No. 2 is answered in affirmative in favour of appellants.

Relief

18. In view of above findings appeal is accepted and judgment and decree passed by learned Trial Court affirmed and judgment and decree passed by learned first Appellate Court set aside. Parties are left to bear their own costs. Learned Registrar Judicial will prepare decree sheet as required under Section 100 of Code of Civil Procedure 1908 forthwith. Parties are left to bear

their own costs. Files of learned Trial Court and learned first Appellate Court along with certified copy of judgment and decree sheet be sent back forthwith. RSA is disposed of. Miscellaneous pending application(s) if any also stands disposed of.

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

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

Cr. Appeal No. 222 of 2007
Date of decision: 20.6.2016

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Mahindra Pick Up on the wrong side of the road and hit the car- complainant and one labourer sustained injuries- accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held, in appeal that a plea was taken by the defence that vehicle had skidded after applying brakes on the frost- however, no frost was shown in the site plan- Mahindra Pick Up had travelled towards inappropriate side of the road- Appellate Court had wrongly acquitted the accused - appeal accepted- judgment of Appellate Court set aside and that of trial Court restored. (Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. Peeyush K Verma, 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 30.3.2007 by the learned Additional Sessions Judge, Shimla, H.P., whereby it while reversing the findings of conviction recorded on 25.5.2005 by the learned Additional Chief Judicial Magistrate, Court No.1, Shimla in case No. 80/2 of 2004, acquitted the respondent (for short 'accused') for the offences punishable under Sections 279, 337 and 338 of the Indian Penal Code.

2. The brief facts of the case are that on 28.1.2004 complainant Nishant Sharma and his cousin Shri Sanjiv Pandit were going to Public Service Commission, Nigam Vihar, Shimla in a vehicle bearing registration No. HP-02-0404. This car was being driven by Rajiv Pandit. At about 2.30 p.m., they were going uphill near Talland and were on their own side of the road suddenly a Mahindra Pickup bearing registration No. HP-07-5377 driven by the accused came to the wrong side of the road and struck against their vehicle. Due to the accident, the complainant and one Kashnmiri labourer sustained injuries on their person. FIR was registered. Spot map was prepared by the Investigating Officer. The Mechanical reports of the vehicles were 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. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the 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. 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 279, 337 and 338 of the Indian Penal Code. However, in an appeal preferred by the accused herein 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 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. A collision occurred inter-se a Mahindra Pickup driver's seat whereof stood manned by the accused and a Maruti Car whereon complainant alongwith his cousin were aboard. In sequel to the collision which occurred inter-se the vehicles aforesaid injuries stood entailed upon the Gulam Mohd.Deen and Rajiv Pandit, injuries whereof stand depicted in their MLCs comprised in Ex. PW-8/B and PW-8/D. The complainant stepped into the witness box as PW-1 for sustaining the charge against the accused. His testimony qua the occurrence as comprised in his examination-in-chief unravels of his therein making firm echoings of the accused while at the relevant time manning the driver's seat of the aforesaid vehicle his taking to ply his vehicle to the inappropriate side of the road, hence the vehicle aforesaid striking against the vehicle driven by the victim. The gravity of the collision which occurred inter-se the vehicles aforesaid, led the vehicle occupied by the complainant to be pushed against the retaining wall existing on the side of the road. In his cross-examination no underscorings stand communicated by him of the accused while driving the vehicle aforesaid despite adhering to the standards of due care and caution rather the existence of frost if any on the road precluding him to successfully apply its brakes, failure of application of brakes though concerted by the accused naturally leading the vehicle to swerve to the inappropriate side of the road. The absence of aforesaid communications by PW-1 in his deposition comprised in his cross-examination stands sequelled by the learned defence counsel thereat not putting any apposite suggestion to him qua the existence of frost at the site of occurrence, existence whereof purportedly preempted the accused to successfully apply the brakes of the vehicle for his hence obviating the road mishap rather hence his vehicle swerving to the inappropriate side of the road. The effect of the learned defence counsel thereat omitting to put apposite suggestions to PW-1 while holding him to cross-examination whereas they constituted the best defence of the accused, is of at the outset the defence not holding with formidability any espousal of the aforesaid defence being available with it for its standing concerted by it for exculpating the guilt of the accused. The further effect of the aforesaid omission impinges upon the subsequent pronouncements if any in the depositions of the prosecution witnesses, of frost at the relevant time existing at the site of occurrence, existence whereof purportedly preempted the accused to successfully apply for obviating the road mishap the brakes of the apposite vehicle, rather existence of frost thereon leading it to naturally swerve to the inappropriate side of the road being construable to be merely an afterthought defence for thereupon negating the incriminatory role of the accused. An afterthought endeavor is obviously an invented endeavor qua the aforesaid facet. An invented and afterthought endeavor qua the

facet aforesaid for hence dis-imputing credence to the prosecution version cannot stand to be countenanced by this Court.

10. Be that as it may, PW-3 the occupant of the vehicle driven by the accused at the relevant time though resiled from his previous statement recorded in writing nonetheless on his standing declared hostile whereupon the learned APP proceeded to subject him to cross-examination he has therein voiced of the vehicle driven by the accused swerving to the inappropriate side of the road besides has also communicated therein of the accused fleeing from the site of occurrence. The aforesaid factum of the accused fleeing from the site of occurrence pronounces upon the conduct of the accused inconsistent with his innocence. Even though, he proceeded to depose of frost existing on the middle of the road, also he deposes of the accused despite applying the brakes of his vehicle, the said application of brakes by the accused proving abortive, on anvil whereof the learned counsel for the accused contends of the defence succeeding to prove the factum of the accused not abandoning adherence to the standards of due care and caution rather the existence of frost at the relevant time at the site of occurrence precluding him to successfully apply the brakes of the vehicle driven by him whereupon hence the apposite vehicle naturally swerved to the inappropriate side of the road whereat it struck the vehicle occupied by the victim/complainant, swerving whereof not constituting any element of negligence on the part of the accused while driving the apposite vehicle. However the aforesaid submission when also acquires succor from the testimony of PW-6, the learned counsel appearing for the accused makes a vehement submission before this Court qua the findings of acquittal recorded by the Appellate Court not warranting any interference. However the aforesaid submission does not acquire any immense force primarily given this Court for the reasons alluded hereinabove dispelling the endeavor made by the learned defence counsel subsequent to his holding PW-1 to cross-examination whereat no communications in congruity thereof for want of apposite suggestions in consonance therewith standing put to him by the learned defence counsel thereat of hence the aforesaid subsequent endeavor of the learned counsel for the accused standing infected with a vice of premeditation besides with PW-3 in his cross-examination admitting the preparation of site plan by the Investigating Officer which omits to embody therein the defence concerted to be espoused by the counsel for the accused renders the oral communications in contradiction thereto by either PW-3 or any other PWs examined subsequent thereto to suffer from a vice of accentuated impairment. Consequently, hence with creditworthiness standing imputed by PW-3 to site plan comprised in Ex. PW-11/B wherein there is no display of frost occurring at the relevant time, the creditworthiness of the depositions of the prosecution witnesses in contradiction thereto hold no efficacy, also hence any espousal made before this Court by the learned counsel for the accused qua the aforesaid facet of defence holding any formidability besides sinew cannot stand to be accepted by this Court.

11. Even if PW-4 has in his cross-examination deposed of no skidding marks being available at the relevant time at the site of occurrence, yet the absence of skid marks at the relevant site of occurrence stands explicated by PW-6, of frost existing thereon precluding the existence of skid marks thereat, nonetheless the aforesaid explication purveyed by PW-6 the owner of the vehicle driven by the accused appears to be perse interested also its worth gets dispelled on the score of his being unavailable at the relevant site at the time contemporaneous to the occurrence rather his admittedly proceeding thereat after half an hour elapsing since its taking place hence when absence of existence of skid marks at the relevant site of occurrence stands solitarily voiced by him whereas it stands unvoiced by any other PWs nor the defence adducing any potent evidence comprised in a display by the expert who visited the site of occurrence to check the solidity of frost existing at the site of occurrence of given the solidity of the mass of frost thereat of hence its not bearing any impression of any skid marks, absence whereof thereon hence capacitating the espousal of the defence of their non-existence thereat not negativing the inference of the accused not applying the brakes of the apposite vehicle for preempting the accident, hence his not deviating from adhering to the standards of due care and caution. The aforesaid expert evidence was not enjoined to be led by the prosecution rather was enjoined to be led by the defence especially when its concert to hence exculpate the accused stood

rested thereupon, as a corollary its non-adduction by the defence constrains this Court to conclude of depictions in site plan admitted by PW-3 alone holding sway qua unavailability of frost at the site of occurrence nor hence its existence if any thereon precluding the successful application of brakes of the apposite vehicle by the accused for his hence obviating the road mishap.

12. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned Appellate Court suffers from a gross perversity and absurdity or it can be said that the learned Appellate Court in recording findings of acquittal has committed a 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 deems it fit and appropriate that the findings of acquittal recorded by the learned Appellate Court merit interference.

13. In view of the above discussion, I find merit in this appeal, which is accordingly allowed and the impugned judgment of acquittal recorded by the learned Appellate Court is set aside. In sequel the judgment of conviction and sentence recorded by the learned trial Court is maintained and affirmed. Records be sent back.

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

State of Himachal Pradesh and another ...Appellants.

Versus

Dr. Ramesh Chauhan ...Respondent.

LPA No. 129 of 2014
Decided on: 20.06.2016

Constitution of India, 1950- Article 226- Petitioner had retained government accommodation – he pleaded that retention was due to circumstances beyond his control- some other persons had also retained the government accommodation but they were not directed to pay such huge penalty- Writ Court allowed the writ petition- held, that equity can be claimed only for lawful things and not for unlawful things – however, State had reduced the amount of penalty – writ petition disposed of with a direction to the writ petitioner to pay the reduced amount of penalty and to the respondent to release all the service benefits. (Para-3 to 8)

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondent: Mr. N.D. Sharma & Mr. S.R. Sharma, Advocates.

The following judgment of the court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral*

This Letters Patent Appeal is directed against judgment and order, dated 18th December, 2013, made by the learned Single Judge/Writ Court in CWP No. 1727 of 2011, titled as Dr. Ramesh Chauhan versus State of H.P. & another, whereby the writ petition filed by the writ petitioner-respondent came to be allowed and the writ respondents-appellants were directed to recalculate the amount of damages, which were to be paid by the writ petitioner-respondent for retaining the government accommodation for the period with effect from 1st October, 2009, up to 31st October, 2010 (for short "the impugned judgment").

2. The case of the writ petitioner-respondent before the Writ Court was that he retained the government accommodation for the said period because of the circumstances beyond his control. It was also pleaded that some other persons have also retained the premises unauthorizedly, but they were not directed to pay such a huge penalty.

3. The Writ Court, after noticing the averments contained in the writ petition, held that the writ respondents-appellants have not drawn action against so many officers, then why against the writ petitioner-respondent. Perhaps, this is the only reason for allowing the writ petition. It would be profitable to reproduce para 6 of the impugned judgment herein:

> *"6. It is seen that the Estate Officer has chosen to levy maximum damages @ 18 per sq. ft., but then respondents cannot act in an arbitrary and discriminatory manner. More than 31 officers/officials in the year 2008 and more than 38 officers/officials in the year 2009 have unauthorizedly retained their premises. In none of such cases, damaged @ 18 per sq. ft. was charged. Then why so in the case of the present petitioner? Petitioner is ready to pay damages eight times the market rent."*

4. It is apt to record herein that equity can be claimed only for lawful things and not for unlawful things. Thus, the foundation of the impugned judgment is bad, erroneous and illegal.

5. Accordingly, the impugned judgment merits to be set aside and the writ petition is to be dismissed.

6. At this stage, Mr. J.K. Verma, learned Deputy Advocate General, stated at the Bar that the writ respondents-appellants have examined the case of the writ petitioner-respondent afresh and in case he approaches the concerned authority, perhaps, he has only to pay ₹ 1,40,889/- and not ₹ 2,37,744/-, as has been mentioned in para 7 of the memo of appeal. His statement is taken on record.

7. In view of para 7 of the appeal, we deem it proper to direct the writ petitioner-respondent to pay ₹ 1,40,889/- to the writ respondents-appellants within six weeks.

8. At this stage, learned counsel for the writ petitioner-respondent stated at the Bar that the service benefits of the writ petitioner-respondent have been withheld by the concerned authority because of the orders passed by the writ respondents-appellants, which were subject matter of the writ petition. The concerned authority is directed to release all the legitimate service benefits in favour of the writ petitioner-respondent after he complies with the directions (supra).

9. The State-authority(ies) is/are commanded to draw action in future, as per the law and not to use different yardsticks.

10. The appeal is disposed of accordingly alongwith all pending applications.

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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

Amit Kumar .....Respondent

Cr. Appeal No. 463/2012
Reserved on: June 17, 2016
Decided on: June 20, 2016

Indian Penal Code, 1860- Section 452, 376 and 506- **Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act 1989-** Section 3(1)(XI)- Prosecutrix was present in her home with her children- somebody knocked at her door in the middle of the night- she opened the door thinking that her husband might have come- however, accused was found standing outside- he came inside the house and raped the prosecutrix- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had narrated the incident to her husband after considerable delay- her husband stated that he used to inform the prosecutrix about his late arrival, thus there was no question of opening the door by the prosecutrix thinking that her husband had come- prosecutrix had not raised any alarm- she had made various improvements in the Court- her testimony is not trustworthy and does not inspire confidence- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-19 to 22)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the Respondent : Mr. K.D. Sood, Senior Advocate with Mr. Ankit Aggarwal, 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 13.7.2012 rendered by the learned Sessions Judge, Bilaspur, HP, in Sessions Trial No. 09 of 2011, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offences under Sections 452, 376 and 506 IPC, and, Section 3 (1)(XI) of The Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act, has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 23.3.2011, the prosecutrix (name withheld) wife of Kishori Lal came to Police Station, Barmana alongwith her husband and mother-in-law and lodged a report that her marriage was solemnised with Kishori Lal, resident of village Karot, about 9 years back ,according to Hindu rites. She had three children, two sons and one daughter. Daughter was six years old. Her house was situated at a lonely place. Her parents-in-law were residing at village Mugrani alongwith brother of her husband. On 22.3.2011 at about 8.30 AM, her husband had gone to see the Nalwari fair at Bilaspur and she was alone in her house with her children. She further stated that her husband did not return to his house till evening. She and her children took meals and went to sleep at 9.00 PM. During the intervening night of 22 and 23.3.2011 at about 1.10 AM, somebody knocked at the door of her house from outside. She thought that her husband might have come back from the fair. She went to open the door. As soon as she opened the door, she found accused standing there. He caught hold of her from her arms and twisted the same towards her back. She started crying. He gagged her mouth with another hand. She stated that the accused lifted her and brought her in a room and made her to lie on a big trunk (box). She tried to rescue herself and raised hue and cry but due to gagging of her mouth, she was helpless. Accused opened the string of her *Salwar*, committed rape upon her forcibly and ran away from the spot. She sustained injuries on her body and abrasions on her wrist, her bangles were also broken. She further stated that due to fear she closed the door from inside and sat in a room. Her daughter Shivani who had hidden herself in a corner of a room, told the prosecutrix that "*Mami main dar gaye thi, maine socha ki mujhe bhi marein gay*". Thereafter, she slept in the bed with her children and asked her husband over telephone as to where he has reached. Her husband told that he had reached Jabal bridge and would reach the house in a while. She also mentioned that at 2.15 AM, her husband Kishori Lal reached home but she did not tell him about the incident during night. In the morning, she narrated whole incident to her husband and also told her mother-in-law Smt. Krishani Devi on telephone. She belonged to a Scheduled Caste and accused had committed rape on her after trespassing into her house during midnight. Prosecutrix was medically examined by Dr. Supriya Atwal vide MLC Ext. PW-11/A. Clothes of the prosecutrix were taken into possession. Site plan was also prepared.

Accused was also medically examined. Case property was sent to FSL Gutkar through Constable Hussan Lal. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as fifteen 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 person.

5. Mr. K.D. Sood, learned Senior Advocate with Mr. Ankit Aggarwal, Advocate, has supported the judgment dated 13.7.2012.

6. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. Prosecutrix (name withheld) (PW-1) testified that she was married about nine years back. She had three children. Her husband had gone to see Nalwari fair at Bilaspur in the morning at 8.30 AM on 22.3.2011. He told her that he would come back after watching the night programme. She was present in her house alongwith her three children. They had gone to sleep at about 9 PM. In the intervening night of 22 and 23.3.2011 at about 1 AM, someone knocked at the door of her house. She thought that her husband has come back. She went to the ground floor and opened the door. When she opened the door, accused entered her house and caught hold of her from arms and breast and asked her about her husband. On this, she told the accused that her husband was sleeping, but he told that her husband was present in the Nalwari fair and he had consumed liquor and that was why he has come to her house. When accused caught hold of her, she cried and tried to rescue herself but there was no one to save her. She also tried to push the accused away from her but accused had laid her on the box forcibly and committed sexual intercourse with her against her consent. After committing rape, accused fled away. He also threatened her not to disclose the incident to anybody otherwise he kill her. Her husband came to the house at 2.30 AM. He was under the influence of liquor. She asked him if he wanted to take meals. He refused. Prosecutrix did not disclose to him anything due to the fear that he might kill the accused. At about 6 AM, she disclosed to her husband that the accused had committed rape upon her. She also disclosed this fact to her mother-in-law over the telephone. Her mother-in-law reached her house. Her bangles were broken and she had received injuries on her body. She, alongwith her husband and mother-in-law, went to the Police Station Barmana and lodged report against the accused. She was medically examined in Zonal Hospital Bilaspur. Police visited the spot and took into possession the broken bangles and *Dupatta* and sealed in a separate parcel and took into possession vide memo Ext. PW-1/B. In her cross-examination she admitted that the house of maternal uncle of her husband was situated adjoining to their house at the same level. Her house was double storied. There were two rooms in ground floor and one room and store room on the upper storey. At the time of knocking of door, she did not hear any voice. When she opened the door, she did not have any talk with the accused nor the accused uttered any word. Accused talked to her in the room. When she tried to save herself from the accused, she received abrasions/ injuries on her wrists, breast and legs. Blood also oozed out from the injuries. She had shown injuries to the lady constable as well as to the Doctor. Accused remained in the house for about one hour. The fact that when accused entered her house, she asked about her husband and she told him that he was sleeping, then accused told her that her husband was lying in the Mela after consuming liquor and that was why he had come, was disclosed by her to the police at the time of lodging FIR. (confronted with Ext. PW-1/A, wherein it is not so recorded). Fact that accused had threatened her not to disclose about sexual intercourse to anybody otherwise he would kill her, was disclosed by her to the police at the time of lodging FIR. (confronted with Ext. PW-1/A, wherein it is not so recorded). The fact that when her husband arrived home in the night, she did not disclose about the sexual intercourse to him thinking that if she disclosed the same, her husband might kill the accused, was disclosed by her

to the police at the time of recording FIR. (confronted with Ext. PW-1/A, wherein it is not so recorded).

8. Krishani Devi (PW-2) is the mother-in-law of the prosecutrix. She received a telephonic call from the prosecutrix. She went to village Karot. She alongwith prosecutrix and Kishori Lal went to the Police Station. Prosecutrix lodged FIR Ext. PW-1/A with the Police Station. Police visited the spot and took into possession broken bangles, bed sheet and *Dupatta*. Police sealed the articles and took the same into possession.

9. Kishori Lal (PW-3) is the husband of the prosecutrix. He testified that he reached his house at 2.15 AM on the intervening night of 22 and 23.3.2011. His wife asked him to take meals. He refused. He went to sleep. In the morning, his wife disclosed to him that at about 1.15 AM, in the midnight, accused had come to the house and committed rape upon her. In his cross-examination, he admitted that when he reached his house, door was opened by his wife on his knocking. He had called his wife from outside and asked her to open the door. He admitted that whenever he reached house during night, either he used to call his wife from outside or on the telephone before entering the house. He also admitted that the house of his maternal uncle Mansha Ram was situate near to his house and there were about 7/8 family members in that house.

10. Sant Ram (PW-4) testified that he accompanied the police to the house of Kishori Lal where they took photographs in the house of Kishori Lal. Police took into possession the broken bangles of prosecutrix which were sealed and put in a parcel. Police also took into possession bed sheet and *Dupatta*.

11. Brij Lal (PW-5) deposed that he visited the house of Kishori Lal and prepared site plan.

12. Kumari Shivani (PW-6) is the daughter of the prosecutrix. In answer to Question No. 9 put to her by the Public Prosecutor, she testified that she had heard cries of her mother and saw from the hole of the stair case that her mother was lying on the tin box and accused was doing 'Ghoolna' with her mother. She also deposed that when her father entered the house, during nighttime, her mother asked him to take meals but she had not disclosed anything else to him. Her father slept in the ground floor on that night.

13. Gandhi Ram (PW-7) recorded FIR Ext. PW-1/A.

14. Dr. Kuldeep Singh (PW-8) has medically examined the accused. He issued MLC Ext. PW-8/A. No blood was present on the injuries of the accused. Abrasions were dark brown. Abrasions were horizontal on forehead and vertical on nose and forearms.

15. Lady Constable Maya Devi (PW-10) testified that she accompanied the prosecutrix to Regional Hospital Bilaspur.

16. Dr. Supriya Atwal (PW-11) has medically examined the prosecutrix. She issued MLC Ext. PW-11/A. In her final opinion, she stated that there were signs of physical violence and possibility of sexual intercourse could not be ruled out. In her cross-examination she admitted that injuries were superficial and no blood was oozing out from the abrasions. Semen, which was detected, as per report of FSL, Ext. PW-11/B, could not be identified.

17. Balak Ram (PW-12) prepared the *Tatima* of the house of Kishori Lal.

18. Bhagat Ram (PW-15) testified that he was posted as Additional Superintendent of Police, Bilaspur since April, 2010. On 23.3.2011, after registration of FIR, Ext. PW-1/A, he visited the spot He took photographs Ext. P-14 to Ext. P-23 and took into possession broken pieces of bangles. In his cross-examination, he has admitted that he has seen the memo of information of arrest of accused. There was no reference to any injury on the person of the accused. He admitted hat there was a ventilator near entrance door but it was not shown in Ext. PW-15/A. He has not recorded the statements of Mansha Ram or his family member during investigation.

19. Case of the prosecution, precisely, is that when PW-1 (Prosecutrix) was alone and Kishori Lal (PW-3) was away, accused entered the house and committed forcible sexual intercourse with the prosecutrix.

20. Prosecutrix, in her examination-in-chief, has testified that accused entered the house at 1 AM and thereafter committed forcible intercourse with her. Her husband came to the house at 2.30 AM. However, she did not disclose the incident to him. Incident was disclosed to the husband only at 6 AM in the morning. It is an unusual conduct on the part of prosecutrix. It was expected from the prosecutrix to immediately inform her husband about the incident instead of waiting till 6 AM. Explanation given by her that she apprehended that her husband would kill the accused, is not believable. PW-3 Kishori Lal, in his cross-examination, has categorically stated that when he usually entered the house at night, he either used to call his wife or inform her over the telephone. Prosecutrix, thus, was not supposed to open the door when it was knocked by a stranger. Prosecutrix has informed her mother-in-law over the telephone. It has come on record, as noticed above, that husband used to inform the prosecutrix of his whereabouts on the telephone as and when he reached near the house. Thus telephone was available with her. She could immediately inform her mother-in-law or husband about the incident. PW-1 (Prosecutrix) has admitted that the house of maternal uncle namely Mansha Ram was adjoining to their house on the same level. PW-3 Kishori Lal has also admitted in his cross-examination that the house of his maternal uncle Mansha Ram was situate near to his house and there were 7-8 family members in that house. Had the prosecutrix raised alarm, same could not go unnoticed by Mansha Ram or his family members. Accused, according to the prosecutrix, remained in the house for about one hour. She had sufficient time to raise alarm. According to the prosecutrix, blood oozed out from the injuries but no blood was noticed by the Doctor who examined her. It has also come in the statement of PW-3 Kishori Lal that on the relevant day also when he reached his house, he knocked the door and asked his wife to open the door. Thereafter door was opened by his wife. Thus, prosecutrix was not supposed to open the door without identifying the person who was knocking the door at night. Natural conduct of the prosecutrix would have been to disclose immediately the incident to her husband instead of trying to save the accused. She could also visit the house of Mansha Ram which was adjoining to their house till her husband had not come, immediately after the incident had taken place. Prosecutrix has testified that the box was covered with bed sheet and she had spread *Dupatta* on the box whereas Sant Ram testified that the bed sheet and *Dupatta* were lying on the cot. Prosecutrix has deposed that she had received injuries and bruises on her body but in the medical examination, these injuries were not noticed by the doctor.

21. Prosecutrix has made various improvements in her statement. In her examination-in-chief, she deposed that accused entered the house and inquired about her husband upon which she told that her husband was sleeping. However, it is not so recorded in the FIR. She also stated that accused had threatened not to disclose the incident to anybody otherwise he would kill her. This fact is also not mentioned in the FIR. Prosecutrix deposed that she apprehended that if she narrated the incident to her husband, her husband would kill the accused. It is also not so mentioned in the FIR.

22. The statement of the prosecutrix is neither trustworthy nor natural and does not inspire confidence. Shivani (PW-6) has not answered the most of the relevant questions put to her by the learned defence Counsel. Even according to her, when she saw accused and her mother (prosecutrix), both of them were wearing their clothes. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt.

23. 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

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

Cr. Appeal No. 6 of 2009
Reserved on: 24.05.2016
Date of decision: 20.06.2016

Indian Penal Code, 1860- Section 304-B- Deceased was married to the accused- accused called the father of the deceased on his mobile phone and told that deceased was seriously ill and was referred to IGMC for treatment- father of the complainant found a car coming from the opposite side in which deceased was lying unconscious- deceased died on the way- deceased had consumed poison as she was being maltreated for dowry- accused was tried and acquitted by the trial Court- held, in appeal that father of the complainant had not made any inquiry about the cause of illness of the deceased either from the accused or the Doctor- no complaint was lodged on the date of death- FIR was lodged subsequently- delay was not explained- parents had not reported the factum of harassment either to police or any other person- no independent witness was examined to prove that deceased was being subjected to harassment – trial Court had taken a reasonable view, which was possible- appeal dismissed. (Para-22 to 30)

Case referred:
Surinder Singh Vs. State of Haryana, (2014) 4 Supreme Court Cases 129

For the appellant: Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.
For the respondent: Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

This appeal has been filed against judgment dated 16.09.2008 passed by the Court of learned Additional Sessions Judge, Fast Tack Court, Shimla, in Sessions Trial No. 5-S/7 of 2008, vide which, learned trial Court has acquitted the accused for offence under Section 304-B I.P.C.

2. The case of the prosecution was that an FIR Ext. PD was registered on 02.08.2007 by Shri Laiq Ram Chauhan at Police Station, Kotkhai i.e. FIR No. 50/07, to the effect that he was resident of village Darkoti and an agriculturist by profession. He had three daughters and a son. His eldest daughter Sureksha (deceased) was married in the month of November, 2002 with accused Yashwnat Singh as per Hindu rites. The deceased and the accused were having a son namely Siwang from the said wedding, who was approximately three years old. The deceased had visited the complainant's house at village Darkoti in the month of March, 2007. She was residing in her matrimonial house in village Tahu. On 30.07.2007 at around 10.30 P.M. accused called the complainant on his mobile phone from Jubbal hospital and told him that Sureksha is seriously ill. Accused also conveyed to him that she had been referred to Indira Gandhi Medical College at Shimla for treatment. After some time, the complainant received a telephonic call from Richpal resident of village Tahu, owner of car No. HP-09-1149 from Jubbal intimating the complainant that his daughter was unwell and had been referred to IGMC Shimla. The complainant gave a telephonic call to his cousin Mohinder Chauhan in Kharapathar. Mohinder Chauhan came to the complainant in his car and the

complainant and his wife left for Jubbal in the car of Mohidner Chauhan. When they reached near village Sundli short of Jubbal, they spotted car No. HP-09-1149 coming from the opposite direction. They signaled the car to stop. Sureksha was lying unconscious on the rear seat of the car and the accused alongwith his younger brother Dicky and driver Richpal were also in the car. The complainant tried to talk with Sureksha but in vain as she was not in her senses. Sureksha was shifted by them in their vehicle alongwith the accused. When they reached near Chalnehar, they realized that the body of Sueksha had become cold. On this, they rushed Sureksha to Kotkhai hospital for treatment. But the Doctor after examining her declared her as dead. After some time, 4-5 residents of village Tahu including Jatinder Mehta and Joginder reached Kotkhai hospital. Body of Sureksha was taken in the morning to village Tahu and she was cremated on 31.07.2007. Thereafter, complainant alongwith other persons returned in car bearing registration No. HP-03-1102 belonging to Mohinder Chauhan to village Darkoti. They found a discharge slip bearing registration No. 887/07 in the car. Vide this slip, Sureksha had been referred from Jubbal hospital to IGMC, Shimla and Medical Officer had mentioned in the discharge slip that the primary disease with which Sureksha was suffering was the consumption of organo phosphorous poison. On 29.07.2007 Sureksha informed the complainant on phone that she does not want to live in the house of her in-laws. According to the complainant, he believed that his daughter had consumed poison as the accused used to illtreat her for dowry and she ended her life due to the act and conduct of the accused who used to maltreat her and demand dowry. It was further mentioned that as they were in shock on account of the sudden demise of Sureksha and were being visited by the relatives to mourn the death of Sureksha, they could not come earlier to the Police Station to lodge the complainant.

3. Stomach wash of the deceased was taken into possession by the police and sent for chemical analysis to Forensic Science Laboratory, Junga, Himachal Pradesh. Report of the laboratory was obtained. As per opinion of the Medical Officer, Sureksha had died after consuming organo phosphorous insecticide poison.

4. Investigation revealed that the deceased was married with the accused in November, 2002 and they were having a son. The deceased was kept nicely for about two years after the marriage by the accused but thereafter, he started harassing her for bringing insufficient dowry. The accused used to remark that instead of giving cash, Sureksha's parents had given bulky items which are "Ghoro Key Mafik". Accused had constructed a new house and used to force Sureksha to bring money from her parents and maltreated her for the same time and again. On this, the complainant called Ram Narain (Mason) and the accused to his house. The contract for construction of the house of the accused was given by the complainant to Ram Narain for an amount of Rs.1,50,000/-. Accused had not paid any money to Ram Narain. An amount of Rs.10,000/- was paid by the complainant to Ram Narain and Rs.20,000/- were paid by him to the accused. Rs.10,000/- were withdrawn by the complainant from his bank at Kotkhai, whereas Rs.20,000/- were borrowed by him from one Jai Ram and thereafter, he paid the said amount to the accused. Despite this, accused kept on maltreating Sureksha. He used to say that the complainant had not given him a golden chain. The accused also restrained Sureksha from visiting her 'Mayika'. On 29.07.2007 at around 4.00 P.M., Sureksha had rang the complainant on his mobile No. 94180-40969 from mobile No. 94186-65333 informing him that the complainant should take her to his house in village Darkoti as she did not want to live in the house of her husband at village Tahu. Thereafter, on 30.07.2007 complainant left village Darkoti for Tahu. The complainant unsuccessfully tried to talk with Sureksha. When he rang her third time, Sureksha talked with him and requested him to return back to his house from Kharapathar instead of going to village Tahu. She had expressed her desire to talk to her mother. The complainant returned back to his house from Kharapathar and asked his wife to talk with Sureksha on phone. When his wife telephoned their daughter, the accused threatened them. Thereafter, on that very day i.e. on 30.07.2007, in the evening, Surekhsa consumed poison and the accused did not inform his in-laws about this fact.

5. After completion of the investigation, final report for the trial of the accused was presented by the police in the Court. The accused was summoned and as a prima facie case was found existing against him, he was charged under Section 304-B I.P.C., to which he pleaded not guilty and claimed to be tried.

6. Learned trial Court on the basis of material produced on record by the prosecution as well as the defence concluded that not even a single person from the village of the accused has come forward to say that the deceased was illtreated by the accused. It further held that the delay in reporting the matter by the complainant to the police was also fatal and it appeared that the story narrated by the complainant and his family members was concocted story and was an afterthought. According to the learned trial Court, the cumulative effect of the entire evidence was that the prosecution had failed to substantiate that the deceased was subjected to cruelty or harassment by the accused for or in connection with the demand of dowry. It further held that the presumption of dowry death as envisaged under Section 113-B of the Evidence Act was not attracted in this case. Accordingly, the learned trial Court acquitted the accused by holding that it would not be safe to hold the accused guilty on the basis of dubious and effete evidence led by the State/ prosecution.

7. Mr. Vikram Thakur, learned Deputy Advocate General has submitted that the judgment passed by the learned trial Court was not sustainable either on facts or on law. According to him, the judgment in fact was based on hypothetical reasonings returned by the learned trial Court based on surmises and conjectures and not on the basis of material produced on record by the prosecution. According to Mr. Thakur, the learned trial Court had failed to appreciate that the prosecution was able to bring home the guilt of the accused beyond reasonable doubt on the basis of material produced on record by it. Mr. Thakur submitted that it stood established from the records that the deceased was harassed by the accused, who illtreated her on account of demand of dowry and this very important aspect of the matter had been ignored by the learned trial Court. Material evidence on record had been disregarded in a perverse manner. According to him, learned trial Court disbelieved the statement of PW-2 Laiq Ram, father of the deceased and other material and principal witnesses i.e. PW-9 and PW-10 without any cogent basis whatsoever. Mr. Thakur argued that all the said witnesses, namely, Laiq Ram, Vijay Laxmi ad Missi Devi, had specifically stated that on 30.07.2007 at about 7.30 P.M. accused made a call on cell phone of PW-9 and asked why PW-9 had made a call to his house. When PW-9 told the accused that her mother wanted to talk with the deceased and she also wanted to talk with the deceased, the accused remarked that "Mein Teri Baat Teri Didi Sey Hamesha Ke Liye Karve Deta Hoon" and disconnected the phone. This fact was narrated by PW-9 to her father i.e. complainant as well mother. Thereafter, PW-2 complainant Laiq Ram tried to contact the accused on phone but was not successful. According to Mr. Thakur, these facts clearly suggested that the conduct of the accused was not above board but all these important aspects of the matter had been totally ignored by the learned trial Court while acquitting him. According to Mr. Thakur, the factum of the deceased of having consumed poison was also hidden from her parents by the accused. Information given to the parents of the deceased about her illness was also cryptic and vague. True facts were never disclosed to them, which also manifestly demonstrated the guilt of the accused. The learned trial Court had ignored this aspect of the matter also. He further argued that in fact the conduct of the accused was very suspicious and the factum of the deceased having consumed poison and being in a serious condition and further her being referred to IGMC Shimla by the Doctor was also hidden by the accused from the parents of the deceased which facts were self-speaking about the guilt of the accused. He further submitted that the prosecution had sufficiently explained as to why there was delay in lodging of the FIR. However, the case of the prosecution in this regard stood brushed aside by the learned trial Court in a slipshod manner without appreciating that the case of the prosecution was neither concocted one nor an afterthought. Mr. Thakur further submitted that even otherwise the judgment passed by the learned trial Court was not sustainable because the conclusions arrived at were neither borne out from the record of the case nor the learned trial Court had appreciated the testimony of the prosecution witnesses

in its correct perspective. The learned trial Court miserably failed to perceive the conduct of the accused including the factum of his alleging that his wife was having illicit relation with one Bikku which allegation of the accused remained an allegation only and could not be proved by him. He also argued that the learned trial Court erred in not appreciating that the villagers of the accused were united and none of them intended to depose against the accused but this according to him did not condone the guilt of the accused. Therefore, he prayed that the judgment passed by the learned trial Court be set aside and the accused be convicted for the offence with which he had been charged.

8. Mr. P.S. Goverdhan, learned counsel appearing for the respondent on the other hand argued that the learned trial Court had rightly acquitted the accused from the charges framed against him because according to him, the accused was not guilty of the said offences. Mr. Goverdhan submitted that the prosecution had miserably failed to prove its case beyond reasonable doubt against the accused. In these circumstances, the learned trial Court had rightly come to the conclusion that the accused could not have been convicted on the basis of dubious and effete evidence led by the State. Mr. Goverdhan further argued that the factum of the case of the prosecution being a concocted story to frame and harass the accused is evident from the fact that there was delay in lodging of the FIR and the said delay had not been plausibly and satisfactorily explained by the prosecution. The so called explanation putforth by the prosecution explaining the delay was totally flimsy and based on false and concocted facts. According to him, accused never harassed the deceased or illtreated her on any account including for the alleged demand of dowry as was alleged by the prosecution. Mr. Goverdhan submitted that the prosecution had failed to produce even a single independent witness to corroborate its story of the deceased being harassed by the accused for want of dowry. He further submitted that the testimony of the prosecution witnesses was neither cogent nor it was trustworthy or truthful and the same was highly doubtful keeping in view the fact that all of them were very closely related to the deceased. He further submitted that besides this there were grave inconsistencies and contradictions in the statements of these witnesses which remained unexplained by the prosecution. Therefore, according to him as the prosecution had failed to prove its case beyond any reasonable doubt against the accused, the learned trial Court had rightly acquitted the accused and the judgment so passed by the learned trial Court called for no interference. Thus, he prayed for the dismissal of the appeal being devoid of any merit.

9. 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.

10. Section 113-B of the Evidence Act, 1872 reads as under:-

> "**113-B. Presumption as to dowry death.** - When the question is whether a person has committed the dowry death of a woman, and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

11. Section 304-B of the IPC reads as under:-

> "**304-B. Dowry death**. – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death."

12. The Hon'ble Supreme Court in ***Surinder Singh Vs. State of Haryana***, (2014) 4 Supreme Court Cases 129, has held as under:-

"17. Thus, the words 'soon before' appear in Section 113B of the Indian Evidence Act, 1872 and also in Section 304B of the IPC. For the presumptions contemplated under these Sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words 'soon before' is, therefore, important. The question is how 'soon before'? This would obviously depend on facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, 'soon before' is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In this connection we may refer to judgment of this Court in Kans Raj v. State of Punjab, where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222-23, para 15)

"15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non- existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."

> Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."

13. Thus, it is evident that for the purposes contemplated in Section 113-B of the Evidence Act 1872 and Section 304-B I.P.C., to spring into action, it is necessary to demonstrate that cruelty or harassment was caused soon before the death. Therefore, the interpretation of the words "soon before" assumes great significance and importance and these words have to be interpreted keeping in view the facts and circumstances of each case. The question obviously will be how "soon before" her death such woman was subjected by the accused to cruelty or harassment for or in connection with demand for dowry. The cruelty or harassment will differ from case to case and it will obviously be relating to the mindset of people which will also vary from person to person. Besides cruelty being both mental and/or physical it can also be verbal or emotional.

14. In the present case, the material witnesses are PW-2 Laiq Ram, father of the deceased, PW-8 Mohinder Chauhan, cousin of the complainant, PW-9 Vijay Laxmi, sister of the deceased and PW-10 Missi Devi, mother of the deceased.

15. PW-2 Laiq Ram, father of the deceased, deposed that Sureksha was married in November, 2002 and after her marriage, she was residing in the house of her in-laws in village Tahu. In March, 2007, she had come to his house. On 30.07.2007 at around 10.30 P.M., accused rang him from Jubbal hospital and told him that Sureksha was seriously ill and had been admitted in Jubbal hospital. He rang his cousin Mohinder, who thereafter came in his car to the house of PW-2 and PW-2 alongwith his wife proceeded towards Jubbal hospital in the car of Mohidner. He further deposed that when they reached Kharapathar one Cheu, a resident of village Tahu, telephoned him and conveyed that Sureksha had been referred to IGMC, Shimla. While they were on their way to Jubbal, a vehicle driven by Cheu came from the opposite side, which was stopped by them. Cheu, accused, Sureksha and Dicky, the younger brother of the accused were in that vehicle. Sureksha was lying on the rear seat of the vehicle and was unconscious. He tried to talk to her but in vain. He took out Sureksha from the vehicle of the accused and made her to lie in their car and also made the accused to sit in their car. Thereafter, they started proceeding towards Shimla. On the way, they checked the body of Sureksha which had become cold. So they immediately took her to Kotkhai hospital, where the Medical Officer after examining Sureksha declared her dead. In the morning, 4-5 persons came from Tahu and took the dead body of deceased to village Tahu, where she was cremated. After the cremation of Sureksha, PW-2 and his wife returned to their house in the vehicle of Mohinder. When Mohinder's car was being cleaned, a discharge slip issued from Jubbal hospital was traced by them which was lying near to the rear seat of the car. This chit was read by him and it was mentioned therein that Sureksha had consummed the poison and she was referred to IGMC, Shimla. He further deposed that accused never told him that Sureksha had consumed poison. After going through the said chit Ext. PC, he suspected that his daughter had died due to poisoning. They returned to their village on 31.07.2007 i.e. in the evening after the cremation of Sureksha. On 02.08.2007 he got FIR Ext. PD registered. He further deposed that he did not report the matter to the police on 31.07.2007 and 01.08.2007 as lot of people were visiting their house and on 01.08.2007, as per the custom, he went to the house of the accused, because a day after the death, all the close relatives of the deceased assemble and fast. He further stated that after the marriage, accused kept Sureksha nicely for two years and thereafter, she used to remain tense. As and when Sureksha came to his house in village Darkoti, he used to enquire from her as to why she remained tense. She told that the accused demanded money. PW-2 further stated that he used to give money as and when Sureksha used to visit them. He further stated that fire had taken place in village Tahu in which 3-4 houses including the house of the accused were burnt. When accused and his family members were

shifting their luggage to the house of someone else on account of the said fire, at that time, the accused remarked that Sureksha had brought the articles "Ghoro Jaise" and she was asked to bring the cash. Vijay Laxmi over heard this, who used to visit the house of Sureksha and who narrated this fact to him. He further stated that in the year 2005, Sureksha told him that they were to build a house and when he enquired from her as to how much money they had for the said purpose, Sureksha remarked that they had nothing and the only money available with them would be the one which he will give. After a few days, he received a phone call from Sureksha and she told him that her husband was demanding money for construction of the house. He called mason Ram Narain as well as the accused to his house. The contract for construction of the house was given to Ram Narain for an amount of Rs.1,50,000/-. He paid an amount of Rs.10,000/- to Ram Narain which he withdrew from the bank as the accused was not paying anything to Ram Narain. On demand from the accused, he borrowed an amount of Rs.20,000/- from his Jija Jai Ram and gave it to the accused. He also stated that in the year 2004, when his younger daughter Bharti was married, he had given a gold chain to the husband of Bharti. Accused enquired from Sureksha as to why gold chain was not given to him by her parents at the time of their marriage. On this, Sureksha got converted her golden bangles in a chain and gave it to the accused. He further deposed that after March, 2007, Sureksha did not come to his house. She used to talk to them on telephone. On 29.07.2007, Sureksha had a telephonic talk with him at about 3-4 P.M. She remarked that she did not want to live in the house of the accused and that he should come to village Tahu and take her with him to his village Darkoti. Sureksha was not interested to live with the accused as he used to harass her for money. On 30.07.2007, he left for village Tahu and he got down from the bus at Kharapathar, from where a link road goes to village Tahu. From Kharapatahr, he rang Sureksha on the mobile phone of her 'devrani' Meera to talk to her. Telephone was received by Meera who said that since the accused was in the house, he should call later. He again rang after 15-20 minutes when Meera again gave the same reply. When he again rang after about half an hour, Meera then handed over her phone to Sureksha so that he could talk to her and when he told Sureksha that he was coming in a vehicle and she should get ready, she remarked that he should go back to his village as she was busy sowing the pea crop. Sureksha also told him that she will come to village Darkoti of her own after 2-3 days. She also expressed her desire to talk with her mother. He rang his younger daughter and asked her to tell his wife to talk to Sureksha on the mobile phone of Meera. He returned back to his house from Kharapathar. On 30.07.2007, the accused made a phone call on the mobile phone of his daughter Vijay Laxmi and enquired as to why phone calls had been made at his house. Vijay Laxmi told the accused that her mother had a talk with Sureksha and she too wanted to talk to her sister. On this, the accused remarked "Mein Teri Baat Rooz Ke Liye Teri Didi Se Karva Deta Hoon" and thereafter, the accused disconnected the phone. PW-2 immediately rang Meera and told her that he wanted to talk to Sureksha. Meera told him that Surekshasha will talk to him after about 5 minutes. However, as no phone call was received by him from Sureksha, he again made a phone call to Meera but this time, her phone was switched off. Thereafter, he made phone calls on the mobile number of the accused but he disconnected the calls. He also stated that Sureksha was a girl having patience. He suspected that his daughter consumed poison as the accused used to illtreat her.

16. In his cross-examination, he stated that Sureksha was shifted by him in their vehicle as Cheu was a slow driver and there was emergency. He denied the suggestion that when they shifted Sureksha to their vehicle, accused handed over the discharge slip Ext. PC to them. He also denied that at that time itself accused had told them that Sureksha had consumed poison. He further stated that from Sundli to Kotkhai he did not enquire from the accused as to what had happened to Sureksha as he was not interested to talk with him. He also stated that Cheu and Dicky came in their vehicle to Kotkhai. He further deposed that in Kotkhai he enquired from Cheu and Dicky about the cause of death of Sureksha, who stated that they knew nothing. When the Doctor declared Sureksha dead in Kotkhai, he did not enquire from him the cause of her death. On 31.07.2007, he was in village Tahu from morning

till evening and on 01.08.2007 also, he was in village Tahu from morning till evening. He further deposed as under in his cross-examination:-

> "**It is correct that in Tahu, the people were saying that Sureksha had consumed the poison. Again said, this fact was not narrated to me by anyone. It is incorrect to suggest that I did not get the FIR registered for two days as I was knowing the truth as to why my daughter consumed the poison.**"

He stated that his other daughter Vijay Laxmi was married to Vikram @ Bikku. He denied that Bikku had proposed to marry Sureksha and Bharti also. He also denied that Sureksha was having love affair with Bikku prior to her marriage with the accused. He also denied that the parents of Bikku did not agree for his marriage with Sureksha on the plea that his house was not good. He also stated that Sureksha had no illness. He also denied the suggestion that Sureksha never telephoned him nor he rang her as they were not on talking terms with Sureksha. He denied the suggestion that he was knowing that Sureksha had consumed poison and had concocted a false story later on simply to involve the accused. According to PW-2, he had borrowed an amount of Rs.20,000/- from PW-6 Jai Ram Madaik and this amount was paid by him to the accused. However, PW-6 Jai Ram Madaik has deposed that complainant Laiq Ram had borrowed an amount of Rs.20,000/- from him in the year 2005 and on being asked, he told him that the payment was being made to the Mason on account of the construction of house being made by his son-in-law.

17. PW-8 Mohinder Chauhan has stated that after coming from the cremation of Sureksha from village Tahu, he and Laiq Ram were cleaning the car, they found discharge slip Ext. PC lying in the car, in which it was mentioned that Sureksha had consumed poison. He stated that on their way to Kotkhai hospital and thereafter the accused did not disclose this fact to them. In his cross-examination, he deposed that none of them inquired from the accused when he was in their vehicle or in Kotkhai hospital about the cause of the death of Sureksha. The relevant portion of his deposition is quoted herein below:-

> **"I do not know that when Sureksha was shifted to my car, the discharge slip Ext. PC was handed over by the accused to Laiq Ram. It is incorrect to suggest that when Sureksha was shifted to my car, the smell of poison was coming. I did not inquire from the doctor in Kotkhai Hospital regarding the cause of death of Sureksha."**

18. Vijay Laxmi, sister of the deceased, had entered the witness box as PW-9. She also stated that after marriage accused kept Sureksha nicely for two years but thereafter he started harassing her and demanding money. She also deposed that she used to visit the house of her sister in village Tahu and when the house of the accused was burnt in the fire he and his family members were shifting the luggage to the other house, the accused remarked "Yeh Ghore Jaisa Saman Kyon Laiye Hai". According to PW-9, the said articles had been given to the deceased in dowry by her father. She stated that she narrated this incident to her father. According to her, when her younger sister Bharti was married, her husband was given a gold chain by her parents. The accused asked his wife as to why the gold chain was not given to him at the time of the marriage. On this, deceased got converted her golden bangles into a chain and gave the same to the accused. As per her, on 29.07.2007, deceased rang her father on his mobile phone and conveyed that he should come to village Tahu and take her to village Darkoti as the accused illtreats her. On 30.07.2007, their father left for Tahu and he rang her from Kharapathar. He gave her the number of the 'devrani' of the deceased and asked her to ensure that her mother talks to deceased on that mobile number. Thereafter, her mother rang deceased on the mobile phone of her 'devrani'. According to her, on the same day, at 7.30 P.M., the accused rang her on her cell phone and enquired as to why phone call had been made at his house. She told him that her mother wanted to talk to the deceased and she also expressed her desire to talk to her sister. On this, the accused remarked "Mein Teri Baat Teri Didi Sey

Hamesha Ke Liye Karva Deta Hoon" and thereafter disconnected the phone. Thereafter, she deposed that then she went to the kitchen and told her father about the words uttered by the accused. Her father made a call on the mobile phone of Meera, who in turn remarked that the Sureksha will talk to their father after about 15 minutes. Thereafter, they tried to contact the accused but in vain and at around 10.30 P.M., accused telephoned their father and informed that Sureksha was ill and had been taken to Jubbal hospital. In her cross-examination, she admitted that she was engaged to a boy of village Jachli, Tehsil Jubbal, which engagement broke down. She denied that before her marriage with the accused, deceased was having a love affair with Bikku. She denied the suggestion that on 29.07.2007 her father did not proceed to village Tahu to bring Sureksha and Sureksha did not make any telephone calls to them on 29.07.2007 or 30.07.2007. She also denied the suggestion that on 30.07.2007 the accused did not make any phone call on her mobile number or uttered any remark as alleged by her. She deposed that before the police she had stated that her father tried to contact the accused on his phone upto 10.30 P.M. She was confronted with Ext. DA made to the police, wherein it was not so recorded.

19. PW-10 Missi Devi, mother of the deceased, also corroborated the story of the prosecution. She stated that on 30.07.2007 at about 10.30 P.M., accused telephoned them and told that Sureksha was unwell due to which she had been brought to hospital. She accompanied her husband in the car of Mohinder to Jubbal hospital and on the way, the vehicle in which the accused etc. were coming met them and they shifted the deceased and the accused to their car. But on the way they found that body of Sureksha had become cold, so they took her to Kotkhai hospital where the doctor declared her dead. She also deposed that the accused never disclosed that Sureksha had taken poison. She feigned ignorance that her husband had received a phone call from the accused informing him that Sureksha had consumed poison. She denied the suggestion that when they were at village Tahu, people were saying that Sureksha had consumed poison.

20. In the present case, the accused had stepped in the witness box as DW-1. He had stated that he was married with Sureksha on 21/22.11.2002. It was an arranged marriage and the couple was leading a very happy married life till the death of Sureksha. According to him, on 30.07.2007 in the evening, the deceased had a talk with her sister on phone and a quarrel took place between the deceased and her sister Vijay Laxmi. Thereafter, he talked with Vijay Laxmi and she indulged in loose talk. The deceased told him that Bikku had proposed her for marriage but her parents refused to do so and because of the said reason, the deceased was not having good relations with Bikku and she never wanted that Vijay Laxmi should be married with Bikku. He further deposed that the deceased was having love affair with Bikku @ Vikrant Chauhan prior to her marriage with him and this was disclosed to him by his wife. His father-in-law had come to his house in village Tahu a day prior to the engagement of Bikku and Vijay Laxmi and requested him and Sureksha to attend the engagement ceremony. The did not attend the function as he and his wife never wanted that Vijay Laxmi should be engaged or married to Bikku. He further deposed that after the engagement of Bikku with Vijay Laxmi, deceased used to remain tense and after talking to Vijay Laxmi on phone she was frustrated and on account of the said frustration she consumed poison within a minute after having the telephonic talk with Vijay Laxmi. He further deposed that as he was under shock he did not inform his in-laws at that time that Sureksha had consumed poison. His brother rang Cheu and asked him to bring his vehicle. Then he took his wife in the vehicle of Cheu to Jubbal hospital. From Jubbal hospital, he rang his father-in-law and informed him that Sureksha had consumed poison and from there Sureksha was referred to Shimla. When they reached near Sundli, the vehicle in which his father-in-law etc. were traveling came from the opposite side. Then Laiq Ram shifted him and his wife in their vehicle. He told his mother-in-law that Sureksha had consumed poison. In Kotkhai hospital, the doctor after examining Sureksha remarked in the presence of Laiq Ram and others that she had died after consuming poison. The smell of poison was coming from the mouth and clothes etc. of Sureksha. He further deposed that no payment was ever made to the Mason by his father-in-law and he never

harassed his wife for dowry. He had everything needed by an individual and Sureksha consumed the poison due to the engagement of Vijay Laxmi with Vikram.

21. DW-2 Richpal had deposed that he knew Sureksha and after the house of accused was burnt, he and his wife lived in their house for about 3 years. The relation between the accused and his wife were normal. When Sureksha consumed poison, she was taken to Jubbal in his vehicle. From Jubbal hospital, he telephoned Laiq Ram and informed him that his daughter had consumed poison, from where she was referred to Shimla. The smell of poison was coming from her mouth and clothes. When Sureksha died, he had enquired from the Doctor in Kotkhai hospital about the cause of her death and the Doctor remarked that she had consumed the poison. He also stated that Laiq Ram was related to him and his real sister Birma Devi was married to Balak Ram, the sala of Laiq Ram. He had got the marriage of Sureksha settled with Yashwant. He also deposed that neither Sureksha or her parents ever talked to him that the accused demanded dowry.

22. It is apparent from the story putforth by the prosecution that the complainant was informed by the accused on 30.07.2007 that Sureksha had been admitted in Jubbal Hospital and she was in serious condition. It is the own case of the complainant that after he was so informed, he alongwith his wife left for Jubbal hospital in the car of Mohinder Chauhan and on their way they met the vehicle being driven by DW-2 in which the accused was traveling with him younger brother and Sureksha. As per the version of the complainant he shifted his daughter from the said car to his own car and he also made the accused to sit with them in the said car. Further, his case was that while on way to Shimla when they checked Sureksha they found that her body had gone cold and accordingly, they took her to Kotkhai hospital and the Doctor declared her dead. Further, her body was taken to the village of the accused, where she was cremated. He thereafter returned back to his own village on 31.07.2007 and while cleaning the car, they came across discharge slip Ext. PC from which it was revealed that Sureksha had in fact consumed poison which fact was not disclosed to him by the accused.

23. Admittedly, the FIR had been lodged on 02.08.2008. As per the contents of the FIR, the complainant had attributed the consumption of poison by the deceased to the harassment meted out to her by the accused for want of dowry. In his deposition, he had maintained that when he was telephonically informed by the accused that his daughter had fallen ill and had been taken to Jubbal hospital, he did not enquire as to what was the cause of illness. He had further stated that even when the accused met him alongwith Sureksha, who had taken ill and she was shifted by him in his own car, even at that time, he did not enquire from the accused as to what had gone wrong with Sureksha. According to him, he did not enquire even from the Doctor when Sureksha was declared dead as to what was the cause of her death. He admitted in his cross-examination that when he had gone to village Tahu in the cremation of the deceased Sureksha, people were saying that Sureksha had consumed poison.

24. This means that even before discharge slip Ext. PC came in the notice of the complainant, he was aware of the fact that Sureksha had consumed poison. In our considered view, had it really been a fact that the deceased was being harassed by the accused for want of dowry and he was demanding dowry and money through her from his in-laws then it is not understood as to why the complainant did not lodge any complaint in this regard either with the police or with Panchayat etc. to this effect on 31.07.2007 itself.

25. Not only this, as per the version of the complainant, discharge slip came to their notice on 31.07.2007 and still the FIR was lodged on 02.08.2007. This delay in lodging of the FIR had not been satisfactorily explained by the prosecution. In our considered view, the delay in lodging the FIR keeping in view the peculiar facts and circumstances of the case clouds the version of the prosecution with suspicion and the possibility of the facts being concocted and the FIR having been lodged as an afterthought against the accused cannot be ruled out. In other words, it raises a suspicion about the truthfulness of the case lodged by the complainant against the accused.

26. In the present case, another factor which is of great significance is the conduct of the parents of the deceased after they came to know that she had fallen ill and had been taken to Jubbal hospital. According to the parents of the deceased, she was being harassed by the accused for want of dowry after two years of her marriage with the accused. No material has been brought on record by the prosecution to demonstrate that the factum of alleged harassment of the deceased by the accused for want of dowry was ever reported before her by her parents either to the police or to any authority or before Panchayat etc. No attempt was made by them to enquire as to what had caused such grave illness to Sureksha so suddenly and what was the cause of her death. In fact, they attended the last rites of the deceased and that too, in the matrimonial village of the deceased. According to PW-2, the cremation of the deceased took place on 31.07.2007 and thereafter, they again went to the village of accused on 01.08.2007 to mourn the death of the deceased. In our considered view, this conduct of the parents of the deceased cannot be termed to be natural had it really been a case of the deceased of having been harassed by the accused which forced her to consume poison.

27. On the other hand, keeping in view this peculiar conduct of the parents of the deceased, the version putforth by the accused that the deceased consumed poison as a result of altercation which took place on telephone between her and Vijay Laxmi cannot be ruled out. No independent witness has deposed that deceased was harassed by the accused or that the accused was demanding dowry etc. from her.

28. A cumulative effect of all what we have discussed above is this that it cannot be said with certainty that the prosecution had proved its case beyond reasonable doubt that deceased consumed poison as a result of her being harassed and illtreated by the accused for want of dowry.

29. Further, keeping in view the fact that PW-2, PW-9 and PW-10 are all interested witnesses being closely related to the deceased, a close scrutiny of their statements reveals that neither do these statements inspire confidence nor they seem to be trustworthy. Thus, they cannot be made the basis for the conviction of the accused. No cogent explanation has come forth as to why there was delay in lodging of the FIR. On the other hand, DW-2 has deposed that the relationship between the deceased and the accused was normal and the marriage between them had been settled by him. He further mentioned that neither the parents of the deceased nor the deceased ever complained to him that the deceased was being harassed by the accused for want of dowry. The prosecution has not been able to impinge the truthfulness of the statement of the said witness.

30. In this background, a mere suspicion that the alleged act of the accused might have resulted in the deceased taking extreme step of committing suicide cannot be made the basis to convict him.

31. The prosecution has failed to establish beyond reasonable doubt that the accused was guilty of the offence alleged against him. Besides perusing the records of the case, we have also gone through the judgment passed by the learned trial Court in detail and the learned trial Court has also dealt with all these aspects of the matter. It has after due deliberation based on the appreciation of evidence on record come to the conclusion that the prosecution had failed to bring home the guilt of the accused beyond reasonable doubt. We are in agreement with the said conclusion arrived at by the learned trial Court. According to us also, the prosecution has failed to drive home the guilt against the accused beyond reasonable doubt and as such, in our view also, he is entitled to the benefit of doubt.

32. Therefore, we uphold the findings recorded by the learned trial Court and dismiss the appeal being without merit. Bail bonds, if any, furnished by the accused are discharged.

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

Anu & another .....Appellants-applicants.
Versus
Santokh Singh & others .....Respondents.

FAO No. 372 of 2007.
Decided on : 21st June, 2016.

Workmen Compensation Act, 1923- Section 22- Petitioners filed a claim petition for the death of R who had died in a motor vehicle accident- petition was dismissed, aggrieved from the award, present petition has been filed- held, that petition was dismissed on the ground that their predecessor-in-interest do not fall within the definition of workman as he was driving the vehicle owned by his father- father of the deceased had not stepped into witness box to prove that deceased was employed by him - there was no proof of payment of salary to the deceased- driving of the vehicle in a casual capacity will not make the deceased as workman- appeal dismissed.

(Para-3 to 7)

For the Appellants: Ms. Tim Saran, Advocate.
For Respondent No.1 &3: Mr. Rajesh Kumar, Advocate.
For Respondent No.2: Mr. Deepak Bhasin, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order of the learned Collector, Sub Division-cum-Commissioner, under the Workmen's Compensation Act, Ghumarwin, District Bilaspur, H.P. (for short the "Commissioner"), whereby he dismissed the application preferred thereat under Section 22 of the Workmen Compensation Act (for short the "Act")) by the successors-in-interest of deceased Rakesh Kumar, who in an accident involving car bearing No. HP-23A-2077 which on 11.10.2004 while standing plied on National Highway from Chandigarh to Mandi developed a mechanical fault sequeling its rolling into a gorge, in consequence whereof deceased Rakesh Kumar sustained grievous injuries to which he succumbed, as apparent on a reading of the apposite postmortem report comprised in Ex.P-8.

2. The learned Commissioner dismissed the petition preferred thereat by the dependents of deceased Rakesh Kumar. The applicants standing aggrieved by the rendition of the learned Commissioner hence concert to assail it by preferring an appeal therefrom before this Court.

3. The primary reason which prevailed upon the learned Commissioner to dismiss the application preferred by the successors-in-interest of the deceased stood anvilled upon an interpretation by him qua the definition of 'workman' encapsulated in Section 2 (n) of the Act, definition whereof stands extracted hereinbelow:-

> "2(n) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is -
>
> (I) a railway servant as defined in Section 3 of the Indian Railways Act, 1890 (9 of 1980), not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II or
>
> (ii) employed [* * * *] [* * *] in any sjuch capacity as is specified in Schedule II,
>
> whether the contract of employment was made before or after passing of this Act and whether such contract is expressed or implied, oral in writing; but does not include

> any person working in the capacity of a member of [the Armed Forces of the Union] [* * *]; and any reference to a workman who has been injured shall, where the workman is dead includes a reference of his dependence or any of them."

On an analysis of the material adduced before the learned Commissioner, he concluded therefrom of given the evident fact of the deceased at the relevant time driving the vehicle owned by his father, constituted his driving it at the relevant time in a "casual nature" whereupon he concluded of with the aforesaid nature of employment under his father as rendered by the deceased in the ill-fated vehicle driven by him at the relevant time, standing excluded from the definition of "workman" existing in Section 2(n) of the Act, rendered him to hence fall outside the ambit of "workman", whereupon he concluded of the petition preferred before him by the dependents of the deceased being not maintainable.

4. The learned counsel appearing for the appellants contends that with Shri Santokh Singh, the father of deceased Rakesh Kumar in his reply furnished to the petition admitting the fact of his engaging the deceased in the ill-fated vehicle as its driver on payment of wages, constituted an admission by him qua the capacity of his engagement by him in the ill-fated vehicle being not of a "casual nature" as erroneously concluded by the learned Commissioner rather being magnificatory of his engaging his deceased son in the ill-fated vehicle as a "workman" as defined in Section 2(n) of the Act, whereupon the counsel contends of the apposite interpretation afforded by the learned Commissioner in his impugned rendition qua the deceased falling outside the definition of "workman" being off the mark, as its standing rendered by him while his remaining wholly oblivious to the admission of Santokh Singh, the father of the deceased qua his engaging the latter as a driver in the ill-fated vehicle on a monthly remuneration of Rs.5000/-.

5. The aforesaid submission addressed before this Court by the learned counsel appearing for the appellant is un-amenable to acceptance by this Court, as Santokh Singh had recorded a statement before the learned Commissioner of his not intending to adduce evidence in support of the aforesaid apposite averments constituted in his reply furnished to the petition. Even if, the omission on the part of Santokh Singh to step into witness box to support the aforesaid apposite averments would not belittle the effect of the principle of law, of admissions in pleadings qua the facet aforesaid yet working against the Insurance-company, especially when the learned counsel for the Insurance-company omitted to at the stage when Santokh Singh made his statement before the learned Commissioner wherein he portrayed his unwillingness to step into the witness box to substantiate the apposite averments constituted in his reply, wherein, he acquiesces to the apposite averments in the petition qua his son standing engaged by him as a driver in the ill-fated vehicle on a monthly remuneration of Rs.5000/-, make a prayer thereat qua the necessity of examination of Santokh Singh for, hence, facilitating his holding him to cross-examination qua the facet aforesaid, besides to repel any inference of the petition constituted by the legal heirs of the deceased son of Santokh Singh, standing hence spurred by collusion. Nonetheless, even if, Santokh Singh in his pleadings acquiesces to his engaging his deceased son as a driver in the ill-fated vehicle also his admitting in his reply furnished to the apposite petition of his defraying to him a remuneration quantified at Rs.5000/- per month, acquiescences aforesaid may constrain this Court to infer therefrom of the learned Commissioner rendering an erroneous finding qua the capacity in which Santokh Singh engaged his deceased son as a driver in the ill-fated vehicle being of a "casual nature" whereupon this Court would be constrained to conclude of the deceased contrarily falling within the ambit of a "workman" as defined in the apposite provisions of the Act, for its hence holding of the impugned rendition of the Commissioner being amenable for its being quashed and set aside. However, the effect, if any, of acquiescences by Santokh Singh in his pleadings qua the facet aforesaid, would not yet relieve him from stepping into the witness box for proving the aforesaid factum nor would the effect of the admissions aforesaid qua the facet aforesaid comprised in his reply furnished to the petition be amenable to a construction of theirs per se proving the factum of his engaging his son in the ill-fated vehicle as its driver on a monthly remuneration of Rs.5000/- nor would omissions, if any,

on the part of the learned counsel for the Insurance Company to at the stage when Santokh Singh under his statement recorded thereat portrayed his unwillingness to step into the witness box to prove the averments constituted in his apposite reply furnished to the petition make a motion thereat qua the imperativeness of his examination before the Commissioner constrain any inference from this Court of Santokh Singh thereupon discharging the onus of proving the factum of his paying salary quantified at Rs.5000/- per month to his deceased son, who at the relevant time was driving the ill-fated vehicle. The necessity of Santokh Singh stepping into the witness box to prove the factum aforesaid was imperative, especially when he holds with the deceased a blood relation of his being his father, factum whereof would hence not facilitate any deduction from this Court on the anvil of his mere apposite acquiescences qua the facet aforesaid of his paying salary to his deceased son quantified at Rs.5000/- per month, of hence, the factum probandum aforesaid standing convincingly proved. Further, his apposite acquiescences in his pleadings, would not relieve him from proving the aforesaid factum by his stepping into the witness box. His omission to step into the witness box rather appears to stand engendered by the factum of his not possessing any cogent proof in display of his paying salary to his deceased son comprised in a sum of Rs.5000/- per month. His omission to step into the witness box sequels also the drawing of an adverse inference against him of his not holding any proof qua any facets of the apposite contentions/averments constituted in his pleadings, wherein he has supported the petition filed by the legal heirs/dependents of his deceased son. Contrarily, it engenders an inference of his apposite acquiescences in his reply being obviously collusive, whereupon no credence is imputable. For reiteration, given his active collusiveness with the applicants/appellants herein, he appears to hence acquiesce to his engaging his deceased son as a driver in the ill-fated vehicle on a monthly remuneration quantified at Rs.5000/-. In sequel, it would be inappropriate to attract the principle of admissions qua the facet aforesaid in his pleadings, constituting sufficient proof qua the prime factum of his paying to his deceased son Rs.5000/- per month as salary to the latter for his performing work under him as a driver in the ill-fated vehicle, rendering him to hence fall outside the ambit of the definition of “workman” extracted hereinabove, definition whereof excludes his evident casual nature of employment/engagement thereon, as aptly concluded by the learned Commissioner, from its ambit, rendering him hence incapacitated for his being construable to be a “workman”. The attraction of the principle qua admissions in pleadings constituting proof is not attractable hereat, given the peculiar fact of his holding a relationship of his being the father of his deceased son, whose dependents/legal heirs constituted the apposite petition before the learned Commissioner, proximity whereof, of his relationship with the deceased engenders an inference of his obviously holding collusion with the petitioners, whereupon rather conclusive proof by his adducing, on his stepping into the witness box, receipts in portrayal of his defraying wages to his deceased son quantified at Rs.5000/- per month for the latter performing under him work as a driver in the ill-fated vehicle, was hence a peremptory obligation cast upon him. His not possessing the aforesaid receipts which he was enjoined to adduce in evidence led him to not step into the witness box. In sequel, the effect of his admitting in his pleadings of, his employing his son as a driver in the ill-fated vehicle does not constitute any proof qua the facet aforesaid, prominently, when he has for reasons aforesaid not discharged the aforesaid onus cast upon him.

6. Be that as it may, subsequent to the institution of the petition by the dependents of his deceased son, he did not depict in Ex.R-3, the factum of his employing his son in the ill-fated vehicle as a driver on his defraying to him wages quantified at Rs.5000/- per month. The aforesaid exhibit stood tendered into evidence by the learned counsel for the Insurance Company. It appears that with the apposite manifestations in Ex.R-3, portrayals whereof dispel the factum of Santokh Singh engaging his deceased son as a driver in the ill-fated vehicle on his defraying to him a sum of Rs.5000/- per month, Santokh Singh for obviating his standing confronted with the manifestations in Ex.R-3 besides his not possessing the apposite receipts displaying his defraying to his deceased son a sum of Rs.5000/- per month as salary for his employing him as a driver in the ill-fated vehicle, hence, omitted to step into the witness box. Consequently, the learned Commissioner has aptly held of his son merely driving the ill-fated

vehicle of his father in a casual capacity. Given his driving the apposite vehicle at the relevant time in a "casual nature" when hence excludes him to fall within the ambit of the definition of "workman" encapsulated in Section 2(n) of the Act, constrains this Court to affirm the order impugned before this Court.

7. For the reasons recorded hereinabove, the instant appeal is dismissed and the order impugned before this Court is affirmed and maintained. All pending applications also stand disposed of. No order as to costs.

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

Bardu & Another ....Defendants-Appellants
Versus
Brij Lal & Others ....Plaintiffs-Respondents

FAO No.205 of 2004
Judgment Reserved on: 23.05.2016
Date of decision: 21.06.2016

Code of Civil Procedure, 1908- Order 22 Rule 4- Suit filed by the plaintiffs was decreed- an appeal was preferred in which respondents No. 1, 4 and 5 died- applications for bringing on record their legal representatives were filed, which were dismissed and the appeal was also dismissed as having abated- respondents No. 1, 4 and 5 had died on 2.12.1998, 10.7.1996 and 13.4.2002 respectively- applications were moved in the year 2004- the Court had framed issues for deciding the application but no evidence was led to prove the contents of the applications - no application for condonation of delay was filed- no prayer for setting aside the abatement was made - applications were rightly dismissed being barred by limitation – appeal dismissed.

(Para-22 to 34)

Cases referred:

Madan Naik (dead by LRs) and Others vs. Mst.Hansubala Devi and Others, AIR 1983 SC 676
Lanka Venkateswarlu (Dead) By LRs vs. State of Andhra Pradesh and Others, (2011)4 SCC 363
Balwant Singh (Dead) vs. Jagdish Singh and others, (2010)8 SCC 685; Katari Suryanarayana and Others vs. Koppisetti Subba Rao and Others, (2009)11 SCC 183
Ram Nath Sao alias Ram Nath Sahu and Others vs. Gobardhan Sao and Others, (2002)3 SCC 195
Badni (Dead) By LRs and Others vs. Siri Chand (Dead) by LRs and Others, (1999)2 SCC 448
M.Veerappa vs. Evelyn Sequeira and Others, (1988)1 SCC 556
Daya Ram and others vs. Shyam Sundari and others, AIR 1965 SC 1049
Union of India vs. Ram Charan (Deceased) through his Legal Representatives, AIR 1964 SC 215
Budh Ram and Others vs. Bansi and Others, (2010)11 SCC 476

For the Appellants: Mr.Neeraj Gupta, Advocate.
For Respondents No.1 & 2: Mr.K.D. Sood, Senior Advocate with Mr.Rajnish K.Lall, Advocate.
For Respondent No.10: Mr.Rupinder Singh Thakur, Additional Advocate General

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellant-defendants No.1,3 & 5, *(for short appellants-defendants)* against the judgment and decree dated 27.4.2004 passed by the learned

District Judge, Bilaspur, District Bilaspur, H.P., whereby the applications, one being CMP No.125 of 2004 under Order 1 Rule 10(2) and Order 22 Rule 4 CPC, for deletion of name of appellant No.3 Bohru, who expired on 29.11.1998, for bringing on record Legal Representatives of respondent No.1 Ram Dass, who expired on 2.12.1998 and Chandu, proforma respondent No.4, who expired on 10.7.1996, and second being CMP Nos.126 of 2004 under Order 22 Rule 4 CPC for bringing on record the legal representatives of proforma respondents No.5, namely; Shri Lachhaman, who expired on 13.4.2002, moved by appellants-defendants have been dismissed, as a result of which appeal stood dismissed as having abated.

2. The brief facts emerge from the record are that the plaintiffs-respondents *(hereinafter referred to as `plaintiffs'),* filed a suit for declaration and permanent prohibitory injunction wherein it was pleaded that the suit land measuring 4-9 bighas comprised of Khewat No.9, Khatauni No.11, Khasra Nos.26,29,100,133 and 140, situated at village Kathpur, Pargana and Tehsil Sadar, District Bilaspur, H.P. was mortgaged with possession in favour of predecessor-in-interest of plaintiffs and defendants No.6 and 7 by the predecessors-in-interest of defendants No. 1 to 4, regarding which mutation was attested. But neither predecessors-in-interest of defendants nor defendants No.1 to 4 redeemed the suit land and took back possession from the plaintiffs within statutory period of limitation for redumption. Since, said statutory period had expired, therefore, plaintiffs pleaded that they have become owners in possession of the suit land. The plaintiffs further stated that defendant No.5 had no right title or interest over the suit land and revenue entries in favour of defendant No.5 in respect of suit land were specifically challenged. Hence, the suit for permanent prohibitory injunction against defendants.

3. Defendants Nos.1 to 4, by way of filing joint written statement wherein, took preliminary objections regarding maintainability of the suit, cause of action, estoppel, notice under section 80 CPC and jurisdiction of the Court. On merits, it is alleged by the defendants that in the year 2004 they returned the mortgage amount to the mortgagees i.e. plaintiffs and entered into possession of the suit land. It is alleged that since defendants redeemed the suit land from the plaintiffs on the same day, when plaintiffs redeedmed it from one Dhani Ram, therefore, the entries in the name of defendant No.5 were wrong. Consequently, defendants prayed for the dismissal of the suit.

4. Defendant No.5, by way of filing separate written statement, took preliminary objections regarding limitation, mis-joinder of necessary parties, notice under Section 80 CPC, estoppel and locus standi. On merits, it is alleged that the plaintiffs had further mortgaged the suit land in favour of Shri Dhani Ram who died issueless. Therefore, the suit land was inherited by State of H.P. and mutation thereof was attested in its favour and in subsequent revenue record the possession of State of H.P. was rightly recorded. Consequently, defendant No.5 prayed for the dismissal of the suit.

5. Defendants No.6 and 7 also filed separate written statement wherein the preliminary objections already taken by the defendants No.1 to 4 were re-asserted and further it was stated that in the year 2004 defendants No.1 to 4 had taken the possession of the suit land after redumption. Consequently, defendants No.s 6 and 7 prayed for the dismissal of the suit.

6. Replication was filed by the plaintiffs wherein averments already made in the plaint were reasserted.

7. The learned trial Court, on the basis of pleadings, settled inasmuch as 9 issues and except first fives issues, which were not pressed, decided all the issues in favour of the plaintiffs and accordingly decreed the suit of the plaintiffs. The appeal, preferred before the learned Appellate Court, was dismissed having abated.

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

9. In the present case, plaintiff had instituted a suit for possession on the ground that neither predecessors-in-interest of defendants nor defendants No.1 to 4 redeemed the suit land and took back possession from the plaintiffs within statutory period of limitation for redumption. Since said statutory period had expired, therefore, plaintiffs pleaded that they have become owners in possession of the suit land. Learned trial Court below decreed the suit of the plaintiffs and they were declared joint owners in possession of the suit land alongwith defendants No.6 and 7 and defendants No.1 to 4 were restrained by way of permanent prohibitory injunction not to interfere in possession of the plaintiff in any manner over the suit land.

10. Present appellants-defendants, feeling aggrieved and dissatisfied with the judgment and decree dated 6.1.1996, filed appeals, under Section 96 of the Code of Civil Procedure *(for short `CPC')* against the judgment and decree dated 6.1.1996 passed by learned Sub Judge Ist Class, Bilaspur, in CS No.75/1 of 95/91 in the Court of District Judge, BiIaspur, bearing Nos.10 of 1996 and 15 of 1996, respectively.

11. Perusal of the impugned judgment as well as documents available on record suggests that during the pendency of appeal No.10 of 1996, present appellants-defendants moved one application bearing ***CMP No.125 of 2004 in CA No.10/1996***, under Order 1 Rule 10(2) and Order 22 Rule 4 CPC, for deletion of name of appellant No.3 Bohru, who expired on 29.11.1998 and for bringing on record the LRs of respondents No.1 and 4; namely; Ram Dass, and Chandu, who expired on 2.12.1998 and 10.7.1996 respectively.

12. Apart from above, appellants-defendants filed another application being ***CMP Nos.126 of 2004 in Civil Appeal No.10 of 1996*** under Order 22 Rule 4 CPC for bringing on record the legal representatives *(in short `LRs')* of proforma respondent No.5 Lachhaman, which were also taken up by the Court of learned District Judge, Bilasur alongwith main appeal for hearing on 27.4.2004.

13. It emerges from bare reading of the impugned order dated 27.4.2004 passed by learned District Judge, Bilaspur that all the aforesaid applications filed by the present appellants were dismissed, as a result whereof appeal stood abated, meaning thereby no findings on merits of the appeal were returned by the Court of learned District Judge, Bilaspur and the judgment and decree passed by learned trial Court below attained finality.

14. Feeling aggrieved and dis-satisfied with the impugned order dated 27.4.2004, passed by learned District Judge, Bilaspur, present appellants filed instant First Appeal under Order 43 Rule 1(k) CPC before this Court.

15. It may be noticed here that defendant No.5-State of Himachal Pradesh, whose applications for bringing on record the LRs of respondents No.1, 7 and 8 and for deletion of name of respondent No.6 were also dismissed by first appellate Court in Civil Appeal No.15 of 1996, also filed RSA bearing No.332 of 2004, before this Court. This Court vide judgment dated 14.6.2016 has already dismissed appeal being not maintainable.

16. Since the appeal filed by present appellants has abated on account of failure on the part of the appellants-defendants to bring LRs of respondents No.1, 4 and 5 on record as well as deletion of name of appellant No.3, namely; Bohru, who allegedly expired on 29.11.1998, it would be appropriate for this Court to examine whether applications filed by the appellants-defendant for bringing on record LRs of respondents No.1,4 and 5 as well for deletion of name of appellant No.3 Bohru were rightly decided by the first appellate Court or not?

17. Accordingly, this Court before adverting to the merit of the case would critically examine the evidence available on record to explore, whether the findings returned by the first appellate Court that the applications filed by the appellants-defendants for bringing on record the LRs of respondent No.5 and for deletion of appellant No.3 cannot be accepted at this belated stage is correct or not, so that impact of not bringing the LRs of aforesaid deceased respondents is ascertained vis-à-vis the merit of the case is concerned.

18. Shri Neeraj Gupta, learned counsel, appearing for the appellants-defendants, vehemently argued that the judgment and decree passed by the first appellate Court is against the facts and law and as such the same deserves to be quashed and set aside. He forcefully contended that the conclusion drawn by the first appellate Court cannot be accepted, in view of the evidence available on record. Rather, finding returned by the first appellate court, while rejecting the applications filed by the appellants-defendants for bringing on record the LRs of respondents No.1,4 and 5 as well as deletion of the name of appellant No.3, is perverse and the same cannot be allowed to stand.

19. Mr.Neeraj Gupta also contended that while dismissing the applications, referred hereinabove, first appellate Court has taken very hyper-technical view with regard to maintainability of the applications at the belated stage. He contended that there is ample evidence on record to suggest that the factum with regard to death of deceased respondents never came into the notice of the appellant and as such delay, if any, could not be taken into consideration by first appellate Court while deciding the applications. He has forcefully contended that the findings returned by the first appellate Court, while rejecting the applications, are totally unreasonable and same shows the non-application of mind. It is contended that learned Judge below has failed to consider the principles of sufficient representation of the estate. He submitted that mere bequeathing of property by way of will by deceased in favour of some other person cannot be a ground to reject the application for bringing on record the LRs of the deceased.

20. Mr.Gupta strenuously argued that the case law relied upon by first appellate court, while rejecting the applications, itself suggest that the same was not applicable in the present case because as per those judgments Hon'ble Apex Court has repeatedly held that while dealing with the applications moved under Order 22 Rule 4 read with Rule 9 CPC, Courts are expected to adopt a liberal approach because parties gain nothing by not bringing on record the LRs of the deceased persons in any legal proceedings. In the aforesaid background, Mr.Gupta strenuously argued that order passed by the learned first appellate Court deserves to be quashed and set aside.

21. Per-contra Shri K.D. Sood, learned Senior Counsel, appearing for respondents No.1 and 2, supported the impugned order passed by the learned first appellate Court. It was forcefully contended on the part of the defendants that no interference of this Court whatsoever is called for in the present facts and circumstances of the case because impugned order has been passed on the basis of proper appreciation of the material evidence available on record. Mr.Sood forcefully contended that bare perusal of the pleadings as well as documents available on record itself demonstrate that applications filed by the appellants-defendants was time barred and no explanation worth the name was given in the applications explaining the delay and circumstances for not brining on record the LRs of deceased respondents No.1, 4 and 5. He also contended that even bare perusal of the applications moved by the appellants-defendants suggests that same have been filed under Order 22 Rule 4 but there is no specific mention with regard to Rule 9 of the CPC, meaning thereby that there is no specific prayer for setting aside the abatement, if any. It is also brought to the notice of this Court by referring to the applications which are available on record that no independent application for condonation of delay, was ever filed by the appellant alongwith the applications moved for bringing on record LRs explaining therein cause for condonation of delay in moving applications.

22. Admittedly, vide order dated 27.4.2004 Court of 2learned District Judge, Bilaspur, dismissed the applications moved by the present appellants-defendants for bringing on record the LRs of respondents No.1, 4 and 5 as well as deletion of name of appellant No.3 and it also remains fact that learned District Judge, Bilaspur, has not returned any finding on the merits of the case and in view of the dismissal of the applications, referred hereinabove, appeal stand automatically abated, meaning thereby that by way of order dated 27.4.2004 learned District Judge has decided the application filed by the appellants-defendants for brining on

record the legal representatives of deceased respondents No.1, 4 and 5 as well as deletion of name of one of appellant No.3. As a consequent whereof appeal stood abated.

23. In the present case also where admittedly respondents No.1, 4 and 5 died during the pendency of the appeal and no steps whatsoever were taken well within stipulated time by the appellants-defendants, as a result thereof, appeal pending before the learned District Judge, Bilaspur, abated. During the pendency of the appeal, appellants-defendants moved applications, as have been referred above, for bringing on record the LRs of respondents No.1, 4 and 5 and for deletion of name of appellant No.3, which were ultimately dismissed by the learned District Judge, BIlaspur vide impugned order. Perusal of the applications referred above suggests that neither specific provisions i.e. under Order 22 Rule 4 read with Rule 9 have been mentioned nor any specific prayer in the applications with regard to setting aside abatement, if any, has been made. Hence, it can be concluded that applications, referred above, were moved by the appellant-State for bringing on record the LRs of deceased respondents No.1, 4 and 5 without any prayer of setting aside of the abatement, if any.

24. In ***Madan Naik (dead by LRs) and Others vs. Mst.Hansubala Devi and Others, AIR 1983 SC 676,*** the Hon'ble Supreme Court held:

> ***"8. Section 2 sub-sec.(2) of the Civil P.C. defines `decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Sec.144 but shall not include any adjudication from which an appeal lies as an appeal from an order". When an appeal abates for want of substitution as envisaged by sub-rule (1) of R.9 of O.22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Sec. 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22 Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore, when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22, Rule 9(2) C.P.C. refusing to set aside abatement is specifically appealable under Order 43, Rule 1k). Such a adjudication if it can be so styled would not be a decree as defined in Sec.2(2) C.P.C. Sec.100 provides for second appeal to the High Court from every decree passed in appeal by any Curt subordinate to the High Court on the grounds therein set out. What is worthy of notice is that second appeal lies against a decree passed in appeal. An order under Order 22, Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent." (pp.679-680)***

25. With a view to ascertain the correctness of the impugned order, this Court examined the evidence available on record, which persuaded the first appellate Court to reject the applications filed by the appellant-State. There is no doubt that appeal, if any, could not be decided by the Courts below in the absence of LRs of respondents No.1, 4 and 5 as all of them were necessary parties for the adjudication of the dispute. But fact remains, as emerges from the record that appellants-defendants remained quite negligent and callous while taking steps for bringing on record LRs of aforesaid deceased respondent. Since respondents No.1, 4 and 5 had died during the pendency of the present appeal before the first appellate Court, it was incumbent upon the appellant therein to move an application for bringing on record LRs of deceased respondents well within stipulated time, but in the present case, there is overwhelming evidence to suggest that no steps whatsoever, were taken for years together.

26. In the present case, respondent No.1 had expired on 2.12.1998, whereas respondents No.4 and 5 expired on 10.7.1996 and 13.4.2002, respectively. Applications for bringing on record LRS of aforesaid respondents and deletion of name of appellant No.3 were moved in the year 2004 i.e. after a lapse of 6, 8 and 2 years respectively, as emerges from the record. Moreover, during proceedings of the case, this Court had an occasion to peruse the evidence adduced by the parties for just and proper decision of the applications moved by the appellant-State for bringing on record LRs of deceased respondents and for deletion of name of appellant No.3.

27. In the present case, record suggests that appellants-defendants led no evidence, whatsoever in support of contentions raised in the applications. It appears that learned first appellate Court on 7.5.2002 framed specific issues for deciding these applications but appellants-defendants did not lead any evidence to prove the contents of these applications. However, respondents tendered documentary evidence Exts.R-1 to R-4 to prove their case. It also emerges from the record that the appellants-defendants while moving the aforesaid applications under reference for bringing on record the LRs even did not move an application under Section 5 of the Limitation Act explaining therein the delay in filing the application under Order 22 Rule 4. Since there was substantial delay in filing the application, it was incumbent upon the appellant-defendant to move an application under Section 5 of the Limitation Act specifically detailing therein the reasons for delay in moving the application for bringing on record the LRs of deceased respondents. Moreover, none of the appellants was examined to prove the contents of the applications or otherwise, who could come in witness box and state that there was sufficient cause which prevented the appellant-State from filing the applications well in time. But, as is observed earlier also, no witness of the appellant had appeared in the witness box to state and explain the circumstances which prevented the appellant from filing the applications well within time. In the present case, where the deceased respondents died long back in the years 1996, 1998 and 2002 respectively and applications were filed in the year 2004, delay, if any, certainly could not be condoned by the Courts below without there being any application under Section 5 of the Limitation Act.

28. In ***Lanka Venkateswarlu (Dead) By LRs vs. State of Andhra Pradesh and Others, (2011)4 SCC 363,*** the Hon'ble Supreme Court held:-

> ***"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 (L.A.) v. Katiji , (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, (2010)8 SCC 685, as follows: (SCC p.696, paras 25-26)***
>
> *"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.

(pp.370-373)

29. True, it is, as held by the Hon'ble Apex Court that the Court should be liberal in condoning the delay in such like matters but as has been observed above, there is no iota of evidence available on record to suggest that any explanation worth name was ever offered by appellants-defendants to explain the delay. Especially in case like present one where there was delay of more than 8, 6 and 2 years, applicants are/were expected to move separate application for condonation of delay explaining therein the reasons which could be sufficient to condone the delay. What to talk about the separate application under Section 5 of the Limitation Act which should have been moved by the appellant, there is no whisper with regard to reasons for delay in the so called composite applications preferred by the applicants under Order 22 Rule 4 CPC for bringing on record the LRs of deceased respondents.

30. Apart from this, one more glaring discrepancy which has been noticed by this Court is that in the aforesaid application there is no mention with regard to the provisions of Rule 9 of Order 22 CPC, which specifically talks about setting aside the abatement, if any. Hence, any application moved under Order 22 Rule 4 CPC without there being mention of Rule 9 and specifically not praying therein for setting aside abatement cannot be held maintainable at all and abatement, which had occurred long time back prior to filing of the applications, could not be set aside by the Court. The learned first appellate Court while rejecting the applications, referred hereinabove, has rightly relied upon the judgments passed by this Court as well as Hon'ble Apex Court, perusal whereof itself suggests that Court can certainly set aside the abatement or can pass order for bringing on record the LRs of the deceased persons after prescribed period of limitation, if it is proved that the party was prevented by any sufficient cause and onus to prove the absence of equity, lack and negligence definitely lies on the applicant. It has also been held in the aforesaid judgment that the application cannot be allowed or dismissed by taking recourse to discretionary powers because under Article 121 of the Act an application to set aside abatement has to be filed within a specific period of 60 days from the date of abatement. Though, Court has

discretion to allow applicant to file application under Order 22 Rule 9 but only in that circumstance where applicant has satisfied that he or she was prevented and had sufficient cause of not making the application within said period. But in the present case, as has been discussed in detail, the applicant at the first instance did not move application under Order 22 Rule 4 CPC in time and moreover no application under Section 5 of the Limitation Act for condonation of delay, if any, was moved alongwith application for bringing on record LRs of the deceased respondents. Even no evidence worth name was led in support of the contents/averments of the application. Hence, this Court does not see any infirmity and illegality in the order passed by learned first appellate Court inasmuch as it has returned finding that the application is hopelessly time barred and cannot be accepted at this belated stage. ***(See: Balwant Singh (Dead) vs. Jagdish Singh and others, (2010)8 SCC 685; Katari Suryanarayana and Others vs. Koppisetti Subba Rao and Others, (2009)11 SCC 183; Ram Nath Sao alias Ram Nath Sahu and Others vs. Gobardhan Sao and Others, (2002)3 SCC 195; Badni (Dead) By LRs and Others vs. Siri Chand (Dead) by LRs and Others, (1999)2 SCC 448; M.Veerappa vs. Evelyn Sequeira and Others, (1988)1 SCC 556; Daya Ram and others vs. Shyam Sundari and others, AIR 1965 SC 1049 and Union of India vs. Ram Charan (Deceased) through his Legal Representatives, AIR 1964 SC 215.).***

31. In ***Budh Ram and Others vs. Bansi and Others, (2010)11 SCC 476,*** it has been held:

> ***"10. Abatement takes place automatically by application of law without any order of the court. Setting aside of abatement can be sought once the suit stands abated. Abatement in fact results in denial to hearing of the case on merits. Order XXII Rule 1 CPC deals with the question of abatement on the death of the plaintiff or of the defendant in a Civil Suit. Order XXII Rule 2 relates to procedure where one of the several plaintiffs or the defendants die and the right to sue survives. Order XXII Rule 3 CPC deals with procedure in case of death of one of the several plaintiffs or of the sole plaintiff. Order XXII Rule 4 CPC, however, deals with procedure in case of death of one of the several defendants or of the sole defendants. Sub-clause (3) of Rule 4 makes it crystal clear that:***
>
> > *"4.(3) Where within the time limited by law, no application is made under sub-Rule 1, the suit shall abate as against the deceased defendant."*
> >
> > *(emphasis supplied)*
>
> ***17. Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the respondents-defendants would abate the appeal in toto or only qua the deceased respondents-defendants, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.***
>
> ***18. The instant case requires to be examined in view of the aforesaid settled legal propositions. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of other co-owners. Therefore, in theory, every co-owner has an interest in every***

infinitesimal portion of the subject matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly with others. A co-owner of a property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place.

19. In the instant case a declaratory decree was passed in favour of respondents-plaintiffs and Smt. Parwatu to the effect that they were co-owners, though, they had specific shares but were held entitled to be in "joint possession". The appellants-applicants had sought relief against Smt. Parwatu before the 1st Appellate court as there was a decree in her favour, passed by the Trial Court where Smt. Parwatu had been impleaded by the appellants-applicants as proforma respondent. In such a fact-situation, she had a right to contest the appeal. Once a decree had been passed in her favour, a right had vested in her favour. On her death on 19.11.2000, the said vested right devolved upon her heirs. Thus, appeal against Smt. Parwatu stood abated. In the instant case, the 1st Appellate Court rejected the application for condonation of delay as well as the substitution of LRs of Smt. Parwatu, respondent No. 4 therein.

20. The only question remains as to whether the appeal is abated in toto or only in respect of the share of Smt. Parwatu. The High Court has rightly reached the conclusion that there was a possibility for the Appellate Court to reverse the Judgment of the Trial Court and in such an eventuality, there could have been two contradictory decrees, one in favour of Smt. Parwatu and the other, in favour of the present appellants. The view taken by the High Court is in consonance with the law laid down by this Court consistently. The facts of the case do not warrant any further examination of the matter." (pp.479, 482-483)

31. However, at this stage, this Court intends to differ with the findings returned by the first appellate Court, wherein, while dismissing the applications moved by the appellants-defendants for bringing on record the LRs of respondents No.1,4 and 5 and for deletion of the name of appellant No.3, on the ground of limitation, learned Court below also took into consideration the fact that at the time of death of appellant No.3, he was succeeded by the LRs on the basis of his Will. Learned Court below concluded that the perusal of Ex.R-2, copy of mutation, shows that the same was attested on 21.12.1998, hence it cannot be said that since appellant No.3 has not left behind any legal heirs, his name is liable to be deleted, rather, his LRs are liable to be brought on record on the basis of Will. Similarly, in the case of respondent No.1, namlely; Ram Dass, Court below returned the finding that names of his son and other legal representatives were mentioned in para-5 of the application, whereas, mutation in regard to his death was attested only in favour of two persons namely; Hari Ram and Brij Lal on the basis of a Will and as such persons named in para-5 of the application cannot be said to be his legal heirs. Similarly, first appellate Court below while deciding the application for bringing on record the LRs of respondent No.4 observed that contention put forth in para-4 of the application that he is survived by his widow and sons/daughters cannot be accepted since mutation is accepted in the names of three sons only.

32. The aforesaid findings of the first appellate Court cannot be accepted at all because after death of any of the party to lis, his/their legal representatives being natural heirs have an absolute right to be substituted/impleaded as a party in the pending case and their rights being LRs cannot be allowed to be taken away by any person who may have got some rights by way of will, if any, executed by the deceased person. This Court has no hesitation to conclude that aforesaid findings/observations of the first appellate Court are totally against the spirit of principles of sufficient representation of estate. Once application is moved for bringing on record the LRs of deceased party, Court is bound to implead him/her as a party

plaintiff/respondent subject to fulfillment of other conditions prescribed for bringing on record the LRs of deceased party.

33. But in the present case, where this Court, in view of the detailed discussion made hereinabove, has come to the conclusion that the applications filed by the appellants-defendants have been rightly dismissed by the Court below being hopelessly time barred, this Court is restraining itself from making any observations and findings on the merits/demerits of other reasons cited/given by Court below for dismissing the application.

34. In the totality of the facts and circumstances of the case, the impugned order passed by the first appellate Court is upheld and the present appeal is dismissed.

35. Interim order, if any, is vacated. All miscellaneous applications are disposed of.

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

Managing Director H.P. State Handicrafts and Handloom Corporation Ltd. ..Appellant

Versus

Subhash Sood and another ...Respondents.

LPA No. 339 of 2010
Date of decision: 21st June, 2016.

Constitution of India, 1950- Article 226- Petitioner was facing trial before Additional Chief Judicial Magistrate, in which he was acquitted- an appeal was preferred against the acquittal, which was dismissed- petitioner was placed under suspension - sealed-cover procedure was followed in his case - subsequently petitioner was promoted without any fetters and restrictions- held that respondents had erred in not releasing the service benefit of increased pay to the petitioner from the date of his promotion. (Para-2 to 6)

For the appellant:	Mr. Nitin Thakur, Advocate.
For the respondents:	Mr.Lovneesh Kanwar, Advocate, for respondent No.1.
	Mr.Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. Anup Rattan Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General for respondent No.2.

The following judgment of the Court was delivered:

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

This Letters Patent Appeal is directed against the judgment dated 29.10.2010, made by the learned Single Judge of this Court in CWP(T) No. 9809/2008 titled *Subhash Sood versus State of Himachal Pradesh and another,* whereby the writ petition filed by the petitioner/respondent No.1 herein came to be allowed and respondents were commanded to release the arrears of salary with effect from 22.4.1989 to the petitioner/respondent No. 1 herein, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. Brief facts, as emerges from the record are that writ petitioner Subhash Sood was facing a trial in FIR No.114 of 1985, before the Additional Chief Judicial Magistrate Dehra, in which he came to be acquitted, was subject matter of Criminal Appeal No. 395 of 1998, before this Court, which too, was dismissed vide judgment and order dated 6.5.2002.

3. During the pendency of the departmental proceedings and the trial, the writ petitioner was placed under suspension. The suspension order was revoked vide order dated 16.10.2002. It is apt to reproduce the said order herein.

"OFFICE ORDER.

Shri Subhash Sood, Accounts Clerk presently working in Himachal Emporium, Shimla was suspended vide letter No. HPSHHC. PF:217/18-4240-43 dated 28.6.1984 and reinstated vide letter No. HPSHHC:PF:217/18-2112-15 dated 8th May, 1990. Now consequent upon the decision of the Hon'ble High Court dated 6th May, 2002, in the Criminal Appeal No. 395 of 1998, Police Challan U/S 409 IPC against Shri Subhash Sood, the matter regarding treatment to be given to his suspension period has been considered and it is ordered that the period of suspension of Shri Subhash Sood from 20.6.1984 to 8.5.1990 shall be treated as period spent on duty and he shall be paid full pay and allowances to which he would have been entitled , had he not been suspended."

4. It is evident from the order referred to supra that the suspension period of the writ petitioner was treated on duty.

5. The case of the petitioner for promotion was considered during both the proceedings and sealed-cover procedure was followed. The department, after noticing the aforesaid orders, opened the sealed-cover and promoted the petitioner w.e.f. 22.4.1989, vide order dated 26.10.2002. The copy of the said order was not on the file. However, Mr. Lovneesh Kanwar, Advocate, for respondent No.1 made the copy of the said order available across the Board, made part of the file. It is also apt to reproduce the said order herein.

"OFFICE ORDER.

Consequent upon the decision in the court case filed in Criminal Appeal No. 395 of 1998, Police Challan U/S 409-IPC against Shri Subhash Sood, Accounts Clerk and as per recommendations of the Departmental Promotion Committee kept in sealed cover, Shri Subhash Sood, Accounts Clerk is hereby promoted to the post of Accountant (now Senior Assistant (Accounts) in the pay grade of Rs.570-1080 (pre-revised) with effect from 22.4.1989."

6. While going through the order quoted supra, one comes to an inescapable conclusion that the writ petitioner-respondent No. 1 herein was promoted w.e.f. 22.4.1989 without any caps, fetters and restrictions. Thus, respondents have fallen in an error in not releasing the service benefit of the said period to the writ petitioner/respondent No. 1 herein w.e.f. 22.4.1989.

7. Having said so, the impugned judgment is well reasoned, needs no interference. Accordingly it is upheld and the appeal is dismissed alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Parmod Sood .....Petitioner.

Versus

The Municipal Council, Solan. .....Respondent.

Civil Revision No.139 of 2009.
Reserved on : 14.6.2016.
Decided on : 21st June, 2016.

Code of Civil Procedure, 1908- Order 7 Rule 10- Plaintiff filed a civil suit for the recovery of money on account of work relating to the renewal of different roads- defendant filed an application under Order 7 Rule 10 of C.P.C. pleading that Court did not have jurisdiction to hear and entertain the suit- Court allowed the application and returned the plaint for presentation before a Court having jurisdiction- held, that according to the plaintiff, work order pertained to the work at Solan - contract was also executed at Solan- it was not established that defendant had any office at Shimla- cause of action had not arisen in Shimla- plaintiff had not led any evidence to show that payment was to be made within jurisdiction of the Court at Shimla- Court had rightly ordered the return of the plaint- revision dismissed. (Para-8 to 16)

Case referred:
Firm Hira Lal Girdhari Lal and another vs. Baij Nath Hardial Khatri, AIR 1960, Punjab 450

For the petitioner : Mr. J.S. Bhogal, Senior Advocate with Mr. Parmod Negi, Advocate.
For the respondent : Mr. Anil God, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Civil Revision is maintained by the petitioner/plaintiff (hereinafter called the plaintiff) assailing the order dated 22.10.2009, passed by learned Civil Judge (Senior Division), Shimla, in RBT No.70-1 of 05/2000 titled Pramod Sood vs. Municipal Council, Solan, whereby plaint has been ordered to be returned for presentation before the Competent Court at Solan, to quash and set aside the impugned order.

2. The facts giving rise to this Civil Revision are that petitioner filed a suit for recovery of Rs. 4,62,152/-, on account of the works executed relating to the renewal of different roads of the respondent/defendant (hereinafter called the defendant). Plaintiff had been issued several work orders for the execution of such works and had executed works worth Rs. 9,00,000/- till June, 1998 and an amount of Rs. 5,76,000/- had been paid to the plaintiff by the defendant whereas the balance amount of Rs. 3,24,000/- had been withheld by the defendant on which plaintiff claimed interest @ 24% per annum from 1.7.1998 to the date of suit alongwith costs. It is averred that suit had initially been filed before the learned District Judge, Shimla, and an application under Order 7 Rule 10 of the Code of Civil Procedure had been filed by the defendant for return of the plaint, which was dismissed, vide order dated 12.8.2002. It is further averred that after filing of the written statement by the defendant an objection with regard to the jurisdiction of the Court had been raised by the defendant and a specific issue was framed on 21.5.2004. The learned trial Court while passing the impugned order dated 22.10.2009, has returned the plaint for its proper presentation to a Court at Solan.

3. In replication, contents of the written statement were denied and that of the plaint were reaffirmed. Also averred that the plaintiff is residing and carrying on business within the jurisdiction of this Court, therefore, this Court has jurisdiction to try and determine the suit.

4. The learned Court below has framed the following issues:

1. To what amount the plaintiff is entitled to for executing the work for the defendant ? OPP.

2. Whether the plaintiff is entitled to balance amount for payment after the execution of the work of the defendant, if so, how much ? OPP.

3. Whether the plaintiff is entitled to the interest on the balance amount, if any and if so to what rate ? OPP.

4. Whether the suit is not maintainable ? OPD.

5. Whether the plaintiff has no locus standi to file the suit ? OPD.

6. Whether this Court has no jurisdiction to try the suit ? OPD.

7. Whether the plaintiff is estopped to file the suit by his act and conduct as alleged ? OPD.

8. Relief.

5. After giving findings only on Issue No.6 in favour of the defendant, the learned trial Court has ordered the plaint to be returned to the plaintiff for presentation in a Court having jurisdiction at Solan.

6. Feeling aggrieved by the judgment of learned trial Court, the petitioner maintained the appeal on the ground that the judgment is based on conjectures and surmises and, therefore, the same is liable to be quashed and set aside.

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

8. The order passed on 12.8.2002 by the learned trial Court on the application of the defendant is reproduced as under :

"In view of the factual position noticed above and the fact that written statement is yet to be filed by the defendant, I think that the principle that debtor must seek credit is applicable. Hence, the application moved by the defendant under Order 7 Rule 10 of the Code of Civil Procedure is hereby rejected. Be it clarified that this order shall have no bearing whatsoever on the merits of the controversy between the parties regarding the question of territorial jurisdiction. Let the written statement be filed on August 26, 2002, copy of which be supplied, in advance, to the learned counsel for the plaintiff, who may also file replication, if any, on the date fixed. Documents to be relied on by the parties be also filed which may be admitted and denied on the date fixed and also for settlement of issues."

9. Now as far as the territorial jurisdiction is concerned, this question was decided by the Court at the stage of final disposal of the suit holding that the Court at Solan has got the jurisdiction. As per the plaintiff, the work order pertaining to the work at Solan and contract was also executed at Solan. There is nothing on record brought by the plaintiff or otherwise on record to conclude that the payment was to be made by the defendant to the plaintiff at Shimla.

10. Section 20 Civil Procedure Code provides for place of suing and jurisdiction of this Court. Section 20 CPC is being reproduced as under :-

20" Other suits to be instituted where defendants reside or cause of action arises-

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

a) the defendant, or each of the defendants where are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

c) the cause of action, wholly or in part, arises

(Explanation)-A corporation shall be deemed to carry on business at its sole or principal office in (India) or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

11. It is apparent from the aforesaid that the suit shall be instituted in a Court where the defendant at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain or where cause of action wholly or in part arises. Regarding Corporation, Order 29 provides that a suit can be instituted at any place where Corporation carries on business or at a place where it has subordinate office.

12. There is nothing on record to conclude that the defendant has any office within the jurisdiction of the Courts at Shimla. There is also nothing on record to conclude that any cause of action has accrued to the plaintiff within the jurisdiction of Courts at Shimla. No office of the defendant is within the jurisdiction of the Shimla Courts. The record shows that no cause of action, even in part, has arisen within the jurisdiction of the Shimla Courts. The defendant also doesn't carry any business within the territorial jurisdiction of Shimla Courts.

13. In so far as the principle that debtor must seek the creditor is concerned, the same is not applicable to the facts and circumstances to the present case because the plaintiff has concealed the vital detail by not producing even a single document much less the alleged contract.

14. It is held in **Firm Hira Lal Girdhari Lal and another vs. Baij Nath Hardial Khatri, AIR 1960, Punjab 450 (Full Bench)** as under :

"Where territorial jurisdiction of the Court is to be determined on the ground that the price of goods was payable within its jurisdiction, the Court should find as a fact whether the money was agreed expressly or impliedly to be paid within the territorial jurisdiction. To find this fact the Court is entitled to take into consideration the contract, its attending circumstances, the creditor's ordinary place of residence or business and the course of dealings between the parties including all the other factors relevant in a given case. If the Court comes to the conclusion that on the facts and circumstances established in the case the amount sought to be recovered was payable within the jurisdiction of the Court, then it should proceed to entertain the suit, otherwise it has no jurisdiction to do so on the basis of this ground.

The English Common Law rule that, where there is no express agreement that payment is to be made at a particular place, a debtor must seek his creditor is not applicable in India, as a matter of law, to determine the forum where the suit is to be instituted. The creditor's place of residence or business is only one of the circumstances attending the contract which may be taken into consideration in finding as a fact the place where the money was agreed to be paid: (S) AIR 1955 Punj. 128, Approved; AIR 1927 P.C 156, Explained; Case **Law discussed."**

15. The plaintiff has failed to lead any evidence as to where the amount of Rs. 5,76,000/- was delivered to him. He has not confronted DW-1 Krishan Dutt that the payment was made at Shimla by the officials of the defendant Corporation. In these circumstances, the ratio of law laid down aforesaid is not applicable to the facts of the present case.

16. In view of the discussion made hereinabove, this Court finds that the impugned judgment suffers from no infirmity and the same has been passed in accordance with law.

17. Accordingly, Civil Revision is devoid of any merit and the same is dismissed. No order as to costs. The record of learned trial Court be returned forthwith. Pending application (s), if any shall 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.

Ramesh Chand ...Petitioner.

Versus

Sh. Tarun Shreedhar and others ...Respondents.

COPC No. 564 of 2015
Decided on: 21.06.2016

Contempt of Courts Act, 1971- Section 12- Petitioner contended that respondents had not complied with the direction passed by the Court- he had prayed for compassionate appointment in lieu of death of his father- respondents were directed to appoint petitioner to the post of Chowkidar- respondent had filed a detailed compliance report which shows that they had appointed petitioner on compassionate grounds against the post of Chowkidar- therefore, respondents have complied with the direction passed by the Court- petition dismissed.

(Para-2 to 4)

For the petitioner: Mr. Hamender Chandel, 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)*

It is contended that the respondents have committed the breach as they have not complied with the directions, dated 23rd August, 2013, made by this Court in CWP No. 4846 of 2013.

2. It would be profitable to reproduce para 3 of the judgment made by this Court in CWP No. 4846 of 2013 herein:

> *"3. It is undisputed before us that the father of the petitioner late Jagat Ram was working as Forest Worker with the respondents and died on 14.3.2003. In these circumstances, it is but obvious that the Rules prevalent in the year 2003 would be applicable to the case of the petitioner not subsequent Rules. We find that the order, Annexure P-2, is a non-speaking order, as it does not disclose any specific rules. We also note that the reply filed by the Conservator of Forests is equally vague. In these circumstances, we quash and set aside Annexure P-2. Writ petition is allowed. The respondents are directed to appoint the petitioner to the post of Chowkidar in accordance with the Rules applicable on 11.4.2003, when the father of the petitioner died, when the cause of action accrued to the petitioner. The action be taken within next eight weeks positively. Writ petition stands disposed of."*

3. The petitioner had prayed for compassionate appointment in lieu of the death of his father and in terms of the judgment (supra), the respondents were directed to appoint the petitioner to the post of Chowkidar.

4. The respondents have filed detailed compliance report, the perusal of which does disclose that the respondents have appointed the petitioner on compassionate grounds against the post of Chowkidar, thus, have complied with the Court directions. It is for the petitioner to seek appropriate remedy, if he is still aggrieved.

5. The contempt petition is disposed of accordingly.

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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
Dheeraj Kumar ....Respondent.

Cr. Appeal No. 440 of 2010.
Reserved on : 23rd May, 2016.
Date of Decision: 21st June, 2016.

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was raped by accused repeatedly- she narrated the incidents to her parents- accused was tried and acquitted by the trial Court- held, in appeal that date of birth of the prosecutrix was proved to be 2.10.1994- incidents had taken place in the year 2009, therefore, prosecutrix was minor at the time of incidents- prosecutrix had improved upon her previous statement in the Court and she had disowned the contents of FIR in her cross-examination- her testimony was contradicted by other prosecution witnesses- trial Court had rightly appreciated the evidence- appeal dismissed. (Para-9 to 16)

For the Appellant: Mr. M.A. Khan, Additional A.G.
For the Respondents: Mr. Dheeraj K. Vashisht, 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 Additional Sessions Judge, Ghurmarwin, District Bilaspur, Himachal Pradesh, rendered on 10.06.2010 in Sessions Trial No. 14/7 of 2009, whereby, the latter Court acquitted the accused/respondent of the offences punishable under Sections 376 and 506 of the Indian Penal Code.

2. The facts relevant to decide the instant case are that during the year 2009, the prosecutrix, aged 14 years, was studying in 8th standard in middle school at Bari Majerwan. Accused Dheeraj was his neighbour and known to the prosecutrix since her childhood. About four months prior to the occurrence the accused called the prosecutrix in the bath room of her paternal aunt Kamali Devi and committed rape on her. Thereafter, the accused repeated sexual act with her on regular intervals. On 16.2.2009 at about 7.00 p.m. accused Dheeraj called her to the bathroom of her aunt Kamli Devi at 8.00 p.m. by making a call on mobile phone No.92187-49628 belonging to her mother. The prosecutrix went there and the accused committed sexual act with her. After short while when her mother called her she went to her house. On being questioned by her mother initially the prosecutrix did not say anything but when her mother thrashed her she told her that she was called to the bathroom by accused Dheeraj where he had sexual intercourse with her. Thereafter, the parents of the prosecutrix visited the house of the accused but he was not present there. Then the prosecutrix visited Police Station, Ghumarwin along with her parents and lodged report about this occurrence on the basis of which FIR No.36 of 17.2.2009 was registered at 12.30 a.m. against the accused. The police carried out the investigation in the case and completed all the codal formalities.

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.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 376 and 506 of the IPC. In proof of the prosecution case, the

prosecution examined 17 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 has not led 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 Addl. 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. Initially it is incumbent upon this Court to rest the prime factum of the prosecutrix at the stage contemporaneous to the ill-fated occurrence having or having not arrived at the age of majority for gauging therefrom hers holding an empowerment to mete consent to the accused for his perpetrating upon her the penal misdemeanors as stand ascribed to him by the prosecutrix or to not mete to him the apposite consent.

10. Evidence which stands adduced by the prosecution qua the prosecutrix at the time contemporaneous to the occurrence being a minor hence rendering her incapacitated to purvey consent to the accused to his perpetrating penal misdemeanors upon her, stands displayed in Ex.PW5/A with a disclosure occurring therein of the prosecutrix standing admitted on 1.5.2000 in Primary School, Bari Majnerwan, District Bilaspur, H.P. by her grandmother Smt. Sukh Devi, who at the time of initiation of investigations by the Investigating Officer was not surviving thereat. A perusal thereof also discloses of its manifesting the date of birth of the prosecutrix being 2.10.1994. Also a perusal of the abstract of the Parivar Register of the family of the father of the prosecutrix comprised in Ex.PW7/A wherein the name of the prosecutrix occurs makes a vivid disclosure of the prosecutrix being born on 2.10.1994. Moreover, the birth certificate of the prosecutrix borne on Ex.PW 7/B records the factum of the prosecutrix being born on 2.10.1994. Even though there exists in the cross-examination of PW-7 Madan Lal a communication qua the name of the prosecutrix standing scribed in Ex.PW7/B on 4.5.2009 yet the factum of the name of the prosecutrix standing scribed on 4.5.2009 in Ex.PW7/B whereas the apposite entry qua hers being born on 2.10.1994 standing recorded in the apposite record on 7.10.1994 would not beget any inference of EX.PW7/B with revelations occurring therein of the prosecutrix standing recorded therein to be born on 2.10.1994 being unrelatable to her, as Ex.PW7/A, the abstract of Parivar Register of the family of the father of the prosecutrix wherein the name of the prosecutrix occurs displays the factum of the prosecutrix being born on 2.10.1994 hence is in conformity with the date of her birth recorded in Ex.PW7/B. In sequel, even if, in Ex.PW7/B the name of the prosecutrix remains unscribed against the apposite entry therein qua the date of her birth, the omission of the recording of the name of the prosecutrix against the apposite entry made in the records concerned displaying hers being born on 2.10.1994 would not render 2.10.1994 to stand unrelated qua the prosecutrix significantly when for reiteration in Ex.PW7/A, exhibit whereof comprises the abstract of the Parivar Register of the family of the father of the prosecutrix wherein the name of the prosecutrix occurs, makes a disclosure in tandem with the disclosure in Ex.PW7/B of the prosecutrix being born on

2.10.1994. Necessarily, hence, omission aforesaid in the apposite record by the official concerned at the time of his scribing therein the date of birth of the prosecutrix being 2.10.1994, to scribe the name of the prosecutrix against the aforesaid entry qua the date of her birth would not foster any conclusion from this Court of the said entry qua the date of birth of the prosecutrix being unrelatable to her. Consequently, it has to be held with aplomb of the prosecutrix at the time contemporaneous to the ill-fated occurrence being a minor hence standing incapacitated to purvey her consent to the accused for his perpetrating penal misdemeanors upon her.

11. This Court having rested the factum of the prosecutrix at the time contemporaneous to the ill-fated occurrence being a minor hence standing incapacitated to mete consent to the accused for his perpetrating penal misdemeanors upon her, it is imperative to allude to her testimony for fathoming therefrom qua her testimony bespeaking therein the perpetration of the alleged penal misdemeanors by the accused upon her person being inspiring as well as credible. The sole testimony of the prosecutrix per se holds immense fomidability besides clout to thereupon sway this Court to sustain findings of conviction against the accused. Necessarily, in case her testimony unfolds of her communications therein qua the perpetration by the accused of the alleged penal misdemeanors upon her person not holding any intrinsic worth or innate truth arising from hers deposing in Court an embellished and an improved version vis-a-vis her previous statement recorded in writing besides unfoldments upsurging on an incisive reading of her testimony in her cross-examination of hers hence contradicting her deposition qua the occurrence/occurrences constituted in her examination-in-chief whereupon her testimony would stand stained with a vice of inter se contradictions rendering it to be incredible besides uninspiring, hence, constraining this Court to oust her creditworthiness.

12. An endeavour on a keen discernment of her testimony recorded before the learned trial Court for gauging her truthfulness begets a sequel of apparently rife embellishments also stark improvements qua the alleged penal misdemeanors perpetrated upon her person by the accused vis-a-vis her previous statement recorded in writing making a stark emergence. The blatant embellishments or improvements as emerge in her testification qua the occurrence before the learned trial Court vis-a-vis her previous statement recorded in writing stand constituted in the factum of hers therein disclosing of hers being a virgin and of hers not holding sexual intercourse with anybody. However, on hers standing re-examined by the learned Public Prosecutor, she acquiesces to the factum of the accused holding her to sexual intercourse. The aforesaid ditherings on her part embedded in the factum of hers initially deposing of none holding her to sexual intercourse whereas subsequent thereto hers naming the accused to be the person who subjected her to forcible sexual intercourse marks her testimony to stand bereft of coherence. Her wavering communications in her testification before the learned trial Court qua the ill-fated occurrence when hence replete with incoherence is a vivid display of hers not holding with assurance a firm view of the accused holding her to forcible sexual intercourse. Only when she with forthrightness bereft of any vice of waverings whereuon her inculpation of the accused when hence devoid of any vice of incoherence would cajole this Court to conclude with invincibility of her testimony qua hers incluplating the accused, holding veracity. Contrarily with vacillations occurring in her testification qua hers fastening an inculpatory role to the accused, she is to be construed to be unsure of the accused subjecting her to forcible sexual intercourse. In aftermath, an unsure inculpation of the accused by the prosecutrix cannot render her testimony to be credible and inspiring qua the inculpatory role as stands ascribed by her to the accused.

13. The effect of the aforesaid vacillations is of theirs staining her testimony with a vice of improvements vis-a-vis her previous statement recorded in writing. Moreover, with hers in her cross-examination disowning the contents of the FIR comprised in Ex.PW1/A has the concomitant effect of her testimony qua the occurrence loosing its creditworthiness significantly when she makes a communication therein of the police obtaining her signatures thereon even when she had not communicated to them the recitals qua the occurrence recorded therein rather hers echoing qua the recitals occurring therein standing purveyed to the police official concerned

by 6 to 7 persons accompanying her, hence, renders the recitals comprised in FIR Ex.PW1/A to stand not scribed thereon at her instance rather the recitals qua the ill-fated occurrence occurring therein standing purveyed to the police official concerned by the persons accompanying her. With the aforesaid deduction emanating from the prosecutrix in her cross-examination, hence, dislodging the recitals embodied in FIR Ex.PW1/A renders the version qua the occurrence recorded therein to suffer enfeeblement. Also the effect of the aforesaid disownings by her of the recitals constituted in FIR Ex.PW1/A is of hers denying the recitals qua the occurrence embedded therein whereupon the prosecution cannot with any vigour make any espousal of its succeeding in its endeavour to prove the charge against the accused. Furthermore, when she also testifies in Court of hers inculpating the accused for the first time in Court also emaciates the vigour of the recitals qua the ill-fated occurrence comprised in FIR Ex.PW1/A. She has testified of hers not making any disclosure qua the occurrence even to PW-3 Dr. Poonam Garg, who subjected her to medical examination whereas PW-3 contradicts her and deposes in Court of the prosecutrix disclosing to her the entire occurrence at the time when she held her to medical examination. Consequently, the aforesaid intra se contradictions vis-a-vis the testimony of the prosecutrix and PW-3 ingrains the former's testimony with a shroud of doubt whereupon it cannot be held of her testimony qua the occurrence being credible besides inspiring rather with hers by the aforesaid stains constituted in her testifications in Court qua the occurrence, hence eroding the intrinsic truth qua the occurrence comprised in FIR Ex.PW1/A, weans a conclusion from this Court of her testimony holding no truth.

14. Be that as it may, the prosecutrix deposes qua her clothes standing taken into possession after 3 to 4 days since the occurrence, factum whereof stands contradicted by her mother PW-2, who deposes of the clothes of the prosecutrix standing taken into possession by the doctor in hospital, contradiction aforesaid is also supportive of an inference of no vigour hence standing acquired qua the genesis of the prosecution case. PW-3 Dr. Poonam Garg on the anvil of the report of FSL comprised in Ex.PW3/E rendered an opinion of the possibility of the prosecutrix standing recently subjected to sexual intercourse being not overruleable. The report of the FSL comprised in Ex.PW3/E is communicative of human semen standing detected on the Salwar of the prosecutrix. However, the revelations in Ex.PW3/E of human semen standing detected on the Salwar of the prosecutrix would not ipso facto sway a conclusion from this Court of the semen occurring thereon belonging to the accused unless the Investigating Officer had with the aid of the doctor concerned who held the accused to medical examination secured the semen of the accused for its standing dispatched to the FSL concerned for on its standing compared by the expert concerned with the human semen found on the salwar of the prosecutrix facilitating him to record a befitting conclusive opinion of the semen found on the salwar of the prosecutrix belonging to the accused. However, for lack of concerts by the Investigating Officer besides with the FSL concerned hence standing defacilitated to compare the human semen found on the salwar of the prosecutrix with the semen of the accused, also its concomitantly standing disabled to conclusively record an opinion qua the semen found on the salwar of the prosecutrix belonging to the accused would obviously constrain this Court to conclude of the mere existence of human semen on the salwar of the prosecutrix not constituting firm and conclusive evidence of it belonging to the accused. In aftermath, the opinion of PW-3 of the prosecutrix standing recently subjected to sexual intercourse cannot be concluded to be evidence for hence connecting the accused with the aforesaid pronouncement by her.

15. Be that as it may even if the accused had refused to render the apposite cooperation to the Investigating Officer concerned besides to the doctor concerned who held him to medical examination, yet his refusal to render the apposite cooperation to them may yet have attracted an adverse inference against him, nonetheless, omissions on the part of the Investigating Officer concerned to make the apposite efforts coaxes a conclusion from this Court of neither the accused refusing to render his apposite cooperation to the Investigating officer concerned or to the doctor concerned nor hence any adverse inference from his apposite refusal in regard aforesaid is drawable against the accused.

16. 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 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.

17. 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 SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Surinder Singh .....Respondent.

Cr. Appeal No. 300 of 2006
Date of decision: 21.6.2016

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Complainant along with school girls was returning after attending a cultural programme in a bus- Maruti van came from opposite side and hit the bus- bus fell down on the right side of the road- driver of the van expired on the spot- passengers in the bus suffered injuries- accident had taken place due to the negligence of the accused who was driving the bus - accused was tried and acquitted by the trial Court- an appeal was preferred, which was allowed- held, in appeal that Investigating Officer had prepared the site plan in absence of the vehicle- hence, no reliance can be placed on the same- testimonies of the prosecution witnesses contradicted each other – accused was rightly acquitted by the Court- appeal dismissed. (Para-9 to 12)

For the Appellant: Mr. R.S Thakur, Additional Advocate General.
For the Respondent: Mr. Prashant Sharma, 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 28.4.2006 by the learned Additional Sessions Judge, Una, District Una, H.P., whereby he while reversing the findings of conviction recorded on 24.10.2005 by the learned Judicial Magistrate Ist Class, Court No.1, Amb District Una, H.P., in case No. 21-1 of 2002/10.II/2002, acquitted the respondent (for short 'accused') for the offences punishable under Sections 279, 337, 338 and 304-A of the Indian Penal Code.

2. The brief facts of the case are that on 7.12.2001 after recording Rapat No. 32 in daily diary, HC Mehar Singh alongwith other police officials went to the spot at Nandpur to inquire about the accident where Smt. Bala Handa made a statement under Section 154 Cr.P.C. According to her she is working as a TGT(Arts) at Government Senior Secondary School, Talmehra, Tehsil Bangana, District Una, H.P. On 6.12.2001 she had gone with school girls in bus bearing registration No. HP-20A-2669 to Nangal Jarialan Senior Secondary School for attending a cultural programme. Surender Singh was the driver of the bus and Tarsem Lal was its conductor. On 7.12.2001 at about 7.30 p.m. while she alongwith the school girls were returning after attending the programme and when their bus crossed the village Nandpur Dausarka and reached about 100 meters ahead of this place then one Maurti van came from the opposite direction struck with the bus as a result of which the bus fall down on the right side of the road and driver of the Maruti van expired on the spot and the passengers who were sitting in

the bus also received injuries and they were taken to the hospital. The driver of the bus was driving the bus at a fast speed and in a rash and negligent manner. On the basis of her statement FIR came to be registered. The investigation was conducted. One another passenger Vishnu Bahadur also expired. Post mortem examinations of Suresh Kumar and Bishnu Bahadur were conducted. 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, 337 338 and 304-A of the I.P.C to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 18 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 evidence on record, the learned trial Court returned findings of conviction against the accused for offences punishable under Sections 279, 337,338 and 304-A of the Indian Penal Code. However, in an appeal preferred therefrom by the accused herein before the learned appellate Court, the latter Court while reversing the findings of conviction recorded by the learned trial Court proceeded to acquit the accused.

6. The learned Additional 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 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 bus driven by the accused collided at the site of occurrence with the van driven by the deceased. The van aforesaid at the relevant time stood occupied by Bishnu Bahadur, PW-6 and one Suresh Kumar**.** Both Suresh Kumar driver of the van and Vishnu Bahadur an occupant therein succumbed to the injuries entailed on their respective person in sequel to the ill-fated collision which occurred inter-se the van and the bus driven by the accused. In proof of the prosecution case the prosecution led 18 witnesses into the witness box. However the statements of PWs 1, 4, 6 and 7 who witnessed the occurrence alone enjoin their respective appreciation by this Court for fathoming therefrom of the unfoldments qua the occurrence embodied therein unflinchingly proving the genesis of the prosecution case. PWs 1, 4 and 7 all wherewhom at the relevant time were the occupants of the bus each in their respective recorded depositions resiled from their previous statements recorded in writing. Since hence they contradict their respective versions qua the occurrence constituted in their respective recorded previous statements recorded by the Investigating Officer concerned wherein they had imputed negligence to the accused, the inevitable effect thereof is of theirs rendering bereft of any legal vigor the genesis of the prosecution case embodied in FIR Ex. PW-18/K.

10. Be that as it may the learned Additional Advocate General with vigor and force submits of lack of substantiation to the prosecution case by ocular witnesses aforesaid would not be adequate to record findings of acquittal in favour of the accused as PW-6 an eye witness to the occurrence besides spot map comprised in Ex.PW-18/C depict of the accused negligently driving

his vehicle, negligence whereof begot a collision inter-se the vehicle driven by the accused with the van driven by the deceased. The aforesaid submission of the learned Additional Advocate General would acquire leverage only in the event of forthright evidence displaying of Ex.PW-18/C standing prepared by the investigating Officer on his arriving at the site of occurrence on his arrival thereat his noticing thereat both the van driven by the deceased and the bus driven by the accused being available thereat. However with the Investigating Officer in his deposition comprised in his cross-examination making a disclosure of on his visiting the site of occurrence his not noticing thereat both the driver and the conductor of the bus besides its occupants also obviously the bus being not available thereat does foist an inference of the Investigating Officer preparing Ex.PW-18/C in the absence of both the vehicles being available thereat. Consequently, depictions in Ex.PW-18/C are construable to be in their entirety an invention whereupon no reliance is imputable. The clicking of photographs of the site of occurrence by the Investigating Officer with a display therein of both the vehicles being available at the site of occurrence would yet negate the effect of the aforesaid communications made by PW-18 in his cross-examination whereupon this Court has disimputed credence to Ex. PW-18/C, however with the investigating Officer omitting to click photographs of the site of occurrence rather gives fillip to an inference of the manifestations occurring in Ex.PW-18/C standing suo moto besides surmisedly displayed therein by the Investigating Officer. As a corollary, Ex.PW-18/C stands stained with a taint of invention besides a concoction, obviously hence no credence is imputable to it.

11. Be that as it may with this Court disimputing credence to Ex.PW-18/C, the testimony of PW-6 who rendered a version qua the occurrence contradictory to the one deposed qua it by each of the other ocular witnesses thereto rather has lent support to the prosecution case also hence has to suffer the fate of its losing its creditworthiness, even if intra-se corroborations occur inter-se the depositions of PW-6 vis-à-vis reflections in Ext.PW-18/C, yet prominently with Ext.PW-18/C losing evidentiary prominence besides its probative worth standing undermined thereupon the deposition of PW-6 who was at the relevant time an occupant along with the deceased in the ill fated van, also hence is amenable to its standing construed to be an interested besides a biased version qua the occurrence. In aftermath, an interested and biased version qua the occurrence rendered by PW-6 holds no tenacity.

12. 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.

13. 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 CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh. .....Appellant.

Versus

Baikunth Lal & others. .....Respondents.

Cr. Appeal No. 318 of 2007
Reserved on: 16.06.2016
Decided on: 21.06.2016

Indian Penal Code, 1860- Section 451, 341, 147, 323 and 506 read with Section 149- Accused gave beatings to the wife of the complainant – he had also damaged television and other articles- when complainant was coming to police Station to report the matter, accused slapped and gave him beatings- accused were tried and acquitted by the trial Court- held, in appeal that incident had taken place during Trilokpur fair – many persons had gathered but only interested witnesses were examined - Medical Officer stated that injuries could not have been caused by stick blow- there was a property dispute between the parties and litigation was pending between them- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 13)

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, Addl. AG, with
Mr. Pushpinder Jaswal, Dy. AG,
For the respondents: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal arises from the judgment of acquittal, dated 30.03.2007, passed by learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P., in Criminal Case No. 68/2 of 2004/03. The State of Himachal Pradesh has maintained the present appeal for setting-aside judgment of acquittal and punishing the accused for the offences punishable under Sections 451, 341, 147, 323 and 506 read with Section 149 of Indian Penal Code.

2. Briefly stating the facts giving rise to the present appeal are that on 29.03.2003 the complainant, Shri Ved Parkash, had gone to Court at Nahan and on his return to house, PW-1 (Smt. Kala Devi, wife of the complainant) informed him that she was beaten up by accused persons, namely, Baikunth Lal, Ram Parkash and his nephew and Nishu etc. total 8 to 10 persons, some of the them were also having *dandas*. The accused persons had also broken the television and other articles. When the complainant was enroute for lodging the report at Police Post Kala Amb, near Kheri, the accused persons prevented him from proceeding and thrashed him. Both, complainant and his wife, were medically examined and FIR was registered at Police Station, Nahan. S.I. Lekh Ram completed the investigation and handed over the case file to Station House Officer, who prepared the *challan* and presented the same in the Court. The prosecution, in order to prove its case, examined twelve witnesses. Ultimately, the learned Trial Court acquitted the accused persons vide its judgment dated 30.03.2007. The State has assailed the judgment on the ground that the findings arrived at by the learned Court below are based on unrealistic standards, the reasoning is unreliable and unsustainable and the Court below has failed to take into consideration the evidence of the prosecution witnesses, which prove the guilt of the accused beyond reasonable doubt.

3. In order prove its case, prosecution examined twelve witnesses.

4. I have heard learned Additional Advocate General for the appellant/State and learned Defence Counsel for the respondent/accused. To appreciate the arguments of the 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.

5. Smt. Kala Devi, deposing as PW-1, has stated that about a year ago, her husband was away to attend Court at Nahan and at about 6:00 p.m., when she was sitting in her courtyard, accused Baikunth Lal, Ramesh, Bammu, Ved Parkash, Pawan, Nishu came there. Accused persons were associated by 6-7 persons. They forcible entered into their shops by

breaking the locks and when PW-1 asked them whey they are trespassing, accused Baikunth Lal inflicted *danda* blow on her and other accused persons gave fist blows. Shri Babu Ram and Shri Rameshwar rescued her. Due to the beatings given to her, she received injuries on her arm and other parts of the body. Smt. Kala Devi (PW-1) narrated the incident to her husband when he returned home at about 7/8/9 p.m. On the very next morning at about 8-9 a.m., when her husband was returning from Nahan, the accused persons inflicted injuries to him. She was informed by Babu Ram about the beatings given to him, when she reached the shop in dispute, and she also saw the accused persons giving beatings to her husband. She rescued her husband from the accused persons. Her father died on the next day, so they went to Renukaji. While her husband was returning from Renukaji, accused persons again gave beatings to him and due to this he suffered multiple injuries and was taken to hospital for medical examination. Accused persons again thrashed her husband after two days, so PW-1 and her husband went to Police Post, Kala Amb, but the report was not lodged. Therefore, they came to Police Station, Nahan, and lodged the report. In her cross-examination, Smt. Kala Devi (PW-1) deposed that the quarrel between them and the accused persons continued for 5-6 days and she does not know that during this period her husband attended his office or not.

6. Complainant, Shri Ved Parkash (PW-2), deposed that his house is near Trilokpur Temple and the day, when occurrence took place, he had gone to Nahan for attending the Court of Civil Judge (Senior Division). On 29.03.2003, at about 8 p.m., when he reached Trilokpur and was enroute, people informed him that 8-10 persons had beaten his wife. On reaching his house, he met his wife and also saw broken television and scattered articles. On inquiry, his wife told him that accused Baikunth Lal, Ramesh Kumar, Dammu, Pawan, Ved Parkash, Nishu alias Ashu etc. gave beatings to her with slap, fist and with bamboo stick. Complainant could not go to Police Post, Kala Amb, as he remained in Trilokpur. Subsequently, on the next morning, complainant moved an application to the police. However, no action was taken thereon. On 30.03.2003, when he was returning after lodging the report, near Kheri bridge, accused Dammu, Nishu, brother-in-law of son of Om Parkash, Ramesh Kumar, Ved Parkash and 8/10 other persons met him and gave beatings to him with slap and fist blows. A danda blow was inflicted on him, due to which he became unconscious and on regaining consciousness he saw the accused persons there. One Chander Bhan told the accused persons not to take law in their own hands. Intermittently, factory workers came there, rescued him and took him to Trilokpur to his residence. Due to the beatings, he sustained injuries on his ear, head and other parts of the body. On subsequent morning, when he went to Police Post, Kala Amb, police personnel told him that he is a quarrelsome person and so the case is beyond their limits. Thereafter, he moved an application before Police Station, Nahan, and Police despite assurance did not visit his house. On 31.08.2004, at 6:00 p.m., when the complainant was present in his house, accused Dammu, Baikunth Lal, Nishu, Ramesh etc. and 10-15 other persons came there and threatened him. When the complainant did not come outside, the accused persons entered the house and inflicted injuries on him. The complainant was taken to hospital at about 9:00 p.m. by one Chander Bhan, who was called by his wife and children. The matter was brought to the notice of the police by the hospital officials and police took him to Police Station and registered the case. After two days, due to the death of his father-in-law, he went to Renukaji and on the next day he came to Nahan as he had to attend the Court at Ambala. On 4th, when he was returning back from Ambala, he was pulled out of his van at Naraingarh Chowk and was thrashed by the accused persons. The incident was reported to the Police vide application, Ex. PW-2/A. Complainant in his cross-examination deposed that 2-4 persons rescued his wife from the accused persons. He further deposed that his wife was not admitted in the hospital, but was locally treated. As per the complainant, the matter was pacified between the parties by the police officials, so the case was not registered. Complainant has further deposed that there were three vans. People were telling that there were 24 persons and 10/12 persons met him at Kheri Pul and he also recognize them by face, as they were residents of Bilaspur. He did not see anything in the hands of 18-19 persons, one of them picked up a stick of *Khair* tree, struck a blow on his head and he became unconscious. PW-1 (complainant) has denied that witness Babu Ram is his tenant.

7. PW-3, Rameshwar Dass, in his cross-examination has stated that except Baikunth Lal, he does not recognize anyone. PW-4 Babu Ram, though in his examination-in-chief has corroborated the versions of PWs 1 to 3, but in his cross-examination admitted that he was a tenant of Ved Prakash (PW-2) and admitted that there were many people on the spot. PW-5, in his cross-examination, has stated that he could not recognize accused Baikunth Lal and other accused persons. He admitted that he has friendship with the father of PW-2 (complainant) for considerable time. PW-7 has not supported the case of the prosecution and was declared hostile, but in cross-examination by the learned APP nothing favourable to the prosecution has come. Similarly, PW-8, Chander Bhan, has not supported the case of the prosecution, though he was declared hostile, nothing favourable to the prosecution has come when he was cross-examined by the learned APP.

8. PW-6, S.I. Purshotam Dass and PW-9, S.I. Lekh Ram, are Investigating Officers. PW-9 in his cross-examination has specifically stated that he has no knowledge that the witnesses produced by PW-2 (complainant) were his tenants. PW-12, Dr. Manisha, has specifically stated that the injuries, which were simple in nature, could have been caused by fall.

9. The occurrence took place during Trilokpur fair and many people had gathered there. Surprisingly, the prosecution has only examined interested witnesses and no independent witness has been associated. PW-3, Rameshwar Dass and PW-4, Babu Ram, have admitted that they are tenants of PW-2, Ved Parkash (complainant), meaning thereby they are certainly influenced by their landlord, so their statements cannot be said to be trustworthy. Moreover, PW-4, Babu Ram, has deposed that spot of occurrence is approximately ½ km from his shop, thus his presence on the spot also becomes dubious. PW-5, Sunder Singh, has unequivocally deposed in his cross-examination that he does not recognize the accused persons and other persons and he has also good kinship with the complainant (PW-2). PWs Karan Singh and Devi Parshad were given up by the prosecution, as they were stated to be won over by the accused. PW-6, S.I. Purshotam Dass and PW-7, Sarwan Kumar, did not support the prosecution case.

10. As per prosecution story, Chander Bhan (PW-8) rescued the complainant (PW-2) from the accused and also took him to hospital. PW-8, Chander Bhan, in his cross-examination, has deposed that he is tenant of the complainant and has cordial relations with him. This witness further deposed that he does not know any of the accused persons. Noticeably, both complainant (PW-2) and his wife (PW-1) have nowhere stated that PW-3, Rameshwar, PW-4, Babu Ram and PW-6, Chander Bhan, are their tenants, so they have concealed this fact. Statements of police officials and Doctor are also of no avail, as they have not witnessed the occurrence.

11. As per the prosecution witnesses, the injuries were caused by *danda,* but on comparison with the injuries, as found by the Doctor, those injuries cannot be said to have been caused by the *danda* blows. Further it has come in evidence that there was a property dispute *inter se* the parties regarding the shops and civil litigation is also pending between them. In these circumstances, it cannot be said that the prosecution has proved the guilt of the accused beyond a shadow of doubt.

12. It has been held in ***K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258*** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non-consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

13. 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.

14. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused persons conclusively and beyond a shadow of doubt, as reasonable suspicion has occurred in the prosecution story.

15. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made above, there is no merit in this appeal and the same is accordingly dismissed. All the pending application(s), if any, stand(s) disposed of accordingly.

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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.
Rekha Devi and another .....Respondents.

Cr. Appeal No.: 98 of 2008
Reserved on : 24.05.2016
Date of Decision: 21.06.2016

Indian Penal Code, 1860- Section 302 and 120-B- Accused R was married to the deceased- relationship between the parties was strained- a compromise was effected- deceased lodged a complaint against the accused R after 2-3 days of the compromise- deceased died under suspicious circumstances- he had committed suicide by hanging himself from ceiling of the house- matter was reported to police- it was found during investigation that accused H and R had intimate relation and they had murdered the deceased- recoveries were effected on the basis of disclosure statement made by R- accused were tried and acquitted by the trial Court- held, in appeal that acrimony in the matrimonial relation was duly established- however, the illicit relation between the accused was not proved- cause of death was asphyxia- there was no injury on the body of the deceased- there was no evidence of any poison or intoxicant in the viscera- disclosure statement was not proved- there was no evidence that deceased had died due to consumption of poison- these circumstances do not lead to any inference that accused had murdered the deceased- accused were rightly acquitted- appeal dismissed. (Para-15 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, Dy. A.G. and Mr. J.S. Guleria, Assistant A. G.
For the respondents: Mr. Vikas Rathore, Advocate, for respondent No.1.
Mr. Virender Singh Rathore, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

The present appeal has been filed by the State against judgment of acquittal dated 20.08.2007 passed by the Court of learned Additional Sessions Judge (1), Kangra at Dharamshala in Sessions Case No. 53-3/2005, whereby the learned trial Court has acquitted the accused of offence under Section 302 read with Section 120-B of the Indian Penal Code.

2. The case of the prosecution, in brief, was that accused Rekha was married to deceased Ram Singh in December, 2004. There was acrimony in the relationship between the deceased and the accused and matrimonial dispute had also been redressed by the Panchayat,

wherein a compromise was also effected. However, two-three days after the compromise, deceased Ram Singh again filed a complaint against his wife in Gram Panchayat, Jakhara.

3. On the intervening night of 15/16.05.2015, Ram Singh died under suspicious circumstances. The matter was reported by accused Rekha Devi, wife of the deceased to her neighbourer Shamsher Singh that her husband had hanged himself from the ceiling of the house. On the basis of this information, the father and mother of the deceased went to her house and found Ram Singh hanging from the wooden plank *(Karri)* of the roof with a *dupatta* with his legs on the ground. His tongue was under his teeth and blood was oozing out from his nose. The *dupatta* with which Ram Singh was hanging was cut with the help of a sickle and Ram Singh was laid on the bed and water was served to him with the hope that he may be still alive, however, by that time, he had already breathed his last.

4. Shamsher Singh informed Smt. Prem Kaur, Pradhan of Gram Panchayat, Jakhara about the death of Ram Singh, who further informed Incharge Police Post, Fatehpur about the said incident on telephone at about 11:15 p.m. ASI Yog Raj, Incharge Police Post, Fatehpur entered *rapat* No. 24 to this effect in the *roznamcha* register (Ex. PW18/A) and also informed SHO, Police Station, Jawali about the occurrence of the said incident and entry to this effect was also recorded vide rapat No. 25 in rapat *roznamcha* register at Police Station, Jawali (Ex. PW18/A). On the basis of these two rapats, ASI Yog Raj and SHO Jagdish Chand proceeded to the spot alongwith other police officials. At the spot, inquest papers Ex. PW23/B and Ex. PW23/C of the dead body were prepared and photographs Ex. PW4/A to Ex. PW4/G were also taken. The statement of the complainant Shamsher Singh Ex. PW1/A was recorded and on the basis of the said statement, FIR was initially registered against accused Rekha Devi, i.e. Ex. PW16/A. Application Ex. PW9/A was moved to Medical Officer, Civil Hospital, Nurpur for conducting post mortem examination of the deceased and accordingly, the post mortem was conducted vide report Ex. PW9/B.

5. During the course of investigation, it came to the notice of the police that accused Harnam Singh was having intimate relationship with accused Rekha and in fact both of them have connived together to do away with the life of deceased and to achieve this end, accused Harnam Singh arranged some sedatives and got the same administered to the deceased in a Coca Cola. After consuming the said Cocal Cola, the deceased came under the influence of intoxicant and during this period, he was throttled and his body was thereafter hanged with *dupatta* with the *karri* of the roof of the house in order to concoct a story that the deceased in fact had committed suicide. On the basis of the said evidence, co-accused Harnam Singh was arrested.

6. During the course of investigation, accused Rekha Devi gave disclosure statement Ex. PW2/A to the police in the presence of Rattan Singh, Suresh Kumar and Surinder Kumar as to where the Coca Cola bottle was hidden and where the sedatives were kept in a piece of newspaper. On the basis of this statement, she led the police and witnesses to her house and got the sedatives (Ex. P7) as well as Coca Cola bottle (Ex. P9) recovered from the roof of her house.

7. After completion of the investigation, challan was filed in the Court and on the basis of the said challan, charges under Section 302 read with Section 120-B of the Indian Penal Code were framed against the accused, who pleaded not guilty and claimed to be tried.

8. Learned trial Court vide its judgment dated 20th August, 2007 acquitted the accused for the commission of the offence alleged against them by holding that that from the scrutiny of entire evidence on record, the only conclusion which can be drawn is this that the deceased had committed suicide and he had not been murdered by the accused as a result of criminal conspiracy.

9. Learned Additional Advocate General has submitted that the learned trial Court has erred in acquitting the accused of the offence with which they were charged. According to him, in the present case, on the basis of material produced on record, the prosecution has

substantiated beyond any reasonable doubt that the deceased had in fact been murdered by the accused as a result of criminal conspiracy hatched by them and it was not a case of suicide. According to him, the findings of deceased having committed suicide returned by the learned trial Court were in fact perverse and not borne out from the records of the case. Learned Additional Advocate General has submitted that the learned trial Court has discarded the cogent and trustworthy testimony of prosecution witnesses for untenable reasons without appreciating that there was no reason to disbelieve the said testimony of the prosecution witnesses in the absence of any proof of enmity between the said witnesses and the accused. He also argued that the learned trial Court has not appreciated that both the accused had in fact been connected with the offence which was evident from the statement of PW-19. He has also argued that PW-11 to PW-13 had proved beyond reasonable doubt that Rekha Devi fled away from the spot and was caught by the villagers and that complaint was made against her by the accused. He has further argued that the factum of compromise having been entered into the deceased and the accused was also proved on record and PW-12 had also proved that Rekha Devi was caught and brought back to the spot and that Harnam Singh was identified by PW-12 in the light of the shop. Thus, according to him, all the circumstances stood proved connecting the accused with the commission of the offence, but the same had been ignored by the learned trial Court with no plausible explanation.

10. Mr. Chauhan further argued that the learned trial Court had erred in concluding that the disclosure statement of accused on the basis of which recovery was effected was not reliable. He also argued that the findings of the learned trial Court to the effect that FSL report and the testimony of doctor (PW-9) did not support the case of the prosecution were contrary to the contents of the same. He also argued that when the presence of accused Rekha Devi and deceased Harnam Singh was proved at the spot at the time of the incident, it was highly impossible for the deceased to have had committed the suicide and this important aspect of the matter has not been appreciated by the learned trial Court. Accordingly, Mr. Chauhan submitted that the findings so arrived at by the learned trial Court be set aside and the accused be convicted for the commission of offence for which they have been charged.

11. Mr. Vikas Rathore, learned counsel for respondent No. 1 and Mr. Virender Singh Rathore, learned counsel for respondent No. 2 have argued that there was no merit in the appeal filed by the State and in fact the learned trial Court on the basis of the material produced before it by the prosecution had correctly concluded that the deceased had committed suicide and that the prosecution had miserably failed to prove its case that the deceased was murdered by the accused. According to the learned counsel for the respondents, there was no eye witness who had seen the commission of the alleged offence. Thus, it being a case of circumstantial evidence, the onus was very high upon the prosecution to have had proved all the links and circumstances connecting the accused with the commission of the alleged offence. In the present case, as the prosecution failed to establish on record by way of circumstantial evidence that the alleged offence had been committed by the accused, therefore, learned trial Court had rightly acquitted the accused of the offence alleged against them. Thus, learned counsel for the respondents submitted that the judgment passed by the learned trial Court warranted no interference and the appeal being without any merit be dismissed.

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

13. In order to substantiate its case, the prosecution examined 23 witnesses.

14. This being a case of circumstantial evidence as there is no eye witness who has seen the deceased being allegedly murdered by the accused, therefore, this Court has to evaluate and adjudicate as to whether by way of circumstantial evidence, the prosecution has been able to link the accused with the commission of offence.

15. 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. Marriage of the deceased with the accused.

2. Acrimony in the matrimonial relations of accused and the deceased.

3. Illicit relationship between accused Rekha Devi and Harnam Singh.

4.Death of deceased and recovery of his dead body.

5. Disclosure statement.

16. 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."

25. 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. 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."

It is settled position of law that suspicion, however strong, cannot take the character of proof.

22. We, therefore, have no hesitation in allowing these appeals and setting aside the conviction and sentence of the two appellants under Section 302 read with Section 34 of the Penal Code. We order accordingly. The appellants are directed to be released from jail forthwith, if not required in any other case."

17. 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

(vii) 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."

18. 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."

> *25. 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. 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."(emphasis supplied)*

18. 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. In our opinion, it is not safe to record a finding of guilt of the appellant and the appellant is entitled to get the benefit of doubt. We, therefore, allow the appeal and set-aside the conviction and sentence of the appellant. The appellant be set at liberty unless required in any other case."

19. 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.

20. We will test all the circumstances vis-à-vis material produced on record regarding each circumstance by the State separately.

1. Marriage of the deceased with the accused:

21. A perusal of the statement made by accused Rekha Devi under Section 313 of the Code of Criminal Procedure makes it evident that the accused was married with deceased Ram Singh in the Month of December, 2004. Thus, this circumstance stands proved that the accused and the deceased were married to each other in December, 2004.

2. Acrimony in the matrimonial relations of accused and the deceased:

22. PW-1 Shamsher Singh in his statement has mentioned in the Court that the accused and the deceased were married in the year 2004. However, they were not having good relations with each other and deceased Ram Singh had also filed a complaint with Pradhan Gram Panchayat and also at Police Post, Fatehpur about two days prior to the incident and a compromise was also arrived at between deceased Ram Singh and accused Rekha Devi.

23. PW-10 HC Satpal has stated that he handed over the complaint of deceased Ram Singh Ex. PW10/A against his wife accused Rekha Devi alongwith compromise deed Ex. PW10/B and summons issued by Incharge, Police Post, Fatehpur Ex. PW10/C, which both deceased and accused Rekha Devi had signed. He has also deposed that complaint Ex. PW10/A was forwarded to him by Pradhan, Gram Panchayat, Jakhara and he (PW-10) summoned both the deceased and accused Rekha Devi to the Police Post on 13.05.2005. On the said date, respectable and responsible persons of the locality also came to the Police Chowki/Police Post and on the persuasion of the respectable persons, dispute between Rekha Devi and deceased were reconciled.

24. Similarly, PW-11 Smt. Prem Kaur, Pradhan Gram Panchayat, Jakhara has deposed that on 07.05.2005, deceased Ram Singh had filed a complaint before her alleging that accused Rekha Devi used to beat him and was not obeying him. It was also stated that even prior to this, the deceased made oral complaints on two occasions. On the written complaint, she visited the house of Ram Singh alongwith Ward Panch and made inquiries. Accused Rekha Devi told her that she does not want to live in the house and she got up from there and left the house. She further stated that she stayed in the house for about 10 minutes, but during the said period, Rekha Devi did not turn up. Then, on the same day, Ram Singh again visited her house alongwith a complaint addressed to SHO and after her endorsement on the same, she referred the same to the police, copy of which was Ex. PW10/A. Police summoned her and some other residents of the village on 15.03.2005, on which date accused Rekha Devi was also present at Police Post, Fatehpur alongwith her father, Pradhan of the Gram Panchayat and uncle of accused Rekha Devi were also accompanying them. Deceased Ram Singh was accompanied by his villagers on the said date. Both of them were made to enter into a compromise.

25. The testimonies of these three witnesses leads to only one conclusion and that is the existence of acrimony in the matrimonial relation of the accused and the deceased.

3. Illicit relationship between accused Rekha Devi and Harnam Singh:

26. According to the prosecution, Ex. PW-10/A and Ex. PW-10/B are the two documents which are pointers towards the factum of there being illicit relationship between accused Rekha Devi and Harnam Singh. The contention of the State is that it was mentioned in the complaint by the deceased *inter alia* that accused Rekha Devi used to leave the house of the deceased and she used to indulge in wrong activities. Similarly, a perusal of agreement/compromise Ex. PW-10/B would demonstrate that the compromise arrived at between the deceased and the accused *inter alia* was to the effect that accused Rekha @ Sharda Devi will not leave her matrimonial house without informing her husband and that in case she does so,

then Ram Singh will have the right to lodge complaint in this regard to his Pradhan. Besides this, no other material has been referred to by the State to establish this circumstance.

27. In our considered view, it cannot be inferred beyond reasonable doubt that there was any illicit relationship between accused Rekha Devi and Harnam Singh on the basis of the complaint Ex. PW-10/A and compromise Ex. PW-10/B. At the most, these two documents demonstrate that there was acrimony in the matrimonial relations between the deceased and the accused, but it cannot be inferred from the contents of these two documents that the reason behind the said acrimony was alleged illicit relationship between accused Rekha Devi and Harnam Singh.

4. Death of deceased and recovery of his dead body:

28. PW-1 Shamsher Singh has stated that on 15.05.2005, it was Sunday and he was in his house and at about 10:30 p.m., he had gone to sleep, when accused Rekha Devi came to his house and informed that her husband had hanged himself. On this, he alongwith his father went to the house of the deceased and saw Ram Singh hanging from the plank of the roof of his house. His nose was bleeding and his tongue had come out from his mouth and his feet were on the floor of the house and his neck tied with a yellow coloured *dupatta.* He has further stated that he found the body of the deceased warm when he touched him and in order to save him, he tried to open the knot of the *dupatta*, but he could not succeed in doing so, therefore, he cut the *dupatta* with the help of a sickle and laid Ram Singh on the bed. Thereafter, he untied the knot of the *dupatta* around his neck. He tried to serve Ram Singh water, however, by that time he was dead. In the meantime, other villagers also reached at the spot and Pradhan Prem Kaur was informed telephonically about the incident, who reached at the spot at around 11:30 p.m. Ward Panch also accompanied her. He further deposed that when said Pradhan reached at the spot, accused Rekha Devi fled away from the spot. However, Jarnail Singh and Nirmal chased her, but they found that accused Rekha Devi had been caught by Khem Raj and they brought Rekha Devi back to the spot. He has further deposed that on the night of incident, Rekha Devi and the deceased alone were present, whereas the mother of the deceased had gone to Beas. He has also deposed that on that day, both of them were present in the house. He has also stated that when he entered the house of the deceased, he saw some scars on the face of the deceased. He also deposed that there were injury marks on the face and neck of the deceased. Police was intimated by the Pradhan, who reached the spot at around 11:35/11:40 p.m.

29. Dr. Raman Sharma has entered the witness box as PW-9. He conducted the post mortem of Ram Singh on 16.05.2005 at around 11:25 a.m. According to him, the cause of death was asphyxia due to strangulation. He has also stated that in his opinion with regard to the ligature mark injury on the neck of the deceased, said injury was ante mortem in nature and the same could have been possible on account of throttling by some person. He also deposed that this injury can also be possible if neck of the person is tied with *dupatta* and throttled with the help of *dupatta*. He also deposed it to be correct that in the report of Chemical Examiner Ex. PA, there was no evidence of any poison or intoxicant in the viscera. He has also admitted that there was no evidence of sign of struggle, scratches, nail marks, fatal injuries or poisoning. He also admitted it to be correct that intoxication which would result from having given or taken alprazolm was not present in the viscera of the deceased. He also admitted it to be correct that in the case of throttling, there should be scratch marks, nail marks and marks of struggle and mark of fatal injuries which were not existing in the present case. Thus, from the evidence of PW-1 and PW-10, it is evident that the dead body of the deceased was found hanging on the fateful night from the *karri* of his house and at that relevant time, the deceased was alone in his house with his wife accused Rekha Devi. Further, according to PW-9, the cause of death was asphyxia and he clearly deposed that there was no injury on the body of the deceased which normally results when a person is strangulated. He also admitted that there was no evidence of any poison or intoxicant in the viscera. Thus, the prosecution has failed to prove beyond reasonable doubt that the death of the deceased was not suicidal but an act of homicide.

5. Disclosure statement:

30. Ex. PW2/A is the copy of disclosure statement made by accused Rekha Devi. This disclosure statement is dated 21.05.2005. The same has been made in the presence of Shri Rattan Singh, Shri Suresh Kumar and Shri Surinder Kumar. The same has also been signed by accused Rekha Devi. It is mentioned in this disclosure statement that the accused had kept a Coca Cola bottle and "*puria*" of newspaper piece in her bed, about which only she knew and that she can have the same recovered. This statement was recorded under Section 27 of the Indian Evidence Act. On the basis of the said statement, recovery was made vide recovery memo Ex. PW-2/C in the presence of witnesses Sh. Rattan Singh, Sh. Suresh Kumar and Sh. Surinder Kumar respectively on 21.05.2005 itself.

31. According to the prosecution, the disclosure statement was made in the presence of S/Sh. Rattan Singh, Suresh Kumar and Surinder Kumar. Out of these three persons, Sh. Suresh Kumar and Sh. Surinder Kumar have not been examined by the prosecution. Sh. Rattan Singh has deposed as PW-2 that in the year 2005, he was Ward Panch of village Jakhara. On 21.05.2005, he alongwith one Suresh went to SHO, Police Station Jawali to ascertain the progress of the present case. He met the SHO where one Surinder was also present. SHO called accused Rekha Devi in his room and she was brought there accompanied by a lady Constable. On interrogation, accused Rekha Devi disclosed the SHO that she has concealed one bottle of Coca Cola and one *puria* in a room of which only she has knowledge. Accordingly, SHO recorded her disclosure statement Ex. PW2/A, which was signed by him as well as Suresh and Surinder. Thereafter, he, Suresh and Surinder were taken by the police in two vehicles to the house of accused Rekha Devi. Accused Rekha Devi led them towards her room and produced one *puria* from gents shoes which were lying beneath the shelf. *Puria* was opened by the SHO, which was fond containing small crystals of cream and white colours. SHO kept the said *puria* in a small plastic box which was thereafter sealed. Thereafter, accused produced one Coca Cola bottle which was lying beneath the Almirah. Police inspected the spot and took the bottle into possession and sealed it. In his cross-examination, he admitted that in the present case, police apprehended some persons who were subsequently released. He also admitted it to be correct that these persons were earlier apprehended and released by the police after interrogating them and they were also beaten up by the police. However, he subsequently stated that he does not know as to whether they were beaten up by the police. He was also confronted with his statement made before the police where as he deposed before the Court was not recorded.

32. We have gone through the contents of the disclosure statement as well as the statement by PW-2. Incidentally, according to the prosecution, this disclosure statement was made by accused Rekha Devi in front of three witnesses. Out of these three witnesses, only one has been produced in the witness box, i.e. PW-2, whereas remaining two witnesses have not been produced. Even the version of PW-2 is not convincing and trustworthy. According to him, on the date when the disclosure statement was made, he went to the Police Station alongwith Suresh to inquire about the progress of the case. There, accused Rekha Devi was called by SHO for interrogation, who during the course of interrogation stated that she wants to make a disclosure statement. The version of PW-2 does not inspire any confidence, especially in view of the fact that two other alleged witnesses to the disclosure statement have not been examined by the prosecution and further the story as put forward by PW-2 does not sounds to be prudent, i.e. he went to the police to inquire about the progress of the case along with Suresh.

33. We are at pains to appreciate as to what was the intent of prosecution in obtaining the said disclosure statement and discovery of Coca Cola bottle and *puria* containing certain tablets etc., because the fact of the matter remains that the post mortem report and the statement of PW-9 do not leave any iota of doubt that the cause of death of deceased is strangulation and he has not died on account of poisoning etc. Thus, this circumstance also does not link the accused with the commission of the alleged crime by them.

34. If we take all these circumstances together, then the only conclusion which can be drawn is this that the prosecution though has been able to establish that there was acrimony in the matrimonial relations between the deceased and the accused, but it has neither been able to establish that there was illicit relationship between accused Rekha Devi and Harnam Singh nor it has established that the deceased did not commit suicide but he was murdered by accused Rekha Devi and Harnam Singh.

35. We reiterate that suspicion no matter howsoever strong cannot be a substitute of proof. In the present case, there is no cogent and reliable proof on record that the petitioners are guilty of offence under Section 302 read with Section 120-B of the Indian Penal Code neither the prosecution has been able to substantiate that any conspiracy was hatched between accused Rekha Devi and Harnam Singh to do away with the deceased. The prosecution has been able to prove that accused Harnam Singh had any motive to kill the deceased, especially keeping in view the fact that the prosecution could not establish illicit relations between accused Rekha Devi and Harnam Singh.

36. In view of what we have stated above, we do not find any infirmity with the judgment which has been passed by the learned trial Court acquitting the accused of the charges levelled against them. It cannot be said that the judgment passed by the learned trial Court is either perverse or that the prosecution had proved its case beyond reasonable doubt against the accused, but the learned trial Court has acquitted them. According to us, the prosecution has not been able to prove its case beyond reasonable doubt. Therefore, the judgment passed by the learned trial Court is up-held by us and the present appeal is accordingly dismissed being devoid any merit.

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

Bharat Bhushan ...Petitioner.

Versus

Himachal Pradesh University and others ...Respondents.

RP No. 59 of 2016
Decided on: 22.06.2016

Code of Civil Procedure, 1908- Section 114 read with Order 47– Order passed in LPA sought to be reviewed by the petitioner- held, that since the order sought to be reviewed was challenged by way of SLP which met dismissal, therefore, the review does not lie at all- even otherwise no material is available in the petition to meet the requirements of law- petition dismissed.

(Para 2 to 4)

For the petitioner: Ms. Jyotsna Rewal Dua, Senior Advocate, with Mr. Kulbhushan Khajuria, Advocate, as legal aid counsel.

For the respondents: Mr. J.L. Bhardwaj, Advocate, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

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

CMP (M) No. 1493 of 2015 & RP No. 59 of 2016

The review petitioner-applicant has sought review of judgment and order, dated 19th May, 2014, made by this Court in LPA No. 210 of 2011, titled as Shri Bharat Bhushan

versus Himachal Pradesh University & others, whereby the appeal filed by the review petitioner-applicant came to be dismissed.

2. It is apt to record herein that the review petitioner-applicant had questioned the said judgment before the Apex Court by the medium of SLP (C) No. 17718 of 2014, which was dismissed vide order, dated 14th November, 2014.

3. In view of the dismissal of the SLP, no review will lie.

4. We have otherwise gone through the review petition and are of the view that no case for condoning the delay or review is made out in terms of the mandate of Section 114 of the Code of Civil Procedure (for short "CPC") read with Order 47 CPC.

5. Having said so, the limitation petition is dismissed. Consequently, the review petition is dismissed as time barred.

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

Himachal Road Transport Corporation and others .....Appellants

Versus

Shri Siri Ram .....Respondent.

LPA No. 92 of 2016
Date of decision: 22nd June, 2016.

Constitution of India, 1950- Article 226- It was found that inadvertently pay was fixed at a higher rate of Rs. 59,845/- and the amount was recoverable from the petitioner - petitioner filed a writ petition- held, that it was not the case of the appellants that petitioner had played any role in fixation of the pay- hence, no recovery can be effected from the petitioner- appeal dismissed.

(Para-3 to 7)

Case referred:
State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc. 2015 AIR SCW 501

For the appellants: Mr. B.N. Sharma, Advocate.
For the respondent: Mr. S.P. Chattey, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment dated 25.6.2015, made by the learned Single Judge of this Court in CWP No. 9550 of 2013, titled *Siri Ram versus Himachal Road Transport Corporation and others,* whereby the writ petition filed by the petitioner came to be allowed, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. It appears that the dispute arose between the employer and the employee after the employee reached the age of superannuation and it was found that inadvertently his pay was fixed at a higher rate and after fixation of pay, Rs.59,845/- were recovered from the petitioner, constraining him to file the writ petition.

3. It is not the case of the appellants/writ respondents herein that the writ petitioner has played any role while fixing his pay.

4. The question is-whether the recovery can be effected from the writ petitioner/respondent herein, after attaining the age of superannuation? The answer is in negative for the following reasons.

5. The apex Court in ***State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc***. reported in ***2015 AIR SCW 501*** has laid down the same principles of law. It is apt to reproduce paras 6, 7, 9,10 and 11 of the said judgment herein.

> *"6.In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.*
>
> *7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.*
>
> *8. ....*
>
> *9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III of the Constitution of India, dealing with "Fundamental Rights". These Articles of the Constitution, besides assuring equality before the law and equal protection of the laws; also disallow, discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice - social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.*
>
> *10. In view of the afore-stated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper,*

and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.

11.....Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in Syed Abdul Qadir's case , that recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation.....”

6. Applying the test, no recovery can be effected from the writ petitioner/respondent herein.

7. There is no illegality in the impugned judgment, the same is accordingly upheld. However, we deem it proper to waive the interest. Ordered accordingly.

8. The appellants/writ respondents are directed to release Rs.59,845/- in favour of the writ petitioner/respondent herein, within eight weeks from today.

9. Viewed thus, the LPA is disposed of, alongwith pending applications, if any.

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

Nikku Ram ....Appellant

Versus

State of H.P. & Other ....Respondents

LPA No.2 of 2016

Judgment Reserved on: 15.06.2016

Date of decision: 22.06.2016

Constitution of India, 1950- Article 226- Petitioner was engaged as salesman/commission agent by respondent No. 4, a Society, on commission basis- it was found on the basis of audit report

that sum of Rs. 56115.60/- was due from petitioner - services of the petitioner were terminated by General House- he filed a representation which was treated as a revision petition and the petitioner was held liable for an amount of Rs. 15,507/-- a direction was issued to deposit the amount within a period of 60 days- an appeal was preferred, which was dismissed- second appeal was filed, which was also dismissed as not maintainable- a writ petition was filed, which was also dismissed by Single Judge- held, that it was specifically pointed out in the audit report that amount of Rs. 56115.60/- is recoverable from the petitioner- conduct of the petitioner for preceding few years was examined- General House took a unanimous decision to terminate the services of the petitioner- 60 persons were present in the meeting of General House- General house has a quorum of 1/3rd or 30 whichever is less, therefore, quorum was also complete - previous secretary was also held liable for depositing some of the amount- second appeal is not maintainable- writ petition was rightly dismissed- appeal dismissed. (Para-15 to 22)

For the Appellant:	Mr.Vivek Singh Thakur, Advocate.
For Respondents No.1 to 3:	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 Respondent No.4:	Mr.Surinder Saklani, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Present Letters Patent Appeal is directed against the judgment dated 1.9.2015 passed by the learned Single Judge of this Court in CWP No.1938 of 2010, whereby the writ petition filed by the petitioner (appellant herein), was dismissed, *(for short 'impugned judgment').*

2. Briefly stated, the facts necessary for adjudication of the case are that on 19.5.1989, the petitioner was engaged as salesman/commission agent by respondent No.4-Society on 50% commission basis. However, in General House of respondent No.4-Society held on 3.6.2001 (Annexure P-1), taking note of the audit report for the year 1999-2000, wherein it was pointed that an amount of Rs.56115.60 paise is due from petitioner Nikku Ram, took a decision to afford one month time to the petitioner for recovery of the aforesaid amount, reserving its right to take legal action against him.

3. In the aforesaid meeting of General House, working of petitioner was also discussed, wherein Members of the House were informed that work and conduct of the official, named above, has not been found satisfactory in the last few years. It was also brought to the notice of the House that the petitioner has not lifted the `Ration' (essential commodities) for the last three months and he misused/mis-appropriated an amount of Rs.56115.60 paise. It was also informed that apart from not lifting essential commodities for last three months, he has also mis-appropriated the mid-day meal of the school children. Accordingly, keeping in view the mis-use/mis-appropriation of an amount of Rs.56115.60 paise, coupled with aforesaid irregularities committed by the petitioner, General House of the respondent No.4-Society took unanimous decision to terminate his services with immediate effect.

4. Petitioner being aggrieved with decision of termination dated 3.6.2001, filed representation before the Secretary Co-operation, to the Government of Himachal Pradesh (respondent No.1), who forwarded the same to the Assistant Registrar, Co-operative Societies, Palampur, District Kangra, (respondent No.3) which was treated as revision petition under Section 94 of the H.P. Co-operative Societies Act, 1968 *(for short, `Act')*.

5. Respondent No.3 after receipt of the representation (Annexure P-2), summoned both the parties and, after perusal of the record made available to him, held that the termination of the petitioner is in public interest.

6. It appears that, during the pendency of the aforesaid revision petition before respondent No.3, competent authority had already initiated surcharge proceedings under Section 69 of the Act (Act No.3 of 1969), on the basis of which, an enquiry under Section 69(1) of the Act was entrusted to one Shri Desh Raj Chaudhary, Inspector, Cooperative Societies, Baijnath, vide Office Order endst.No.Coop-6-14/95(Steno) 2076-80, dated 9.5.2002, to inquire into the alleged mis-appropriation and mis-use of the funds by the present petitioner as well as another person; namely Sansar Chand (Ex-Secretary of the respondent No.4-Society). Competent authority vide order dated 8.6.2004 (Annexure P-3), on the basis of documentary evidence available on record, held the present petitioner liable for recovery of an amount of Rs.15.507/- with further direction to the petitioner as well as other person Shri Sansar Chand to deposit the same within a period of 60 days, failing which Society shall be entitled to recover interest at the rate of 15% alongwith 2% penal interest.

7. Present petitioner being aggrieved with the termination order vide resolution dated 3.6.2001, order dated 21.8.2002 passed by respondent No.3 on the representation and order dated 8.6.2004 passed by respondent No.3 on the revision petition as well as surcharge proceedings under Section 69 of the Act filed an appeal before the Additional Registrar, Cooperative Societies, H.P., Dharamshala (Respondent No.2) which was dismissed by him vide order dated 3.4.2007 (Annexure P-4).

8. Petitioner further made an attempt to assail the order dated 3.4.2007 passed by respondent No.2 before Special Secretary(Cooperation) to the Government of Himachal Pradesh (respondent No.1) by filing second appeal under Section 93(2) of the Act.

9. Respondent No.4-Society contested the appeal preferred by the petitioner before respondent No.1 on the ground of maintainability. Respondent No.4-Society contended that since petitioner has already availed the remedy of appeal provided under Section 93(2) of the Act, no further appeal is maintainable before the Special Secretary(Cooperation) to the Government of Himachal Pradesh.

10. Respondent No.1 vide order dated 20.4.2010 (Annexure P-5) held that since petitioner has already availed remedy of appeal under Sections 93 and 94 of the Act, revision petition is not maintainable before the Government and accordingly dismissed the same.

11. In the aforesaid background, petitioner by way of writ petition approached this Court seeking quashment of order dated 20.4.2010 (Annexure P-5), passed in case No.47/07 by respondent No.1, order dated 3.4.2007, (Annexure P-4) passed by respondent No.2, orders dated 3.6.2001, 21.8.2002 and 8.6.2004 passed by respondent No.3. Petitioner also prayed for direction to the respondents to reinstate him with all consequential benefits by declaring the order of termination bad.

12. Petitioner contended that he was not given an opportunity of being heard by the respondent No.3 before passing order dated 3.6.2001. He also contended that there is nothing on record to suggest that he embezzled the amount in question. Rather, it was the responsibility of Shri Sansar Chand, being Secretary at that point of time, to repay the amount as pointed in the audit report. He also raised issue with regard to non-completion of the quorum on 3.6.2001, where General House decided to terminate the services of the petitioner.

13. However learned Single Judge vide impugned judgment, after hearing the parties as well as perusing the record, dismissed the writ petition preferred by the present appellant. Hence, the present appeal.

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

15. Careful perusal of the impugned judgment clearly establish that each and every point raised by the petitioner in the writ petition has been specifically dealt with by the learned Single Judge and as such, this Court does not see any reason to interfere with the judgment

passed by learned Single Judge. However, this Court, solely with a view to ascertain that the judgment passed by learned Single Judge is based upon correct appreciation of the material available on record, undertook an exercise even in this appeal to examine the entire record to reach just and fair decision.

16. Perusal of the proceedings of the General House i.e. resolution dated 3.6.2001 (Annexure P-1), wherein decision to terminate the services of the petitioner was taken, clearly suggests that an audit report for the year 1999-2000 was placed before the General House of the respondent No.4-Society. It was specifically pointed out that an amount of Rs.56,115.60 paise is recoverable from the petitioner. Apart from above, working of the petitioner for the last few years was also examined/analyzed and irregularities committed by the petitioner in the mid-day meal of the school children was also brought to the notice of the House. Moreover, factum with regard to non-lifting of essential commodities for the last three months by the petitioner also brought to the notice of the House. Accordingly, General House of the respondent No.4-Society, which was admittedly attended by 60 members on the given date, took a unanimous decision to terminate the services of the petitioner. It also emerges from the record that vide resolution dated 26.6.2000, 11.8.2000 and 12.4.2001, petitioner was called upon to file reply to the show cause notices/resolutions, but there is no document available on record from where it can be inferred that the petitioner filed a reply to the aforesaid resolution/notice issued by the respondent No.4-Society. Since, there was no satisfactory reply to the allegations leveled against the petitioner in the General House, as have been referred hereinabove, no fault whatsoever, can be found with the majority decision of the General House of respondent No.4-Society in terminating the services of the petitioner.

17. Petitioner, by way of writ petition, also raised the issue of non-completion of quorum on 3.6.2001. But, as emerges from perusal of Annexure P-1 i.e. proceedings of meeting of General House held on 3.6.2001, it can be seen that 60 persons were present in the meeting. Learned Single Judge, while rejecting the aforesaid objection of the non-completion of quorum, has taken note of bye-law No.23 of the respondent No.4-Society, wherein it is specifically provided that the quorum of General House is 1/3rd or 30, whichever is less. Admittedly, in the present case, as has been mentioned above, 60 Members were present in the meeting and as such, there is no force in the contention raised by the petitioner that the quorum was not complete. Further perusal of the order dated 21.8.2002 i.e. Annexure P-2, leaves no doubt in our mind that respondent No.1, while disposing of revision petition under Section 94 of the Act, has taken note of each and every contention raised by the petitioner. Rather, close scrutiny of order dated 21.8.2002 suggests that petitioner was afforded various opportunities by respondent No.4-Society to lift essential commodities on regular basis and deposit his sale proceeds in the K.C.C. bank, but it appears that petitioner failed to lift the essential commodities quota for the months of February to June, 2001, which compelled the respondent-Society to initiate action against him. Since the petitioner was engaged by the respondent No.4-Society to supply essential commodities by way of Public Distribution System *(for short `PDS')* to the general public, it was duty of the petitioner, being salesman, to ensure that public at large does not suffer for want/requirement of essential commodities. But, in the present case, as emerges from the record, petitioner admittedly failed to lift the quota of essential commodities continuously for three months despite several reminders issued by the Society, hence, action of the respondent No.4-Society, in terminating the services of the petitioner and to appoint new person at his place, cannot be termed to be illegal or unjustified in the present facts and circumstances of the case.

18. Respondent No.3 also dealt with an issue of mis-appropriation of several Special Credit Limit (CCL), K.C.C. Bank, Branch Office, Deol amounting to Rs.17,080.60 paise and mis-utilization of sale proceeds of PDS amounting to Rs.13.932/- and found that due to the negligence of the petitioner, respondent No.4-Society was made to pay higher rate of interest on the Credit Limit to the bank. Rather, it emerges from the order dated 8.6.2004, passed by respondent No.3, in the surcharge proceedings under Section 69 of the Act that the matter was got inquired into by appointing one Shri Desh Raj Chaudhary, Inspector, Co-operative Societies,

Baijnath. Perusal of Annexure R-1/A, annexed with the reply filed by respondent No.4-Society, suggests that the petitioner himself admitted before the Inspector Cooperative Societies, Baijnath that amount of Rs.17,080.60 paise and Rs.13,932/- is recoverable from him as an advance and balance stock at the time of audit. Moreover, record nowhere suggests that petitioner, at any point of time, rendered any explanation/reason for illegally and un-authorisedly using the amount, as has been referred hereinabove.

19. Another submission made by the petitioner that another person; namely; Sansar Chand, Ex-secretary of the respondent No.4 Society, was the actual culprit and he has been falsely implicated, also appears to be baseless and without any reasons because perusal of order dated 8.6.2004, passed by respondent No.3 in the surcharge proceedings under Section 69 of the Act, demonstrates that amount of Rs.17,080.60 paise as advance and mis-utilization of sale proceeds, amounting to Rs.13,932/-, was actually recoverable from the petitioner, who himself admitted the aforesaid irregularities before the Inquiry Officer, appointed by the authorities to inquire into the matter. Accordingly, respondent No.3, while passing order in surcharge proceedings under Section 69 of the Act, has specifically held present petitioner liable for recovery of an amount of Rs.15,507/-. Further, for remaining amount of Rs.24,909/-, a person, namely; Shri Sansar Chand, has been held liable and as such contentions raised by the petitioner that he is being made liable to pay the aforesaid amount for misappropriation of the funds, which have been actually mis-appropriated by aforesaid Sansar Chand, cannot be accepted being contrary to the record.

20. Further perusal of the order dated 3.4.2007 passed by respondent No.2, while hearing the appeal filed by the present petitioner against the order dated 3.6.2001, 21.8.2002 and 8.6.2004, leaves no scope for this Court to differ with the findings returned by the competent authorities as envisaged under the Act, and learned Single Judge of this Hon'ble Court. Rather, careful perusal of the orders, referred hereinabove, suggests that the authorities below, while passing orders at hand, had very meticulously dealt with each and every aspect of the matter. As far as passing of order dated 20.4.2010 by respondent No.1, whereby appeal preferred by the petitioner under Section 93(2) was dismissed on the ground of maintainability is concerned, this Court is of the view that Section 94 of the Act bars the second appeal before the State Government. In this regard Section 94 is reproduced hereinabelow:

> **"94. <u>Review and Revision</u>:**
>
> ***(1) the State Government except in a case in which an appeal is preferred under Section 93 may call for and examine the record of any enquiry or inspection held or made under this Act or any proceedings of the Registrar or of any person subordinate to him or acting on his authority, and may pass thereon such orders as it thinks fit.***
>
> ***(2) The Registrar may at any time:-***
>
> ***(a) review any order passed by himself; or***
>
> ***(b) call for and examine the record of any inquiry or inspection held or made under this Act of the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit".***

21. Bare perusal of the provisions, referred hereinabove, clearly suggest that State Government has no power to entertain an appeal especially where appeal under Section 93 has already been filed by the party concerned. Section 94, as referred hereinabove, only provides for the power of revision to the State Government that too only in those matters which are not

covered by Section 93 of the 1968 Act. Hence order passed by respondent No.1 dated 20.4.2010 appears to be legally correct and cannot be interfered with.

22. Accordingly, in view of the aforesaid discussion and critical examination of the material available on record, we have no hesitation to conclude that orders dated 3.6.2001, 3.4.2007 and 20.4.2010, passed by the competent authorities as envisaged under the Act, are based upon correct appreciation of documentary evidence available on record and same, in no manner, can be termed to be illegal, unjust and arbitrary. Rather, after perusing the material available on record, this Court is compelled to draw an adverse inference against the conduct of petitioner, who admittedly failed to discharge his duties with utmost devotion and honesty and as such decision of the respondents in terminating his services in public interest is liable to be upheld.

23. In view of aforesaid discussion, we do not find any illegality and infirmity in the impugned judgment passed by the learned Single Judge, as such the same is upheld and the appeal is dismissed alongwith pending application, if any.

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

State of H.P. .....Appellant.
Versus
Vinod Kumar and others ....Respondents.

Cr. Appeal No. 470 of 2002.
Reserved on : 23rd May, 2016.
Date of Decision: 22nd June, 2016.

N.D.P.S. Act, 1985- Section 20- Car was intercepted and searched by the police- 3.5 kgs. Charas was recovered from the Car- accused were present in the car- they were tried and acquitted by the trial Court- held, in appeal that testimonies of official witnesses are bereft of intra se contradictions- independent witness had not supported the prosecution version but he had admitted his signature upon the seizure memo- hence, he is estopped from denying its contents in view of Section 91 and 92 of Indian Evidence Act- however, prosecution had failed to connect contraband recovered at the spot with the charas analyzed in the laboratory as malkhana register was not produced before the Court- there was variation in the weight of the case property as recorded in the FIR and as produced before the Magistrate- all these circumstances, create doubt regarding the prosecution version and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para-12 to 18)

For the Appellant: Mr. D.S. Nainta, Additional A.G.
For the Respondents: M/s Paresh Sharma and Surender Sharma, Advocates.

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 Additional Sessions Judge, Solan, District Solan, Himachal Pradesh, rendered on 20.03.2002 in Sessions Trial No. 14-S/7 of 2001, whereby, the latter Court acquitted the accused/respondent of the offences punishable under Section 20-61-85 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the "Act").

2. The facts relevant to decide the instant case are that on 12.01.2001 at about 5.55 a.m., si Brij Mohan along with H.C. Paramljit Singh, No. 79,C. Naresh Kumar, No. 138,C. Paramjit Singh No.345, C. Pankaj Negi No.238 and ASI Prithvi Raj, H.C. Amar Lal No. 62, C.Rajesh Kumar No.145 and C. Kishore Kumar No.237 were present at Parwanoo in connection with Nakabandi and Traffic Checking duty. At that time a maruti car bearing No. DL 6CA-7404 came there from the side of Shimla. On its being stopped by the police, it was found occupied by three persons including the driver. The car was searched by the police. During the course whereof, from beneath the back seat of the car one transparent "lifafa" was recovered which found carrying charas in different shapes. During the course of checking, one person while taking the advantage of the dark fled away from the spot. Thereafter, the charas so recovered was weighed and it was found to be 3 kg and 500 grams. Thereafter, other codal formalities were completed and the accused were 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 were charged by the learned trial Court for theirs committing offence punishable under Section 20-61-85 of the Act. In proof of the prosecution case, the prosecution examined 14 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. However, they did not lead any defence evidence.

5. During the pendency of the instant appeal before this Court, this Court on 7.1.2013 recorded an order directing the Station House Officer of the Police Station concerned to send the entire remaining bulk of contraband to FSL, Junga for its chemical examination thereat. A direction was also rendered upon the SHO concerned to before his thereto sending the bulk of contraband his moving an application under Section 52-A of the Act before the learned Magistrate concerned for issuing a certificate with respect to its identity including the FIR number, date, seal impression on the remaining bulk on the basis of sample-seal besides its weight. He was also enjoined to certify the correctness of the inventory prepared by the Investigating Officer and was also directed to take photographs of the drug/substance in his presence and certify such photographs being true.

6. In compliance with the rendition of this Court of 7.1.2013, the SHO concerned had sent the bulk parcels to the FSL concerned for eliciting an opinion from it qua the bulk of contraband satiating the mandate of this Court comprised in Criminal Appeal No. 259 of 2006, for its hence standing construable to be charas. The FSL concerned purveyed its apposite opinion thereon, opinion whereof stands comprised in Ex. Cx, exhibit whereof exists on the file of Criminal Appeal No. 470 of 2002, opinion whereof is denotative of on its examining the bulk of contraband, its concluding of its holding extract of cannabis and it being a sample of charas. On 12.8.2013 this Court rendered a direction upon the trial Court concerned for recording the depositions of the prosecution witnesses concerned on theirs being re-examined and further cross-examined by the Public Prosecutor concerned and the defence counsel. Also a direction stood rendered to the learned trial Court to on conclusion of re-examination besides further cross-examination of five prosecution witnesses respectively by the Public Prosecutor concerned and the defence counsel concerned, to proceed to record the statements of the accused under Section 313 of the Cr.P.C. The trial Court concerned proceeded to in the manner as directed by this Court record the depositions of five witnesses, also the learned trial Court recorded the statements of the accused under Section 313 of the Cr.P.C. Thereupon the learned trial Court transmitted to this Court the apposite statements of five prosecution witnesses besides the statements of the accused recorded by it under Section 313 Cr.P.C.

7. On 31.03.2016, this Court in pursuance to a decision of a Larger Bench of this Court rendered in State of H.P. Vs. Mehboob Khan, 2013(3) Him. L. R. (FB) 1834 wherein a firm pronouncement stands embedded of resin mixed with other parts of the apposite plant i.e. in crude form being Charas, as the legislature never intended to exclude the weight of the mixture i.e. other parts of the apposite plant in the resin, unless such mixture stands proven to be of some other neutral substance and not that of other parts of cannabis plant besides the amount of resin in the sample in purified or crude form being sufficient to hold of it being charas, especially when the expert expresses an opinion of the entire mass being a sample of Charas, his apposite opinion being both conclusive as well as infallible, hence recorded an order of the report of the FSL, comprised in Ex. Cx being excludable besides unreadable as evidence. In sequel, the order rendered on 16.9.2013 by this Court qua examination of the accused under Section 313 of the Cr.P.C., stood also recalled on 31.3.2016. In aftermath, the report of the FSL concerned comprised in Ex. Cx is unreadable as evidence. However, the report of the expert concerned comprised in Ex.PW14/E is alone readable. There exists a vivid portrayal therein of the sample denoted therein as transmitted for analysis to it being charas.

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

9. 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.

10. 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.

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

12. The depositions of the official witnesses comprised in their respective examinations-in-chief qua effectuation of recovery of charas, Ex.P-2 under memo Ex.PW1/A at the site of occurrence by the Investigating Officer 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, Ex.P-2 under memo Ex.PW1/A by the Investigating Officer at the site of occurrence from the exclusive and conscious possession of the accused are bereft of any intra se contradictions. Consequently, when the respective depositions of the prosecution witnesses when unstained with any vice of any inter se contradictions or any blemish of any intra se contradictions coax an inference from this Court of their respective versions qua effectuation of recovery of charas Ex.P-2 under memo Ex.PW1/A by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused as stand comprised in their respective depositions being both truthful as well as credible. Even when the testimonies of the official witnesses qua effectuation of recovery of charas Ex.P-2 under memo Ex.PW1/A 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, stood recorded prior to the rendition of this Court of 31.03.2016 whereby this Court excluded the reading of the recitals of report comprised in Ex. Cx besides excluded from reading the statements of the accused subsequently recorded under Section 313 of the Cr.P.C., hence, alone constitute readable prosecution evidence in proof of the charge for which the accused stood tried and acquitted by the learned trial Court, depositions whereof when for reasons aforestated, stand

unblemished with any stain of any intra se or inter se contradictions qua effectuation of recovery of charas Ex.P-2 under memo Ex.PW1/A by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused 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-1 Shri Kamal Kumar, 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-1, 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 unbesmirched testimonies of official witnesses appears to have overlooked the factum of with PW-1 admitting his signatures on the apposite memos Ex.PW1/A and Ex.PW1/B 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 by 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 singatures, 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 the learned trial Court to conclude of the recorded recitals borne on Ex.PW1/A and Ex.PW1/B holding 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 Ex.P-2 under recovery memo Ex.PW1/A 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."

13. Be that as it may, the prosecution was enjoined with a solemn duty to connect charas Ex.P-2 weighing 3kg and 500 grams with both the opinion rendered by the laboratory concerned comprised in Ex.PW14/E besides was also enjoined to prove the contraband produced in Court with its recovery standing effectuated by the investigating officer at the site of occurrence from the purported exclusive and conscious possession of the accused under memo comprised in Ex.PW1/A. The connectivity or the apposite link for sustaining the factum of the opinion comprised in Ex.PW14/E as stands recorded therein by the laboratory concerned being relatable to its recovery under Ex.PW1/A by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused would emerge only on the Investigating Officer adducing before the learned trial Court the relevant abstract of the Malkhana Register magnifying the factum of its under signatured recitals borne thereon standing deposited in the apposite Malkhana by the In-Charge of the Malkhana concerned. However, the aforesaid evidence remains unadduced by the prosecution. The effect of the best evidence aforesaid in portrayal of charas Ex.P-2 recovered under memo Ex.PW1/A by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused being linkable to the opinion recorded qua it by the laboratory concerned comprised in Ex.PW14/E remaining unadduced is of its de-establishing the preeminent prime factum of the opinion recorded by the laboratory concerned comprised in Ex.PW14/E holding any formadibility for this Court to conclude of its standing rendered by the laboratory concerned qua charas Ex.P-2 recovered under memo Ex.PW1/A by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused. In sequel, the opinion of the laboratory concerned comprised in Ex.PW14/E is unreadable qua Ex.P-2 which stood recovered under recovery memo Ex.PW1/A by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused. As an apt sequitur, it is to be held of the opinion of the laboratory concerned comprised in Ex.PW14/E not holding any efficacy for this Court to conclude thereupon of it being sufficient to conclude thereupon of the accused at the relevant time holding conscious and exclusive possession of charas Ex.P-2 recovery whereof by the Investigating Officer at the site of occurrence from their purported exclusive and conscious possession stood effectuated under memo Ex.PW1/A.

14. Furthermore, the prosecution was also enjoined to adduce potent evidence displaying the factum of the item of contraband as stood produced in Court by the Public Prosecutor concerned for its being shown to the prosecution witnesses concerned being analogous to the item of contraband as purportedly stood recovered from the purported exclusive and conscious possession of the accused at the site of occurrence by the Investigating Officer. The best evidence in display thereto stood embedded in adduction by the Public Prosecutor concerned at the time contemporaneous to its production by him before the learned trial Court for its being shown to the prosecution witnesses concerned, of the apposite abstract of the Malkhana Register with its evincing of the relevant item of contraband under signatured recitals

standing retrieved from the apposite Malkhana by the In-Charge of the Malkhana concerned whereupon it stood transmitted by him to the Public Prosecutor concerned through an authorised official concerned for facilitating the former to show it to the prosecution witnesses concerned while holding them to examinations-in-chief. However, the aforesaid best evidence remains unadduced. Furthermore, even at the time of production of the relevant item of contraband by the Public Prosecutor before the learned trial Court for its being shown to the prosecution witnesses concerned at the time of their depositions standing recorded by the learned trial Court, there is no articulation therebefore by him of his receiving the relevant item of contraband from an authorized official, who had received it from the In-charge of the Malkahana concerned after the latter had retrieved it from the apposite Malkhana under apposite signatured entries recorded in the apposite register in display of its standing retrieved therefrom by him on each occasion it stood transmitted by him through an authorized official to the Public Prosecutor concerned for its being shown to the prosecution witnesses concerned during the course of the recording of their depositions before the learned trial Court. The omission of the aforesaid communications forestalls an inference of the prosecution adducing cogent proof in display of the item of contraband as stood produced in Court by the Public Prosecutor concerned for its standing shown to the prosecution witnesses concerned at the time of the recording of their depositions before the learned trial Court standing accentuatedly linked or connected with the effectuation of recovery of charas Ex.P-2 under memo Ex.PW1/A by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused. In aftermath, it can hence be invincibly concluded of the relevant item of contraband as stood produced before the learned trial Court by the learned Public Prosecutor concerned for its being shown to the prosecution witnesses concerned at the apposite stage of the recording of their depositions thereat whereupon they voiced of its being the item of contraband which stood recovered by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused not holding any congruity with the effectuation of recovery of charas Ex.P-2 by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused under memo Ex.PW1/A. Contrarily, it has to be concluded of the aforesaid lack of proof for linking Ex.P-2 with the item of contraband as stood produced by the Public Prosecutor concerned before the learned trial Court renders the contraband qua which the official witnesses recorded their depositions before the learned trial court of it being the very same contraband which stood recovered at the site of occurrence by the Investigating Officer from the purported exclusive and conscious possession of the accused at the site of occurrence not holding any evidentiary clout for this Court to conclude of its constituting conclusive proof qua the relevant item of contraband standing recovered by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused under memo Ex.PW1/A.

15. Be that as it may, this Court in its previous renditions has consistently held the view of the omissions aforesaid by the prosecution sapping the vigour of the prosecution case. However, the learned Additional Advocate General has contended of with the seals borne on the case property, at the time contemporaneous to its production before the learned trial Court by the Public Prosecutor concerned for its being shown to the prosecution witnesses concerned at the time of their depositions standing recorded by it, remaining intact renders insignificant besides minimizes the legal impact, if any, of the omissions aforesaid by the prosecution. He also contends of hence the effect, if any, of the omissions aforesaid standing undermined. However, the mere factum of the seals borne on the case property at the time of its production in Court by the Public Prosecutor concerned for its being shown to the prosecution witnesses concerned at the time of their depositions standing recorded by it would not sway from this Court a conclusion of hence the Investigating Officer or any police official concerned of the Police Station concerned standing precluded to tamper with the case property besides holding no latitude by ingenuous contrivances deployed by him to insert even in the sealed parcel by breaking the seals existing on the parcel(s), some contraband unlike and dissimilar to the one which stood recovered at the site of occurrence by the Investigating Officer from the purported exclusive and conscious possession

of the accused nor would it baulk the Investigating Officer concerned or any police official concerned of the Police Station concerned to after breaking the seals existing on the parcel(s) successfully insert therein contraband unlike the one or in addition to or in reduction to the weight borne by it at the stage contemporaneous to its recovery at the site of occurrence by the Investigating Officer from the purported exclusive and conscious possession of the accused whereafter the factum of his with facile grace resealing the parcels with the very same seals as borne thereon at the time contemporaneous to the effectuation of its recovery at the site of occurrence by the Investigating Officer from the purported exclusive and conscious possession of the accused, cannot stand obviously negated especially when the apposite seals always remain in the Police Station concerned. In sequel, when given the easy availability of apposite seals in the police station concerned would facilitate the Investigating Officer concerned to at any stage make use of it, hence, when the aforesaid possibility remains alive to be accomplished by the Investigating Officer concerned or by any other police official concerned of the Police Station concerned rather when hereat, it has palpably assumed a realistic form connoted by the factum of a display standing manifested in Ex.PW15/B, the apposite certificate prepared by the Magistrate concerned under Section 52-A of the NDPS Act in compliance to the renditions of this Court of there occurring a variance besides a stark discordance inter se the weight qua the bulk of contraband standing disclosed in the FIR to be 3 kgs, 500 grams vis-a-vis its standing drastically reduced to 2 kgs, 530 grams at the time of the Magistrate concerned weighing it also when the Magistrate concerned on weighing the sample parcels has unraveled in Ex.PW15/B of his on weighing it, detecting it to weigh 75 grams whereas its weight stands denoted in the apposite record maintained by the Investigating Officer to be 50 grams. Consequently, when the weight of the sample parcel when hence has increased from 50 grams it bore at the time of its standing separated from the mass or bulk by the Investigating Officer at the site of occurrence to 75 grams at the time of the Magistrate concerned weighing it, besides when the weight of the bulk stands reduced to 2 Kgs, 530 grams from 3 Kgs, 500 grams it initially bore as underscored in the FIR, constrain an inference of the aforesaid omissions made by the prosecution whereupon this Court has concluded of the omissions aforesaid de-establishing the factum of effectuation of recovery of contraband at the site of occurrence by the Investigating Officer from the purported exclusive and conscious possession of the accused standing not emphatically linked to the opinion purportedly recorded thereon by the laboratory concerned comprised in Ex.PW14/E besides detaching and delinking it from the item of contraband produced in Court by the Public Prosecutor concerned for its being shown to the prosecution witnesses concerned, omissions whereof when read in entwinement with the manifestations in Ex.PW15/B also give leeway to an inference of the item of contraband as sent to the laboratory concerned besides the item of contraband produced in Court by the Public Prosecutor concerned standing tampered with. In aftermath, for reiteration, with reflections in Ex.PW15/B fortifying the inference recorded by this Court of omissions of the prosecution qua the facets aforesaid standing engendered by proactive tamperings by the police official concerned of the Police Station concerned with charas Ex.P-2 recovered under memo Ex.PW1/A at the site of occurrence by the Investigating Officer from the purported exclusive and conscious possession of the accused, obviously with discrepant and infirm evidence standing adduced by the prosecution in display of the report of the laboratory concerned comprised in Ex.PW14/E being relatable to the effectuation of recovery of charas Ex.P-2, by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused under memo Ex.PW1/A besides adduction of emaciated evidence by it for linking the item of contraband produced before the learned trial Court by the Public Prosecutor concerned for its being shown to the prosecution witnesses with the relevant item of contraband comprised in Ex.P-2, recovery whereof stood purportedly effectuated by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused constrains this Court to hold with aplomb of the prosecution failing to prove the charge against the accused beyond all reasonable doubts. Hence, they are held entitled to the benefit of doubt.

16. 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.

Versus

Sunder Singh ... Respondent.

Cr. Appeal No 263 of 2009.
Reserved on 31.5.2016.
Decided on: 22.6.2016.

N.D.P.S. Act, 1985- Section 20- Police had set up a nakka- driver of the vehicle stopped the vehicle at some distance on seeing the police and tried to run away- he was apprehended- search of the vehicle was conducted during which 4.5 kg. charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that it was a case of chance recovery- police had no prior information- accused was apprehended when he had tried to run away on seeing the police- mere suspicion even if it is a positive suspicion cannot be equated with reason to believe or prior information- trial Court had wrongly held that police was required to comply with Sections 41, 42 and 50 of N.D.P.S. Act- however, testimonies of the prosecution witnesses were contradictory- defence version was probable- independent witnesses were not associated despite availability – trial Court had taken a reasonable view– appeal dismissed. (Para-16 to 29)

Cases referred:

Ms. Shriki Ravit Vs. State of H.P., 2002(2) Shim. L.C. 276
Mohinder Kumar Vs. State, Panaji, Goa, (1998) 8 Supreme Court Cases 655.
Ms. Shriki Ravit Vs. State of H.P., 2002(2) Shim. L.C. 276
State of Himachal Pradesh Vs. Sunil Kumar, (2014) 4 Supreme Court Cases 780
Union of India Vs. Major Singh and other, (2006) 9 Supreme Court Cases 170

For the appellant. : Mr. V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, Dy. Advocate General.
For respondent. : Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

The present appeal has been filed by the State against judgment dated 15.10.2008 passed by the Court of learned Special Judge, Kullu in Sessions Trial No. 7 of 2008, vide which the learned Trial Court has acquitted the accused for the commission of offence under Section 20 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (in short the 'Act').

2. In brief, the case of the prosecution was that ASI Jagat Singh along with HC Purshotam Lal, HC Hira Singh, Constable Sohan Singh and Constable Bhader Singh were on patrolling and 'Naka' duty at Sumo Ropa, District Kullu. On 14.11.2007, at around 2:30 a.m., a vehicle was coming from Manikaran towards Bhuntar. When driver of the said vehicle saw police party, he stopped the same at some distance of the 'Naka' and tried to run away. On suspicion, he was overpowered by the police party. On enquiry, he disclosed his name as Sunder Singh.

Constable Bhader Singh was sent in search of local witnesses. A bag was recovered from the front seat of said vehicle. As no local person was found, accordingly, HC Purshotam Lal and Constable Bhader Singh were associated and on search 4Kg 500 grams charas was recovered from the said bag. Besides this, a money belt, one passport, identity card, digital camera, ATM card and a scale was also found in the said bag. Samples were taken from the recovered charas and these samples as well as bulk charas were sealed. Rukka was sent to Police Station through HC Hira Singh for registration of the case. Thereafter, investigation was carried in the matter and on receipt of Chemical Examiner, challan was put up in the Court. Charge was framed against the accused under Section 20 of the NDPS Act and accused pleaded not guilty and claimed trial.

3. In order to substantiate its case, prosecution, in all, examined eight witnesses. Whereas, accused has also examined one witness in defence.

4. PW1, Purshotam Ram, has corroborated the story of prosecution. He has deposed that driver of the vehicle bearing registration No. HP-34A-3672 disclosed his name as Sunder Singh son of Hukam Singh. He further deposed that one bag was found lying in front of the seat by the side of the driver and he could not give any satisfactory reply about the bag. There being a suspicion that the bag may be containing some contraband, constable Bhader Singh was sent in search of local witnesses. He also deposed that interception was done on the road which was isolated place and Bhader Singh came after about 25 minutes and told that he knocked one or two doors but due to cold and odd hours nobody came out. In these circumstances, Investigating Officer, ASI Jagat Singh, associated him i.e. PW1 and Constable Bhader Singh, as witnesses in the process of search. He (PW1) personally searched accused Sunder Singh vide memo Ext. PW1/A. Thereafter, bag was searched and in the central pocket of the bag, 20 packets of charas along with 'Batinuma' charas were found wrapped with polythene. As per him, in the bag there were two wrapping papers, one cello tape and in the third pocket there was a money belt of cloth, which was of cozy colour and inside there was a passport, one ATM and one identity card and 15 photographs. Digital camera, scale and 4 Euros in the denomination of 50 each were also found in the said bag. The recovered charas was weighed with electronic scale and on weighing the same, it was found to be 4 Kg 500 grams. Two samples of 25 grams each were taken and thereafter the same was wrapped in polythene and put in cloth and was sealed with 4 impressions of seal 'T'. Remaining charas along with other articles were put in the same bag and sealed with seal impression 'T'. Thereafter, the sample charas, remaining charas and vehicle along with RC, driving licence were taken into possession, vide recovery memo Ext. PW1/B. This witness was declared as a hostile.

5. PW2, Manoj Kumari, has also corroborated the story of prosecution. She has deposed that on 14.11.2007 Inspector SHO Partap Singh deposited three sealed parcels, out of which one parcel was having eight impressions of seal along with two sealed parcels containing four seals impressions. All parcels were sealed with seal 'T' and 'C' having four impressions each. Along with case property, sample seals of 'T' and 'C', NCB forms in triplicate and photocopy of seizure memo and other documents of case FIR No. 659 were deposited. To this effect, she made entry of case property received by her in Malkhana Register at Sr. No. 314 dated 14.11.2007 and on the same day, she handed over one parcel along with sample seals of T and C, NCB form in triplicate along with other documents to LHC Sunil Kumar vide RC No. 306 of 2007 for depositing the same in FSL, Junga, which was deposited by him on 15.11.2007 and receipt of the same was handed over to her.

6. PW3, Nirat Singh, deposed that he was posted as Reader to Dy. SP Kullu and on 14.11.2007 ASI Jagat Singh gave special report in case FIR No. 659 to Hardesh Kumar, Addl. SP at 6 O'clock, who made an endorsement on the report and handed over the same to him. He made entry in the Special Report Register at Sr. No. 32 on the same day.

7. PW4, Constable Mehar Chand, deposed that he was posted at PP Jari and brought original Rapat Rojnamcha from 5.7.2007 to 5.10.2007. PW5, Inspector SHO Partap Singh, deposed that on 14.11.2007 at 7:05 a.m. in the morning, case was registered on receipt of

Rukka and FIR Ext. PW5/A was registered at the police station. He also made endorsement on the Rukka, Ext. PW5/B. On the same day at 10:30 a.m ASI Jagat Singh produced case property which was one big parcel and two small parcels, (the bigger parcel was sealed with seal impression T with eight impressions and small parcel with four seals each of impression T), NCB forms and the accused. He resealed the bigger parcel with eight seals of impression C and small parcel with four impressions of C. He also filled concerned columns of the NCB form. He also took sample seals Ext. PW5/B and issued certificate Ext. PW5/E and handed the case property along with NCB form in triplicate to MHC Manoj Kumari and accused was put in custody.

8. PW6, Constable Hira Singh, has, *inter alia*, deposed that on 14.11.2007 he along with other persons was on petrol duty at Suma Ropa Jungle. At 2:30 a.m. one vehicle came from Manikaran and on noticing police party, the driver stopped the vehicle at some distance and tried to run away. He was overpowered by ASI and his whereabouts were enquired. He disclosed his name as Sunder Singh. The registration number of the vehicle was read in torch light to be HP 34-A-3672. He could not give any satisfactory reply regarding his travelling in the late night. One bag was kept in front seat of the vehicle and he could not give any satisfactory reply regarding the bag. On suspicion, PW-Bhader Singh was sent to bring local independent witness but after some time he retuned and told that no independent witness was available. Thereafter, ASI gave his personal search to accused in front of witness vide Ext. PW1/A which was signed by him. Bag kept in the vehicle was searched and there were 20 plastic bags, cello tape, wrapping paper and 'Battinuma' charas were recovered from it.

9. PW7, ASI Jagat Singh, has also deposed to this effect only. He mentioned that he took search of the vehicle and checked the bag which was in the vehicle.

10. PW8, LHC Sunil Kumar, has deposed that he was posted in Police Station, Sadar Kullu. On 14.11.2007, MHC PS Sadar handed over to him parcel of charas along with documents and RC, vide Ext. PW2/B and he deposited the same at FSL, Junga and handed over the receipt to MHC vide Ext. PW2/C. The case property remained intact in his custody.

11. Defence has examined one Chander Pal as DW1. He has deposed that in the year 2007 he was Vice President of Gram Panchayat, Kasol. On 13.11.2007 he had gone to his in-laws house at village Meteura. While he was coming back approximately at 12:00 at night, one Parshotam of Jari Police Chowki met him on the road, outside the Police Chowki and told him that they want lift in his vehicle. They were 4-5 persons including Thanedar. After some time they reached Sanjha Chulha and asked him to park his vehicle and told him that they had received some complaint and want to go on checking and asked him to accompany them. They went to the house of Sundar Singh where said Sunder Singh was sleeping and he was woken up. They reached his house at about 12:30 at night. Thereafter, brother of accused was called telephonically and house of accused was searched. Nothing was found from his house. Thereafter, his shops were searched but nothing was found in the shops. A document was prepared in which his signatures were obtained that nothing was recovered. Besides him, Shyam Singh and one police person signed the document. Thereafter, police said that they had definite information about the possession of contraband. There was a knokha below the shop of the accused. They made enquiries about the khokha and accused stated that khokha belongs to Nepali who comes off and on. Police party broke the lock and recovered one bag which was black in colour and on checking, recovered 'Batinuma' charas from the said bag. Thereafter, police talked with their superiors and then SHO and one more person went to the house of accused and brought some documents, camera from there. There was one vehicle standing in front of the house of accused and on inquiry, accused told them that the vehicle belongs to his friend Chuni Lal and said Chuni Lal keeps the key of the vehicle in his shop.Police asked him to accompany them to Kullu for enquiry and told him to drive the vehicle and they went to Kullu and he get back to his house.

12. On the basis of material produced on record by the prosecution, the learned Trial Court came to the conclusion that the prosecution had failed to prove compliance of provisions of

Section 42(1) and 42(2) and Section 50 of the NDPS Act and further in the opinion of the learned Trial Court the version put forth by the defence was probable and accordingly the learned Trial Court gave benefit of doubt in favour of the accused and acquitted him.

13. Mr. V.S. Chauhan, learned Addl. Advocate General has argued that the judgment of acquittal passed by the learned Trial Court was perverse and, in fact, the learned Trial Court had erred in acquitting the accused for commission of offence under Section 20 of the NDPS Act. He further argued that learned Trial Court had discarded the testimony of prosecution witnesses on account of untenable reasons and in the absence of any proof of enmity, no reason whatsoever has been assigned by the learned Trial Court for discarding the version of the official witnesses. According to him, the learned Trial Court wrongly held that there was no compliance of provisions of Section 42(1), 42(2) and Section 50 of the NDPS Act, in fact, according to him, the learned Trial Court erred in not appreciating that in the facts of the present case, the provisions of Section 42(1), 42(2) and 50 of the NDPS Act were not attracted at the time of interception of the vehicle. There was no prior information regarding charas being kept in the vehicle and it was a case of chance recovery. The learned Trial Court has miserably failed to appreciate this very important aspect of the matter, therefore also, according to him, the judgment passed by the learned Trial Court was perverse and liable to be set aside. He further argued that the learned Trial Court erred in coming to the conclusion that before searching the vehicle, the Investigating Officer ought to have given option to the accused as required under Section 50 of the NDPS Act. As per him, the learned Trial Court ignored the fact that it was not a case of personal search of the accused. He further submitted that the learned Trial Court had also erred in placing implicit reliance on the version of accused that, in fact, the charas was recovered from khokha near the house of accused. According to him, the so-called version of accused was totally uncorroborated and was not substantiated by any material produced on record by the defence. According to him, in the absence of a case of animosity or enmity put fourth by the accused, there was no occasion for the police to have planted a case under the NDPS Act against the accused and that too with such a heavy quantity of charas. Learned Additional Advocate General further argued that the learned Trail Court had erred in not appreciating that there were minor contradictions in the testimony of police witnesses and it was satisfactorily explained by the prosecution as to why no independent witness was associated by the police. He further, submitted that learned Trial Court ignored the cogent and trustworthy evidence of the prosecution witnesses and acquitted the accused by relying upon minor trifle contradictions which, in fact, had no bearing as far as the veracity of the case of the prosecution was concerned. Therefore, he submitted that the judgment under challenge was liable to be set aside and the accused deserved to be convicted for the charge alleged him.

14. Mr. Anand Sharma learned counsel for the respondent on the other hand submitted that the appeal filed by the State had no merit in it at all. According to him, there was neither any perversity nor any other defect in the judgment passed by the learned Trial Court vide which it had acquitted the accused by giving him benefit of doubt. Mr. Sharma strenuously argued that the learned Trial Court had rightly come to the conclusion that the prosecution had failed to prove its case against the accused beyond reasonable doubt. According to him, the entire case against the accused was a concocted version which story had been cooked up just to frame the accused. The accused had not been nabbed while running from the car as alleged by the prosecution and he, in fact, was taken from his house in a totally illegal manner by the prosecution. Mr. Sharma further argued that the contradictions in the testimony of police witnesses were glaring. According to him, there was no cogent and satisfactory explanation coming fourth from the prosecution as to why no independent witness was associated with the search and seizure by the police. According to him, the reason as to why no independent witness was associated was that the story put fourth by the prosecution was a false story and the events had not been taken in the manner in which they have been narrated by the prosecution.

15. We have heard learned counsel for the parties and also gone through the records of the case minutely. We have also perused the judgment passed by the learned Trial Court.

16. The learned Trial Court has held that in the present case the mandatory provisions of Section 41(1), 42(2) and 50 of the NDPS Act were required to be complied with. The learned Trial Court has held that on account of the non-compliance of the said mandatory provisions, the trial stands vitiated. In this regard, the learned Trial Court has placed reliance upon the judgment passed by this Court in **Ms. Shriki Ravit** Vs. **State of H.P**., 2002(2) Shim. L.C. 276 and the judgment of Hon'ble Supreme Court in **Mohinder Kumar** Vs. **State, Panaji, Goa**, (1998) 8 Supreme Court Cases 655.

17. We are afraid that the conclusions arrived at by the learned Trial Court in this regard are not sustainable in law. It is not the case of the prosecution that they had any prior information that the vehicle in which the accused was travelling was carrying some contraband. The case of the prosecution is that policy party had laid a Naka and the car being driven by accused came from Manikaran side and when the driver of the car saw the Naka, he stopped the car and tried to run away. The driver was apprehended by the police party. A bag was found lying inside the car and on search of the said bag revealed that it was containing charas. Thus, it is evident that this is a case of chance recovery. The Hon'ble Supreme Court in **Mohinder Kumar** Vs. **State, Panaji, Goa**, (1998) 8 Supreme Court Cases 655 was dealing with a matter where police party alighted from the vehicle and reached the house and noticed two persons sitting in the verandah of that house and as soon as they saw the policy party, they hurriedly entered the house. This aroused the suspicion of the Sub-Inspector whereupon he and policy party went to the house and directed the two accused persons to stay where they were and asked the Head Constable to alert the others and to arrange for Panchas. On the arrival of the Panchas, he and his companions entered the house and questioned the accused persons. He saw a white plastic bag lying by the side of the accused and on search he found that the bag contained two polythene packets of charas like substance. It was in these facts that the Hon'ble Supreme Court has held as under: -

> "*3. In the instant case, the facts show that he accidentally reached the house while on patrolling duty and had it not been for the conduct of the accused persons in trying to run into the house on seeing the policy party he would perhaps not have had occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion he went there and effected the search, seizure and arrest. It was, therefore, not on any prior information but he purely accidentally stumbled upon the offending articles and not being the empowered person, on coming to know about the accused persons being in custody of the offending articles, he sent for the panchas and on their arrival drew up the panchnama. In the circumstances, from the stage he had reason to believe that the accused persons were in custody of narcotic drugs and sent for panchas, he was under an obligation to proceed further in the matter in accordance with the provisions of the Act. Under Section 42(1) proviso, if the search is carried out between sunset and sunrise, he must record the grounds of his belief. Admittedly, he did not record the grounds of his belief at any stage of the investigation subsequent to his realizing that the accused persons were in possession of charas. He also did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the Act because he had not made any record under the proviso to Section 42(1). He also did not adhere to the provisions of Section 50 of the Act in that he did not inform the person to be searched that if he would like to be taken to a Gazetted Officer or a Magistrate, a requirement which has been held to be mandatory. In Balbir Singh case, it has been further stated that the provisions of Sections 52 and 57 of the Act, which deal with the steps to be taken by the officer after making arrest or seizure are mandatory in character. In that view of the matter, the learned counsel for the State was not able to show for want of material on record, that the mandatory requirements pointed out above had been adhered to. The accused is, therefore, entitled to be acquitted.*"

18. In our considered view, the facts of the present case are entirely different from the one which the Hon'ble Supreme Court was dealing with in the abovementioned case. Therefore, the learned Trial Court has erred in relying upon the said judgment while coming to the conclusion that there was violation of the mandatory provisions of Section 42(1), 42(2) and 50 of the NDPS Act.

19. In the present case, the judgment of this Court in **Ms. Shriki Ravit** Vs. **State of H.P**., 2002(2) Shim. L.C. 276, is also no more good law in view of the subsequent judgments of the Hon'ble Supreme Court. In **State of Himachal Pradesh** Vs. **Sunil Kumar**, (2014) 4 Supreme Court Cases 780, the Hon'ble Supreme Court has held as under:-

> "18. It is true that Sunil Kumar behaved in a suspicious manner which resulted in his personal search being conducted after he disembarked from the bus. However, there is no evidence to suggest that before he was asked to alight from the bus, the police officers were aware that he was carrying a narcotic drug, even though the Chamba area may be one where such drugs are easily available. At best, it could be said that the police officers suspected Sunil Kumar of carrying drugs and nothing more. Mere suspicion, even if it is 'positive suspicion' or grave suspicion cannot be equated with 'reason to believe'. These are two completely different concepts. It is this positive suspicion, and not any reason to believe, that led to the chance recovery of charas from the person of Sunil Kumar.
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> 19. Similarly, the positive suspicion entertained by the police officers cannot be equated with prior information. The procedure to be followed when there is prior information of the carrying of contraband drugs is laid down in the Act and it is nobody's case that that procedure was followed, let alone contemplated.
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> 20. We are not in agreement with the view of the High Court that since the police officers had a positive suspicion that Sunil Kumar was carrying some contraband, therefore, it could be said or assumed that they had reason to believe or prior information that he was carrying charas or some other narcotic substance and so, before his personal or body search was conducted, the provisions of Section 50 of the Act ought to have been complied with. The recovery of charas on the body or personal search of Sunil Kumar was clearly a chance recovery and, in view of Baldev Singh, it was not necessary for the police officers to comply with the provisions of Section 50 of the Act."

20. The Hon'ble Supreme Court in **Union of India** Vs. **Major Singh and other**, (2006) 9 Supreme Court Cases 170, has held as under:-

> "3. The High Court has recorded the acquittal on two counts; firstly, the provisions of Section 50 of the Act and secondly, under Section 42(2) of the Act have not been complied with. So far as Section 50 of the Act is concerned, in the present case, the same shall have no application as the search and seizure was made from a truck and not from the person of any of the accused persons. This question has been examined by a three-Judge Bench of this Court in State of H.P. v. Pawan Kumar in which it has been categorically laid down that search of a bag, briefcase or any such article or container which is being carried by a person is not search of a person, as such the provisions of Section 50 of the Act would not apply in case search and seizure is not made from the person of the accused. In the present case, as the search and seizure have not been made from the person of the accused but from the truck, the provisions of Section 50 of the Act shall have no application.
>
> 4. Turning now to Section 42(2) of the Act, in this regard, it may be stated that from the prosecution case and evidence it would be clear that the search and seizure was made of a public carrier at a public place and 127 bags of poppy straw (opium) were seized from a public carrier. This point is also concluded by a

judgment of this Court in State of Haryana v. Jarnail Singh in which it has been categorically laid down that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 for searching the vehicle between sunset and sunrise. In the case in hand the search was made of a public conveyance at a public place between sunrise and sunset. Therefore, the provisions of Section 42(2) of the Act shall have no application to the case. This being the position, the High Court was not justified in acquitting the respondents and the trial court was quite justified in convicting them."

21. In view of the above, in our considered view, the findings returned by the learned Trial Court to the effect that trial stood vitiated for non-compliance of provisions of 42(1), 42(2) and 50 of the NDPS Act are not sustainable in law.

22. Now we will deal with the other aspects of the matter.

23. Perusal of statement made by the accused under Section 313 Cr.P.C. reveals that, his stand therein was that, he never met police along with vehicle No. HP34A-3672 at Sumo Ropa Jungle at 2:30 a.m. on the night of 14.11.2007. According to him, it was on the intervening night of 13.11.2007 and 14.11.2007 at around 12:15 a.m. when police came to his house along with Chander Pal and searched his house and shops. As nothing incriminating was found there, they searched one khokha adjoining to his shop which was situated on Government land, from where they recovered one bag which was containing charas. Thereafter, police brought digital camera, ATM card, photographs, passport etc. from his house and falsely implicated him in the case. DW1, Chander Pal, has corroborated the version of accused by entering into the witness-box. His cross-examination reveals that the truthfulness of this witness has not been impinged by the prosecution. His statement seems to be cogent and trustworthy.

24. As per the prosecution, after accused-Sunder Singh was apprehended and on search 4 Kg 500 grams charas was recovered from the bag, they took search of the house of accused but nothing incriminating was recovered from there and thereafter PW7 along with accused and case property came to Police Station Kullu. On the other hand, as we have discussed above, the defence of the accused was that the entire story put forth by the prosecution is a concocted one. In fact, police party first searched the house of the accused, as it was having prior information about contraband and thereafter the shops of the accused were searched. When nothing incriminating was found either in the house or the shops, they break open the lock of an abandoned khokha owned by one Nepali or the charas was recovered there. In order to substantiate this contention, the accused has relied upon the testimony of DW1, who also happens to be the Vice President of Gram Panchayat, Kasol. Ext.DA is the copy of recovery memo, the same has been signed by DW-Chander Pal, as a witness. Therefore, his presence at the time of preparation of Ext. DA is not in dispute. Incidentally, Ext. DA was not appended with challan by the prosecution, though it was their case that house of accused was searched by them and nothing incriminating was found in the house of the accused. A perusal of Ext. DA demonstrates that, it is not mentioned therein that before carrying search of the house of accused, they had already apprehended the accused and charas already stood recovered from the bag which he was carrying in his house and it was thereafter that the police was carrying out search of the house of accused. In our considered view, this gives credence to the defence of the accused that, in fact, the police officials took lift in DW-1's vehicle, as they were having prior information that some incriminating substance was in the house of accused and thereafter they searched the house and shops of the accused, where nothing incriminating was found and after that, one khokha which is constructed on the Government land situated close to the house and shops of the accused was also searched and recovery was effected from there. All these facts cast a serious doubt on the prosecution case whereas they give veracity to the version of the defence and this possibility cannot be ruled out that the version of the defence may be a probable version.

25. Even as far as the factor of not associating independent witness is concerned, the same also creates serious doubt over the truthfulness of the case of prosecution because the prosecution witnesses have admitted this fact that one NHPC store is situated close to Suma road where Naka was put by the police and the said store remains open throughout night and security guard was also on duty. Besides this, it has also come on record that there are few houses and two hotels situated on the side of the road at some distance from where the Naka was put, but no effort was made to associate the independent witness and the so-called assertion on behalf of the prosecution witness (Bhader Singh) that he knocked one or two doors but due to cold weather and odd hours nobody came out does not seem to be plausible.

26. There is no dispute that the version of the prosecution can be proved on the basis of testimony of police officials alone, however, it still remains a fact that in those cases where it is apparent that independent witnesses could have been associated but the police party does not make any serious efforts to associate independent witnesses and further it is not able to substantiate as to why no independent witness was associated with search and seizure then all these circumstances create serious doubt on the story of the prosecution.

27. In our considered view, in the present case, there are lots of inconsistencies and contradictors in the case put forth by the prosecution. The prosecution has not associated any independent witness to corroborate its case and its case hinges on the testimonies of police witnesses itself. The statements of these police witnesses are neither cogent nor trustworthy nor do they seem to be truthful. There are lots of contradictions in the statements of PWs which have not been satisfactorily justified by the prosecution.

(a) PW1, HC Purshotam Ram, has mentioned that the patrolling party was consisting of five persons i.e. he, ASI Jagat Singh, Constable Hira Singh, Constable Sohan Singh and Constable Bhader Singh, however, according to PW6 Hira Singh the police party consisted of Purshotam Ram, Bhader Singh, Sohan Singh and he himself.

(b) Similarly, PW6, Hira Singh, has stated that Naka was put two places between Jari and Soma, whereas PW7-Jagat Singh has said that no other Naka was put up except one where the accused was apprehended.

(c) As already pointed out, PW1 has admitted in his cross-examination that before Soma road just ahead of Soma there is NHPC store and security guard is also deputed on duty around the clock. He also admitted that there are 5-6 houses and two hotels on side of the road. This witness further states that the original seal which was given to him has been lost by him.

(d) Further according to PW1, out of the seized contraband, two samples of 25 grams each were taken. PW8, LHC Sunil Kumar, has mentioned in his deposition that the seized samples along with other documents were deposited at FSL, Junga by him.

(e) According to PW8, he took one sample of 50 grams. Ext. PW2/D is the copy of NCB form in which it is mentioned that one sealed sample 25 grams charas sent to Director, FSL, Junga vide RC No. 306 of 2007. These are also major contradictions in the story of the prosecution which have not been satisfactorily explained by them.

28. This Court is not oblivious to the effect that discrepancies do creep in the testimonies of witnesses on account of passage of time that elapses between the occurrence of the event and the date on which the witness deposes. However, keeping in view the fact that in the present case no independent witness has been associated by the prosecution, these contradictions do gain importance.

29. It is well settled principle of criminal jurisprudence that more stringent the punishment, more heavy is the burden upon prosecution to prove offence. No independent witness has been associated by the police and the police witnesses have not been able to satisfactorily prove the case of the prosecution.

Therefore, keeping in view what we have discussed hereinabove, though we set aside the findings returned by the learned Trial Court with regard to the compliance of mandatory provisions of Section 42(1), 42(2) and 50 of the NDPS Act, however, we uphold the judgment of acquittal passed by the learned Trial Court on other grounds which we have discussed in the judgment above and accordingly the present appeal is dismissed and the judgment of acquittal passed by the learned Trial Court is confirmed. Bail bonds, if any, furnished by the accused are discharged.

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

Sukh Dev .....Appellant
Versus
Kishan Chand and others .....Respondents

RSA No. 273/2002
Reserved on June 20, 2016
Decided on June 22, 2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration and injunction pleading that he is owner in possession of the suit land- revenue entries showing the name of the defendant No. 1 as owner in possession are incorrect- land was previously owned by N who had executed a Will in favour of the plaintiff- defendant No. 1 taking advantage of minority of the plaintiff had filed a civil suit against the plaintiff, which was not properly defended by mother of the plaintiff- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal, that N was declared to be the non-occupancy tenant of the suit land- this judgment was upheld in appeal – proprietary rights were conferred upon N- dispute raised by the plaintiff had already been adjudicated in the earlier suit - appeal dismissed.

(Para-8 and 9)

For the Appellant : Mr. Ajay Sharma, Advocate.
For the Respondents : None.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against Judgment dated 18.3.2002 rendered by the learned Additional District Judge Una (H.P.) in Civil Appeal (RBT) No. 198/2K/97.

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 with permanent injunction and in the alternative, for possession, against the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake). According to the plaintiff, land measuring 0-07-92 Hectares bearing Khewat No. 188, Khatauni No. 392, Khasra No. 605 as entered in *Misal Hakiat Ishtemal* for the year 1991-92 was owned and possessed by the plaintiff and defendants had no right, title or interest over the suit land and entries in the revenue record in favour of defendant No. 1 as owner-in-possession were wrong, illegal and void. Judgment and decree dated 7.1.1978 rendered by the learned Senior Sub Judge, Una, HP passed in Civil Suit No. 228/1976 titled as Sukh Dev vs. Labhu and in Civil Appeal No. 47/1978 dated 26.2.1980 of learned District Judge, Hamirpur, Una were not binding upon the plaintiff. It is also averred in the plaint that Smt. Nanki widow of Dhaula was the original owner of the suit land and she was a distant relative of the plaintiff. She had executed a valid will in favour of the plaintiff about her property and after the death of Nanki, property was inherited by

the plaintiff. Mutation No. 780 was sanctioned in favour of the plaintiff on 8.1.1976, and after the death of Nanki Devi, plaintiff had become owner of the suit land. It was further averred that plaintiff was minor at the time of death of Nanki and defendant No.1 taking undue advantage of the minority of plaintiff, filed Civil Suit No. 228/1976 for permanent injunction against the plaintiff. In the said case, mother of the plaintiff, Mansho Devi was appointed as guardian of plaintiff who was minor in the year 1976. Mother of plaintiff took no interest in the said suit and she acted in a highly negligent manner. Appointment of said Mansho Devi as guardian of plaintiff was not in accordance with law and same was illegal and as such plaintiff was not bound by the decision dated 7.1.1978 in the Civil Suit and judgment and decree in Appeal No. 47/1978 rendered by the District Judge, Hamirpur at Una on 26.2.1980.

3. Suit was contested by the defendants. According to them, suit was contested by the mother of the plaintiff. She had no adverse interests to that of the interests of the plaintiff. They supported the mutation No. 990 dated 10.9.1982.

4. Issues were framed by the learned Sub Judge First Class on 4.2.1995. He dismissed the suit on 30.8.1997. Plaintiff filed an appeal before the learned Additional District Judge, Una. He also dismissed the appeal on 18.3.2002. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was admitted on 24.5.2003, on the following question of law:-

"Whether the impugned judgments and decrees being contrary to the provisions of Section 104(8) of the H.P. Tenancy and Land Reforms Act and Rules 27 to 29 of the H.P. Tenancy and Land Reforms Rules, 1975 are unsustainable in the eyes of law?"

6. Mr. Ajay Sharma, Advocate, on the basis of the substantial question of law framed, has vehemently argued that the impugned judgments and decrees were contrary to the provisions of Section 104(8) of the HP Tenancy & Land Reforms Act and Rules 27 and 29 of the HP Tenancy & Land Reforms Rules, 1975.

7. I have heard Mr. Ajay Sharma, Advocate and also gone through the record carefully.

8. Ext. D1 is the certified copy of judgment dated 7.1.1978 passed by learned Senior Sub Judge, Una on 7.1.1978 in case titled as Labhu vs. Sukhdev. Learned Senior Sub Judge has already held the plaintiff i.e. Labhu @ Labh Singh, in Civil Suit No. 228/1976, in possession of the suit land. Labhu was declared as non-occupancy tenant. Judgment rendered by the learned Senior Sub Judge on 7.1.1978 was upheld by the learned District Judge, Hamirpur at Una, in appeal. Thus, the judgment rendered by the Senior Sub Judge, on 7.1.1978 rendered in Civil Suit No. 228/1976 has attained finality. Mutation No. 990 dated 10.9.1982 was attested in favour of the defendant Labhu @ Labh Singh vide Ext. P7. As proprietary rights were conferred on Labhu under Section 104 of the HP Tenancy & Land Reforms Act, he was shown in *Misal Hakiat Ishtemal* for the year 1991-92 (Ext. P1) as owner-in-possession of the suit land. He was declared non-occupancy tenant. Dispute raised by the plaintiff in the present suit has already been finally adjudicated upon by the learned Senior Sub Judge on 7.1.1978 in Civil Suit No. 228/1976. Certified copy of the judgment dated 7.1.1978 is Ext. D2 and copy of judgment rendered by the learned District Judge, Una dated 26.2.1980 is Ext. D1. Mother of the plaintiff was appointed as guardian as per record in Civil Suit No. 228/1976. She contested the suit. Plaintiff has attained the age of majority in the year 1983. He could challenge the judgment and decree dated 7.1.1978, after attaining the age of majority. Learned first appellate Court has rightly come to the conclusion that the present suit was time barred also. Judgment and decree rendered by the learned Senior Sub Judge Una operate as *res judicata* against the plaintiff, since Labh Singh has been declared as non-occupancy tenant over the suit land.

9. Mr. Ajay Sharma, Advocate has failed to point out that in what manner proprietary rights conferred upon Labhu @ Labh Singh were against the provisions of Section

104(8) of the HP Tenancy & Land Reforms Act. The proprietary rights have rightly been conferred upon Labhu by the competent authority.

10. The substantial question of law is answered accordingly.

11. 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 TARLOK SINGH CHAUHAN, J.

Sweety (Eunuch) .....Appellant/Plaintiff

Versus

General Public ....Respondent/Defendant

R.S.A. No. 17 of 2016
Judgment reserved on: 17.6.2016
Date of decision: June 22, 2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit pleading that she was the only successor of the property left behind by the deceased who was eunuch (Kinner)- suit was dismissed by the trial Court- an appeal was preferred which was dismissed- held, that Courts had presumed that parties were governed by Hindu Succession Act, whereas, pleaded case of the parties was that they were governed by eunuch custom- Hindu law does not confer a right of inheritance upon eunuch - transgenders have been categorized as third gender only by the judgment of the Supreme Court- it was duly established by the plaintiff that deceased was her Chela - her statement was required to be accepted in absence of any contest - Court had wrongly held that Hindu Succession Act was applicable, whereas, custom was applicable- judgments passed by the Courts set aside- appeal allowed. (Para-6 to 14)

Case referred:
National Legal Services Authority vs. Union of India and others, AIR 2014 SC 1863

For the Appellant : Mr. Janesh Mahajan, Advocate.
For the Respondent : None

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This appeal raises rather an interesting and important question of law for consideration as what would be the mode of succession of an eunuch i.e. transgender, in absence of any religion being professed or have been claimed by the plaintiff.

2. The brief facts of the case are that the plaintiff /appellant filed a suit for declaration that the plaintiff was the only successor in interest for moveable and immoveable property left behind by deceased Rajia alias Ratni Nani (Eunuch). It was claimed that the plaintiff is the Guru/Patron of late Rajia and Desh Raj (Eunuch) who died on 29.10.2009 leaving behind the plaintiff as only their legal heir-cum-Guru. It was averred that there is a custom in the society governing the Kinners that at the time of birth of eunuch (Kinner child) it is generally taken by the Guru Kinner of that area and she/he is brought up by the said Guru. The Guru is the only

person related to the chela and deceased was the chela of the plaintiff and, therefore, it is plaintiff alone who is entitled to succeed to the estate of the deceased.

3. Notice of the suit was issued to the defendant through general public, but none appeared on behalf of the defendant to contest the claim of the plaintiff. Accordingly, the appellant was directed to lead evidence before the trial Court. On conclusion of the evidence and after evaluating the same, the learned trial Court dismissed the suit and the appeal filed before the learned lower Appellate Court also met the same fate.

4. Aggrieved by the concurrent findings of the learned Courts below, the appellant has filed the present appeal before this Court in which the notices were issued to the respondent, but again none has put in appearance on its behalf.

5. The appeal was admitted on the following substantial question of law:

"Whether the learned Courts below have gravely erred in holding that the plaintiff is governed by Hindu law of succession and is not governed by Kinnar custom of Guru-Chela Parampara?"

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

6. The learned Courts below while dismissing the claim of the plaintiff for some strange reasons have relied upon the provisions of Hindu Succession Act, 1956 and on the basis of the same dismissed the claim of the plaintiff. Whereas, the pleaded case of the plaintiff was that in matters of succession, eunuchs were governed by Guru-Chela Parampara and in support of such averment had also led sufficient evidence to prove the same. The learned lower appellate Court has gone to the extent of holding that it was admitted case that deceased was governed by Hindu Succession Act as they were Hindus, whereas this was not even the pleaded case of the plaintiff. Therefore, in absence of any religion having been spelt out by the plaintiff in her pleadings how the provision of Hindu Succession Act, came to be invoked by the learned Courts below is anybody's guess. Merely because a particular name suggests to be that of a Hindu, the Courts cannot in absence of any material readily infer that the person is in fact a Hindu by religion, more particularly, when there are many common names shared by the people professing different religions. The Court is not expected to jump conclusions only because its individual perception perceives the person to be belonging to a particular religion.

7. Coming to the question of law, it would be noticed that Shastric law did not confer a right of inheritance upon eunuch.

8. Of the Smriti writers, Vishnu had observed as under:

"Outcastes, eunuchs, persons, incurably diseased or deficient in organs of sense or action, such as blind, deaf, dumb, or insane persons or lepers, do not receive a share; they should be maintained by those who take the inheritance and their legitimate sons receive a share – Chapter XV, Ss. 32 – 35."

9. Manu has stated eunuchs and outcastes, persons born blind or deaf, the dumb and such as have lost the use of a limb, are excluded from the share of heritage.

10. Yajnavalkya had stated that "an impotent person or outcaste and his son, an eunuch, one lame, a mad man and an idiot, one born blind and who is afflicted with an incurable disease must be maintained without any limit of shares.

11. It is only now by virtue of the judgment rendered by the Hon'ble Supreme Court in ***National Legal Services Authority vs. Union of India and others, AIR 2014 SC 1863,*** that transgenders have been categorized as third gender who like any other person now enjoy legal and constitutional protection.

12. Adverting to the case, it would be noticed that the plaintiff in her evidence, had clearly established and proved the deceased to be her chela and in all the documents like ration card, bank account etc. the name of the plaintiff had been reflected as Guru. Therefore, in absence of any cross-examination, such statement was ordinarily required to be accepted but as observed earlier, the learned Courts ruled that the property in issue would not devolve upon the plaintiff on the basis of Guru- Chela Parampara, but would be governed by the provisions of Hindu Succession Act even though the learned Courts below had categorically come to the conclusion that the plaintiff was Guru and deceased was Chella. The learned lower appellate court has specifically in para 9 held as under:

> *"..... Thus, in view of such evidence adduced by the plaintiff, it is established that the plaintiff is Guru of the deceased Razia alias Ratni and Desh Raj and all of them are belonging to Kinner society. "*

13. Similar custom came up for consideration before the Madhya Pradesh High Court in ***Illyas and others vs. Badshah alias Kamla AIR 1990 Madhya Pradesh, 334*** wherein not only the custom was upheld, but the same was also held to be not against the public policy.

14. In view of my aforesaid discussion, I am of the considered view that the learned Courts below have gravely erred in concluding that the plaintiff in matters of succession was governed by the Hindu Succession Act and not by the custom which finding is perverse and contrary to the pleaded and proved case of the plaintiff.

The substantial question of law is accordingly decided in favour of the appellant.

15. Resultantly, the judgment and decree passed by the learned Courts below cannot withstand judicial scrutiny and are therefore set-aside. Consequently, the appeal is allowed and the suit of the plaintiff is decreed as prayed for. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR.JUSTICE VIVEK SINGH THAKUR J

Vikas Sharma ....Petitioner

Versus

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

C.W.P. No.9660 of 2011.

Date of decision: 22.6.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as a teacher through Parents Teacher Association- however, grant-in-aid was not provided to him- respondents claimed that petitioner was engaged without conducting interview and he is not entitled for grant-in-aid- he does not possess essential qualifications- held, that petitioner was appointed on the basis of norms prevailing at the time of appointment prior to the enforcement of Grant-in-Aid Rules, 2006 - petitioner possessed academic qualification for the post of Language Teacher - State has exploited the petitioner, which is contrary to essence of the Constitution- petition allowed and respondents directed to release the grant-in-aid to the petitioner. (Para-6 to 10)

For the petitioner. : Mr. Shyam Singh Chauhan, Advocate.

For the respondents. : Mr. Pankaj Negi Deputy Advocate General.

The following judgment of the Court was delivered:

Justice Vivek Singh Thakur, J(Oral).

Petitioner was engaged as PTA Teacher against sanctioned post of Language Teacher by respondents through Parent Teacher Association in April, 2004 in Govt. Middle School

(now GHS), Jaunta. Respondent has notified Grant-in-Aid to Parent Teacher Association Rules, 2006 (here-in-after referred to as GIA Rules, 2006) vide Notification No.EDN-A-Kha))7-3/2006 dated 29.06.2006. Petitioner was engaged much before notifying GIA Rules, 2006. Petitioner is claiming grant-in-aid w.e.f. June 2006 with all consequential benefits.

2. Respondents are contesting claim of the petitioner on the ground that petitioner was appointed on the basis of resolution No.26 dated 15.9.2004 before issuance of (GIA) Rules, 2006 without conducting proper interview on merit basis and therefore, petitioner is not entitled for grant-in-aid from respondents as his appointment was not made, as per procedure prescribed, under GIA Rules 2006.

3. It has been further contended that at the time of his appointment essential qualifications for direct recruitment of Language Teacher was "Prabhakar (Honors in Hindi) with Matric (full subject) and Language Teacher Training or JBT 2 years training from recognized University/Institution, whereas petitioner was possessing qualification of B.A. with an elective subject of Hindi having more than 50% marks and therefore, petitioner was not having essential qualifications at the time of his initial appointment as per R & P Rules in vogue at that time.

4. It is further stand of respondents-State that as per revised R&P Rules, essential qualifications for Language Teacher is "B.A. with Hindi as an elective subject from a recognized university with 50% marks in Hindi or its equivalent or M.A in Hindi with 50% marks". It has been admitted by respondents that as per R&P Rules prevailing as of today, petitioner is possessing essential qualifications required for post of Language Teacher.

5. On 26.4.2016, learned Deputy Advocate General was directed to have fresh instructions from the Department. As per instructions dated 7.5.2016 imparted by Director of elementary Education, Himachal Pradesh, it has been stated as under:-

> "*Though both the incumbents are similar and possess the academic qualification as per new R&P Rules for the post of Language Teacher, but they have not been appointed as per the GIA Rules 2006 by adopting the proper process.*"

Only objection of respondents is that petitioner has not been appointed as per GIA Rules, 2006 by adopting proper process.

6. Denial of grant-in-aid for non compliance of procedure which was not in existence at the time of appointment of petitioner is not justified rather irrational, unreasonable and arbitrary. Procedure prescribed under Grant-in-Aid Rules, 2006 cannot be made applicable retrospectively.

7. Petitioner was appointed prior to existence of GIA Rules, 2006 in the year 2004 against sanctioned post of Language Teacher by passing a resolution by Parent Teacher Association on the basis of norms prevailing at the time of appointment of petitioner. Respondents are availing service of petitioner till date but are not willing to release grant-in-aid to petitioner, despite the fact that petitioner is performing the same duty as are being performed by other similar situated teachers to whom grant-in-aid is being released. Petitioner is neither entitled nor claiming grant-in-aid prior to issuance of GIA Rules, 2006.

8. Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. Even in ancient era, in India, State was always for welfare of citizens being guardian and protector of their rights. Primary duty of State was welfare of people and exploitive actions of rulers were always deprecated and even such rulers were punished. "Rule of Law" was Fundamental Principle of "Raj Dharma". Dream of our forefathers to establish 'Rule of Law' after independence, has emerged in our Constitution. Exploitation by State was never expected on the part of State as the same can never be termed as 'Rule of Law' but arbitrariness which is antithesis of 'Rule of Law'. To make law to ameliorate exploitation is duty of State and in fact

State has also framed laws to prevent exploitation. But in present case State is an instrumental in exploitation which is contrary to essence of the Constitution.

9. In an identical matter, Co-ordinate Bench of this Court in **CWP No.8692 of 2012 dated 10.4.2015 titled *Lata Kumari vs. State of H.P. & Ors.,*** directing the State to release grant-in-aid to the person appointed prior to issuance of notifying GIA Rules, 2006, has held as under:-

> *"9. The matter can be looked from a different angle. Indisputably the petitioner had been appointed and assigned the duties to teach the students and such duties have been continuously performed by her. Then can the respondents, who are model employers, be permitted to act with total lack of sensitivity and indulge in "Begar", which is specifically prohibited under Article 23 of the Constitution of India.*
>
> *10. The State government is expected to function like a model employer, who is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit its employee and take advantage of their helplessness and misery. In the present case the conduct of the respondents falls short of expectation of a model employer.*
>
> *11. It is not the case of the respondents that petitioner has not been discharging her duties diligently, honestly and faithfully. Therefore, in such circumstances while demanding her legitimate due by way of grant in aid under the Rules, the petitioner has not asked for the moon.*
>
> *12. In view of the aforesaid discussion, there is merit in the petition and the same is allowed and the respondents are directed to release the grant-in-aid to the petitioner as per the 'Grant-in-Aid to Parent Teacher Association Rules, 2006' from the date of promulgation of the Rules. No costs."*

10. In view of above discussion, petition is allowed and respondents are directed to release the grant-in-aid to petitioner from the date of notification of GIA Rules, 2006 within eight weeks from today after adjusting amount, if any, received by petitioner under these Rules. Respondent No.2 shall file compliance affidavit within ten weeks.

11. Petition is disposed of in aforesaid terms, so also the pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CHIEF J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

H.P. State Electricity Board Ltd. ....Petitioner

Versus

Dharam Pal Dwivedi ....Respondent

CMP (M) No. 1613 of 2015
Date of decision: 23.06.2016

Code of Civil Procedure, 1908- Section 114- Order 47- Review petitioners have to satisfy the mandate of Section 114 and Order 74- order was passed with the consent of the parties- there is no error apparent on the face of the record- petition dismissed. (Para- 5 to 7)

Cases referred:
Union of India & others versus Paras Ram, ILR 2015 (III) HP 1397 (D.B.)
Surjeet Kumar and others versus State of H.P. and others I L R 2016 (II) HP 335 (D.B.)

For the petitioner : Mr. Vinay Kuthiala, Senior Advocate with Mr. Raj Pal Thakur, Advocate.
For the respondent: Mr. Bimal Gupta, Senior Advocate with Ms. Kusum Chaudhary, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Heard. We have gone through the limitation petition as well as the review petition.

2. The review petition is not maintainable and merits to be dismissed.

3. We deem it proper to condone the delay in filing the review petition. Accordingly CMP (M) No. 1613/2015 is allowed and the delay in filing the review petition is condoned. The application is disposed of.

4. The Review Petition is taken on Board. Registry to diarize the same.

5. It is apt to record herein that in order to seek review, the review petitioners have to satisfy the mandate of Section 114 of the Code of Civil Procedure (for short "CPC") read with Order 47 CPC, as has been held by this Court in **Review Petition No. 56 of 2014,** titled as **Ranjeet Khanna versus Chiragu Deen and another,** decided on 8th August, 2014; **Review Petition No. 65 of 2015,** titled as **Union of India & others versus Paras Ram,** decided on 25th June, 2015; **Review Petition No. 115 of 2015,** titled as **Surjeet Kumar and others versus State of H.P. and others,** decided on 16th March, 2016; **Review Petition No. 20 of 2016,** titled as **Onkar Singh versus Executive Engineer, HPSEB Ltd. and another,** decided on 12th May, 2016; **Review Petition No. 54 of 2015,** titled as **State of Himachal Pradesh and others versus Sh. Jitender Kumar Mahindroo (since deceased) through LRs,** decided on 12th May, 2016 and **Review Petition No. 116 of 2015** titled as **The State of Himachal Pradesh and another** versus **Smt. Ramesh and another,** decided on 14.06.2016.

6. We have gone through the judgment under review. The order/judgment was passed with the consent of the learned Counsel for the writ respondent/review petitioner. It is apt to reproduce para-1 of the judgment under review herein:-

> *"Mr. Raj Pal Thakur, learned Counsel appearing on behalf the Board, stated at the Bar that in terms of the directions of this Court, they have sought instructions and the Board has agreed to pay the arrears for three years prior to the date of presentation of the writ petitions and has also agreed to pay the pension as per the revised pension/rates prevalent. Learned Counsel for the petitioner(s) have no objection to the same. Their statements are taken on record."*

7. Thus, there is no error apparent on the face of the record.

8. Having said so, no case for review is made out. Accordingly, the review petition is dismissed.

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

State of H.P. .....Appellant.
Versus
Jai Chand .....Respondent.

Cr. Appeal No. 144 of 2007
Decided on : 23.6.2016

Scheduled castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3 (i) (viii)- A civil suit was filed by accused, which was dismissed- an appeal was preferred, which was also dismissed- complainant claimed that he had no concern with the suit land but he was wrongly arrayed as co-defendant- he was harassed by the accused by initiating legal proceedings- accused was tried and acquitted by the trial Court- held, in appeal that mere institution of civil suit against the complainant by accused will not attract the penal provision of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, unless accused made derogatory aspersions qua his caste- no evidence was led to prove this fact- appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. Kishore Pundir, Advocate vice Mr. Ajay Sharma, 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 22.1.2007, by the learned Sessions Judge, Hamirpur, H.P., in Sessions Trial No. 13 of 2006 whereby it acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 10.5.2007 a suit for permanent prohibitory injunction in relation to the land comprised in Khata No. 69 min, Khatoni No. 192, Khasra No. 3087/2019, measuring 10 marlas, situated in Tika Dain, Mauja Lohdar, Tehsil Barsar, District Hamirpur, H.P stands preferred by the accused against one Smt. Shakuntla Devi, her son Jagdev, daughter in law Smt. Anjana Devi and complainant Dhani Ram Shukla in the Court of learned Sub Judge, 1st Class, Barsar, District Hamirpur, H.P. The suit aforesaid came to be dismissed under judgment of the learned trial Court comprised in Ex.P-2. A further appeal therefrom as stood preferred before the learned Appellate Court sequelled dismissal under a judgment rendered by the learned Appellate Court comprised in Ex.P-3. As per the complainant he belongs to village Balh Bagh which is at a distance of about 15 kms from village Dain, where the land which was subject matter of the suit exists, he has no landed property/cow-shed as well as he had no concern or relation with unknown lady smt. Shakuntla Devi her son an her daughter-in-law. However, even despite that accused arraigned him as co-defendant in the suit aforesaid as reflected in paragraphs 3 to 5 of the plaint (Ex.P-1). The victim/complainant stands aggrieved by the factum of the institution of frivolous Civil Suit against him by the accused which he was made to contest for three years sequelling loss of his reputation besides lowering his estimation in public. It is further alleged by him that in order to defend the appeal he had to incur expenditure of Rs.10,000/- as counsel's fee. It stands further alleged by the complainant that the accused had harassed him by committing atrocities on him by way of initiating legal proceedings against him without his fault. 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 stood charged by the learned trial Court for his committing offences punishable under Section 3 (i) (viii) of the Scheduled castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 12 witnesses. On closure of the 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 evidence in defence and examined two DWs.

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 counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. A civil suit stood instituted on 10.5.2002 against the complainant by the accused. The suit aforesaid instituted by the accused against the complainant was qua the complainant arrayed as co-defendant therein holding unauthorized occupation of a cowshed. The suit came to be dismissed under a judgment of the learned trial Court comprised in Ex.P-2. A further appeal therefrom as stood preferred by the aggrieved plaintiff before the learned Appellate Court also sequelled dismissal, dismissal whereof stands comprised in a judgment rendered by the learned Appellate Court embodied in Ex.P-3. The victim/complainant stands aggrieved by the factum of the institution of a frivolous Civil Suit against him by the accused constraining him to contest it for three years sequelling a loss to his reputation besides lowering of his estimation in public. Even though, the victim/complainant arrayed as a co-defendant in the Civil Suit instituted by the accused is uncontrovertedly a member of a Scheduled Caste community, consequently the mere institution of a civil suit against him by the accused, a member of non-scheduled caste community, would not perse render the victim/complainant to espouse herebefore of thereupon any of the penal provisions engrafted in the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the Act") standing infringed by the accused unless palpable evidence stood adduced by the victim/complainant of the accused publicly making derogatory aspersions qua his caste whereupon his reputation stood undermined in society. Since there occurs no communication either in the apposite complaint instituted by the victim/complainant of the accused publicly making derogatory utterances qua his caste nor any evidence standing obviously adduced qua the aforesaid facet. Consequently when the aforesaid manifestations are enjoined to be embodied in the apposite complaint for securing an inference of any of the penal provisions constituted in "the Act" standing attracted. Contrarily with apposite non-manifestations therein, the order of acquittal recorded by the learned trial Court does not suffer from any infirmity.

10. Be that as it may if the findings of acquittal recorded by the learned trial Court are not sustained it would give leeway to any member of a Scheduled Caste Community, to merely on the anvil of civil proceedings standing instituted against him by a member of a non Scheduled caste community seek attraction against him of the penal provisions engrafted in "the Act", attraction whereof on the score aforesaid would detract from the salutary purpose of the Act, of only on the apposite penal ingredients constituted therein standing satiated by adduction of

cogent evidence thereupon alone Courts of law standing coaxed to punish a member of a non-scheduled caste community for his committing a penal delinquency upon a member of a scheduled caste community besides would also preclude any member of a non-scheduled caste community to redress his grievances before the Civil Court concerned by launching civil proceedings against a member of a scheduled caste community.

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 having mis-appreciated the evidence on record or its having omitted 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 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
Prem Raj .....Respondent.

Cr. Appeal No. 218 of 2007
Decided on : 23.6.2016

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the bus- he suddenly started the bus, when complainant was getting down from the same - complainant fell down and sustained injuries- accused was tried and acquitted by the trial Court- held, in appeal that no witness except PW-2 had deposed that accused had moved the bus without getting signal from the conductor- Investigating Officer had not ascertained from the passengers the truthfulness of assertion of PW-2 that bus was started without getting a signal from the conductor- conductor himself had not asserted such fact and had not supported the prosecution version- in these circumstances, accused was rightly acquitted by the Court- appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. Lalit K Sharma, 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 20.3.2007, by the learned Judicial Magistrate, IInd Class, Court No.(VI), Shimla, H.P., in Criminal Case No. 61-2 of 06/2005, 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 15.5.2005 at about 3.40 p.m. at main road near IGMC Shimla, accused was driving the bus bearing registration No. HP63-0310 in a rash and negligent manner and when complainant Geeta Devi was disembarking from the bus at the same time the driver suddenly started the bus as a result thereof complainant fell down on the road and sustained simple as well as grievous injuries on her person. The complainant lodged FIR qua the occurrence. The complainant was medically examined at IGMC, Shimla. Her MLC

was procured. The police went to the spot and prepared the spot map. Statements of witnesses were recorded. Vehicle aforesaid was taken into possession vide separate seizure memo. 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 338 of I.P.C, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of the 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 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 counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. In support of the prosecution case the prosecution examined nine witnesses. The injuries suffered by the victim/complainant were a sequel to hers falling on the road while she was in the process of disembarking from the front door of the bus driven by the accused at the relevant time. The prosecution attributes negligence to the accused comprised in the factum of his not ensuring the safe disembarking therefrom of PW-2 (Geeta Devi) rather his without ensuring of the victim safely egressing from the bus, his taking to drive it. The prime evidence qua the lack of adherence by the accused of the prime duty cast upon him to not ply the bus unless all the passengers aboard it safely egress therefrom stood comprised in the factum of the accused despite its conductor not blowing the whistle as a signal to him of all the passengers safely egressing from the bus, his yet proceeding to ply it. However except PW-2 who is the complainant none has deposed qua the aforesaid factum hence no other PWs secure corroboration to the said fact deposed by PW-2. Even though the sole testimony of PW-2 qua the factum aforesaid may constitute clinching evidence against the accused, yet the communication aforesaid made by PW-2 in her deposition for its attaining immense probative succor, is to be also read in entwinement with the deposition of PW-3 (kalyan Singh) an eye witness to the occurrence who in his cross-examination held by the learned defence counsel has deposed of his disembarking from the bus prior to the victim/complainant disembarking therefrom yet his not making any echoings therein of the conductor of the bus not blowing his whistle and of the accused yet proceeding to ply the bus renders the effect if any of the deposition of PW-2 who has deposed of the accused despite not receiving a signal from the conductor to ply it, his yet proceeding to ply it even when the complainant/victim had not safely egressed therefrom to acquire no truth it being wholly invented besides surmisal. Since the victim/complainant in the FIR lodged by her qua the occurrence solitarily has made a communication therein of the accused being negligent in plying the bus without ensuring hers safely egressing therefrom comprised in his taking to ply it without his receiving a signal from the conductor, it was incumbent upon the Investigating Officer to from PW-3 besides from other co-passengers of the bus elicit apposite

communications in their respective previous statements recorded in writing by him, of the accused in the manner aforesaid being negligent in driving the bus hence seqeulling entailment of injuries on the person of the complainant/victim. The aforesaid omission on the part of the Investigating Officer constrains this Court to also conclude of the solitary deposition of PW-2 qua the aforesaid manner of negligence of the accused being a pure invention.

10. Be that as it may the conductor (PW-5) who was the prime prosecution witness for proving the manner of negligence ascribed by the prosecution to the accused yet in his deposition he has resiled from his previous statement recorded in writing wherein he articulates of the accused despite not receiving any signal from him, his yet proceeding to ply it even when the victim/complainant not safely egressing therefrom. With PW-5 the prime prosecution witness not lending support to the prosecution case rather in his cross-examination held by the learned APP on his standing declared hostile his denying the apposite suggestion put to him, of his blowing the whistle at the relevant time rather contrarily constrains this Court to conclude of his signaling the accused to proceed to ply his bus only on his ensuring of the complainant/victim safely egressing therefrom. The effect of the prime witness not supporting the prosecution case constrains this court to conclude of the injuries suffered by the complainant/victim being a sequel to hers accidentally falling on the road.

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 having mis-appreciated the evidence on record or its having omitted 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 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ....Appellant

Versus

Nanhe Lal & another ... Respondents

Cr. Appeal No. 287 of 2012
Reserved on: 14.06.2016
Date of decision: 23.06.2016

Indian Penal Code, 1860- Section 302 and 34- Dead body of J was found covered with the blanket- it was suspected by the wife of the deceased that N and K had killed her husband- N was arrested- he made a disclosure statement leading to the discovery of a stick - K was also arrested- he made a disclosure statement on the basis which a stick, one Pajama and mobile phone were recovered- accused were tried and acquitted by the trial Court- held, in appeal that case was based upon circumstantial evidence- circumstances from which the guilt of the accused is to be drawn have to be established and they should lead only to the inference of guilt and not to any other inference- it was duly proved that accused no. 1 and deceased were working in one factory and they were residing in adjoining premises- it was also proved that family of J and N had returned and they were residing in one premises, thereafter - it was also proved that dispute erupted between deceased and accused relating to the payment of the ration charges – however, it

was not proved that there was illicit relation between deceased and wife of the accused- disclosure statements of the accused were also not proved- there are contradictions in the testimonies of the witnesses regarding this fact- the presence of the accused at the spot was not established- it was also not established that the deceased was physically attacked by the accused with sticks - guilt of the accused was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused- appeal dismissed. (Para-30 to 45)

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
Mehboob Ali & Another Vs. State of Rajasthan, (2015) 9 J.T. 512

For the appellant:	Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General.
For the respondents:	None for the respondents. Mr. Yudhbir Singh Thakur, Amicus Curiae.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, appellant/State has challenged the judgment passed by the Court of learned Sessions Judge, Sirmaur District at Nahan, in Sessions Trial No. 28-ST/7 of 2011/2010, dated 12.12.2011, vide which learned trial Court has acquitted the accused persons of charge under Section 302 read with Section 34 I.P.C.

2. Vide order dated 14.12.2015, this Court appointed Mr. Yudhbir Singh Thakur as Amicus Curiae and he very efficiently assisted this Court in the adjudication of the present appeal.

3. The case of the prosecution was that on 23.02.2010 a message was received on telephone by the then Inspector/SHO of Police Station, Nahan from Police Post Kala Amb that a dead body was lying in All Knight Industry on Trilokpur Kala Amb road. On receipt of the said information, SHO alongwith other police staff proceeded to the spot in Government vehicle, where one Upender Kumar son of Ram Singh got his statement recorded under Section 154 Cr.P.C. to the effect that he was working as Helper in All Knight Factory since November, 2009, whereas Jaiveer Singh was working as Supervisor in the said factory. On 22.02.2010 at 9.00 A.M. he came to the factory and at 6.15 P.M. Supervisor Jaiveer told him that he was going some where and would come back late and that he would keep the keys after closing the shutter on the machine.

4. On 23.02.2010 at 9.00 A.M., he found the small gate of the factory open and also noticed the door of the room of Jaiveer Supervisor was open. When complainant Upender Kumar called Jaiveer, no one responded. He went inside the room and found blood on the floor of the same and body of Jaiveer was covered with a blanket. Thereafter, he called Rajesh Mishra, who came alongwith Parvinder and other workers at the spot, lifted the blanket from the body of Jaiveer and noticed that the double bed was smeared with blood and that Jaiveer had sustained injuries on his head, neck and feet and he had already died. Said murder had been committed by some unknown person during night time.

5. On the basis of statement of Upender Kumar, FIR Ext. PW15/A was registered under Section 302 IPC at Police Station, Nahan. During investigation wife of Jaiveer Neelu disclosed that Nanhe Lal was residing in another room of All Knight factory alongwith his family. Neelu used to visit her husband Jaiveer at Kala Amb during vacations of children. When she had come to Kala Amb, she noticed that her husband had some attraction towards

the wife of Nanhe. She had told her husband that till the wife of Nanhe did not leave Kala Amb, she would not return to Delhi. When her husband visited Delhi, he told her that both Nanhe and Kanahiya were residing with him. On 23.10.2010 she came to know that her husband had died and the persons residing with her husband namely Nanhe Lal and Kanahiya had fled away from the spot. She suspected that they had killed her husband as both Nanhe and Kanahiya had not made payment of ration to Jaiveer and Jaiveer had retained their T.V. and other articles. The police searched for accused Nanhe and Kanahiya. Nanhe was arrested from his village on 16.03.2010, who on interrogation made a disclosure statement on 17.03.2010 Ext. PW1/E, on the basis of which Danda Ext. P-2 concealed in a Nali near Craft factory was taken into possession vide Ext. PW1/F. Accused Kanahiya was arrested on 19.03.2010 from his village Manpur, District Pilibhit and during interrogation he made a disclosure statement Ext.PW10/A on 21.03.2010 on the basis of which he got recovered weapon of offence Danda, one Pajama and mobile phone concealed at different places. Site plans were also prepared by the Investigating Officer and after completion of the investigation, challan was presented against the accused persons.

6. As a prima facie case was found against the accused, they were accordingly charged for the offence under Section 302 read with Section 34 I.P.C., to which both of them pleaded not guilty and claimed to be tried.

7. In order to substantiate its case, the prosecution in all produced 23 witnesses. On the basis of material produced on record by the prosecution, the learned trial Court came to the conclusion that the entire links in chain of circumstances, did not connect the accused with the commission of offence and hence it held that the prosecution had failed to prove its case against the accused beyond reasonable doubt. The learned trial Court accordingly acquitted the accused persons.

8. We have heard Mr. V.S. Chauhan, learned Additional Advocate General as well as Mr. Yudhbir Singh Thakur, learned Amicus Curiae. We have also gone through the judgment passed by the learned trial Court as well as perused the entire record of the case minutely.

9. Mr. V.S. Chauhan, learned Additional Advocate General, has argued that the judgment passed by the learned trial Court was not sustainable in law. According to him, the conclusion arrived at by the learned trial Court were based on surmises and the same were not borne out from the record. According to him, the prosecution had been able to bring home the guilt of the accused. It was submitted on behalf of the appellant that it stood proved beyond reasonable doubt that the accused were guilty of the charges framed against them. Mr. Chauhan submitted that in the present case there was no direct evidence. However, the circumstantial evidence led on record made a complete chain and it was sufficient to link the accused with the crime. According to Mr. Chauhan, the evidence led by the prosecution connected the accused with the crime and the prosecution had proved that there was enough motive with the accused to kill the deceased. According to him, it stood proved on record that the deceased was attracted towards wife of Nanhe Lal one of the accused and further both accused Nanhe Lal as well as Kanahiya Lal owed money to the deceased and as they had not made payment of ration to him in lieu of this, the deceased had retained their T.V. and other articles. He further submitted that Nanhe Lal had withdrawn an amount of Rs. 10,000/- from the account of Kanahiya Lal with his ATM and had not paid this amount to Sonu, whereas the fact of the matter was that Sonu had deposited the said amount in the account of Kanahiya Lal, which in fact belonged to Jaiveer and there was a dispute about the withdrawal of the said money. He further argued that the disclosure statements made by both the accused had led to the recovery of Danda as well as one Pazama and Mobile phone. Thus, according to him, all the circumstances stood proved on record by the prosecution made a complete chain to link the accused with the crime in issue. On these basis, he submitted that the judgment passed by the learned trial Court acquitting the accused was totally unsustainable in law and was liable to be set aside. Mr. Chauhan also argued that the learned trial Court erred in brushing aside the testimony of PW-1 who had categorically

proved the case of the prosecution. He further submitted that similarly statement of PW-5 had been brushed aside by the learned trial Court without any cogent explanation, though the said witness had also corroborated the case of the prosecution, which linked the accused with the commission of the offence. According to Mr. Chauhan, similar was the case with the testimony of PW-7 Harvir Singh, brother-in-law of deceased Jaiveer, which testimony was also ignored by the learned trial Court without any sufficient reason. According to him, a harmonious reading of the testimony of these witnesses alongwith other prosecution witnesses proved beyond reasonable doubt that the prosecution had been able to bring home the guilt of the accused, and, therefore, according to him, the learned trial Court was not justified in acquitting of the accused of the charges framed against them. Accordingly, he submitted and prayed that the judgment passed by the learned trial Court be set aside and the accused be convicted for the charges allegedly framed against them.

10. Learned Amicus Curiae also assisted us in adjudication of the present appeal. He has very effectively and efficiently and without being partison drawn the attention of this Court towards various aspects of the matter including contradictions and discrepancies in the case of the prosecution, on the basis of which, according to the learned Amicus Curiae, it could not be said that the judgment passed by the learned trial Court was not sustainable in law.

11. Undisputedly, there is no direct witness who has seen the commission of the alleged offence, therefore, the present case is a case of circumstantial evidence. The learned Additional Advocated General has culled out following circumstances, which according to him were duly proved on record by the prosecution and the chain of which circumstances according to him was unbroken and which linked the accused with the commission of the offence.

12. The circumstances upon which the appellant/ State has relied upon are as under:-

Circumstance No. 1:

Accused and deceased were working together and residing in the adjoining premises.

Circumstance No. 2:

10 days prior to the occurrence of incident both accused Nanhe Lal and deceased left their wives at their native place and started residing together in the same premises. Accused Kanahiya Lal also joined them in the same premises.

Circumstance No. 3:

Dispute erupted between deceased and the accused relating to payment of charges of ration.

Circumstance No. 4:

Motive.

Circumstance No. 5:

Recovery of dead body.

Circumstance No. 6:

Disclosure statements of accused Nanhe Lal and Kanahiya Lal.

Circumstance No. 7:

Recoveries effected pursuant to the said disclosure statements.

Circumstance No. 8:

Conduct of the accused after the commission of the offence.

Circumstance No. 9:

Medical evidence.

13. 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."*
>
> *25. 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. 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."

It is settled position of law that suspicion, however strong, cannot take the character of proof.

22. We, therefore, have no hesitation in allowing these appeals and setting aside the conviction and sentence of the two appellants under Section 302 read with Section 34 of the Penal Code. We order accordingly. The appellants are directed to be released from jail forthwith, if not required in any other case."

14. 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

(viii) 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."

15. 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."

25. 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. 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." (emphasis supplied)

18. 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. In our opinion, it is not safe to record a finding of guilt of the appellant and the appellant is entitled to get the benefit of doubt. We, therefore, allow the appeal and set-aside the conviction and sentence of the appellant. The appellant be set at liberty unless required in any other case."

16. 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.

17. 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. Neither there is any direct evidence nor there is any eye witness who allegedly has seen the accused committing the crime. Thus, the case of the

prosecution is solely based on circumstantial evidence. 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.

18. We will test all the circumstances vis-a-vis material produced on record regarding each circumstance by the State separately.

Circumstance No. 1:

Accused and deceased were working together and residing in the adjoining premises.

19. According to the appellant/State, this circumstance stood proved by PW-1, PW-5, PW-8 and PW-11. It has come in the statement of PW-1 Rajesh Mishra who was working as Supervisor in Besta Appliances Company situated at Kala Amb, that Jaiveer was working as Foreman in All Knight factory for the last 4-5 years and he knew Jaiveer. He also stated that family of Jaiveer was living in Delhi, but used to visit him during the vacation of his children. Accused Nanhe also used to stay in one of the rooms situated inside All Knight factory alongwith his family. Wife of Jaiveer was reluctant to return to Delhi after she came with her children in January, 2010, as she was suspecting that Jaiveer was having illicit relations with some lady. Similarly, PW-5 Neelam alias Neelu also deposed that deceased (her husband) was working in All Knight factory and he was living in a room provided by the factory owner in the factory premises. There was another adjoining room which was occupied by accused Nanhe. PW-8 Parvinder had deposed that Jaiveer was Supervisor in All Knight factory and he was residing in one room in the factory premises. He deposed that there was another quarter adjoining to quarter of Jaiveer in All Knight factory, in which both the accused were residing. PW-11 Harcharan Singh had also deposed that Jaiveer was his employee, he was working in All Knight factory and he was living in a room inside the premises of the factory.

20. It is evident from the testimony of PW-1, PW-5 and PW-8 that deceased and accused No. 1 were working in all Knight factory and they were residing in adjoining premises. PW-11 also deposed that the deceased was serving in All Knight factory.

Circumstance No. 2:

10 days prior to the occurrence of incident both accused Nanhe Lal and deceased left their wives at their native place and started residing together in the same premises. Accused Kanahiya Lal also joined them in the same premises.

21. According to the appellant/State, this circumstance stood proved by PW-1, PW-5 and PW-8. PW-1 stated that after completion of vacation of children, wife of Jaiveer Singh was reluctant to return to Delhi as she was suspecting that Jaiveer had some illicit relations with some lady. Later, accused Nanhe left his wife and children at his native place and thereafter wife of Jaiveer had also left for Delhi alongwith her children. He had also deposed that accused Kanahiya Lal used to work in H.M. Steel factory at Kala Amb. He had also deposed that when children of Nanhe had left, thereafter accused Kanahiya started living with accused Nanhe. PW-5 had deposed that after she returned back to Delhi with her children, her husband came to Delhi after few days and told her that Kanahiya was also staying with Nanhe in the adjoining room. She further deposed that on telephone her husband told her that he alongwith Nanhe and Kanahiya were living together in the factory premises and they cook food jointly. PW-8 had deposed that after the family of Nanhe and Jaiveer had left, Jaiveer, Kanahiya and Nanhe, used to cook food together.

22. The testimony of the said three witnesses goes on to prove that after the family of Jaiveer and Nanhe had gone back, the said three persons were residing in adjoining rooms

i.e. in the rooms allotted to Jaiveer and Nanhe in the factory premises of All Knight factory and they were maintaining joint kitchen.

Circumstance No. 3:

Dispute erupted between deceased and the accused relating to payment of charges of ration.

23. This circumstance also according to the appellant/ State stood proved by PW-1, PW-5 and PW-8. PW-1 deposed that there was a boy namely Sonu whom he knew. Sonu had deposited Rs.10,000/- in the account of Kanahiya in PNB Bank, Kala Amb. There was some dispute about withdrawal of aforesaid money from bank and because of that reason, Nanhe Lal had fled away. He had also talked to bank authorities about withdrawal of aforesaid money and Jaiveer had also accompanied him to the bank in the aforesaid connection. The bank authorities told them that the said money had been withdrawn through ATM and the card holder was Kanahiya Lal. He further deposed that there was dispute about payment of ration between Jaiveer, Nanhe and Kanahiya and in lieu of non-payment of ration by Kanahiya, television belonging to Kanahiya was retained by Jaiveer deceased and thereafter Kanahiya had left the aforesaid place. PW-5 had deposed that on 23.02.2010 she received a telephonic call and came to know that her husband had been died and thereafter she rushed from Delhi to Kala Amb. After reaching at Kala Amb, she came to know that Nanhe and Kanahiya had killed her husband and had fled away. Both the accused persons did not make the payment of ration, therefore, her husband had retained the articles of these persons which included T.V. and other articles. She also deposed that her husband's mobile phone was also taken away by the accused persons. PW-8 had testified that he knew Sonu who was working in HM Steel factory at Kala Amb and he was from the village of accused. Sonu had deposited Rs.10,000/- in the account of Kanahiya Lal in PNB Bank at Kala Amb and the aforesaid money was withdrawn. Later on, it was found that the aforesaid money was withdrawn by accused. Thereafter, Nanhe left Kala Amb. Enquiries about withdrawal of money was got conducted from the bank authorities by Rajesh Mishra and there was a talk between them that whosoever had withdrawn money, his photo may be there in the bank. An amount of Rs.3400/- was due towards Nanhe and Kanahiya as payment of ration and in lieu of aforesaid payment, Jaiveer had retained TV and other utensils of the accused.

24. According to the state, it stood proved on record that a dispute erupted between the deceased and the accused relating to payment of charges of ration and the same stood proved beyond doubt by the prosecution.

Circumstance No. 4:

Motive.

25. As per the State, the accused had a motive to do away with the deceased. Deceased was having illicit relationship with the wife of accused Nanhe. This was proved by way of the testimony of PW-1 as well as by way of the testimony of PW-5 who is the wife of deceased. Besides this, there also was a dispute between deceased and both the accused relating to the payment of ration charges. Deceased had retained the belongings of Kanahiya including his T.V. set. Besides this, there also was a dispute with regard to an amount of Rs.10,000/- which actually belonged to the deceased but had been deposited in the account of Kanahiya in PNB Bank at Kala Amb Branch, which was withdrawn through ATM and the card holder was accused Kanahiya. According to the appellant, all these facts also stood proved on record by the prosecution and this clearly demonstrated that the accused had a motive to kill the deceased and that there was animus between the accused and deceased.

Circumstance No. 5:

Recovery of dead body.

26. According to the appellant/State, this circumstance stood proved by PW-1 and PW-6. PW-1 had deposed that on 23.02.2010 at around 9.30 A.M. Upender came to his

company and told him that Jaiveer Singh was lying on the bed in blood. Thereafter, he, Parvinder, Upender and others came to All Knight factory and to the room where Jaiveer was lying on the bed and his body was covered with blanket. They removed blanket from the body of Jaiveer Singh and noticed that Jiaveer had injury marks on his body and blood had oozed out. Jaiveer Singh had expired and it was suspected that he had been killed by someone. They informed the owner of the factory namely Guzral, who informed the police at Kala Amb. Police came on the spot alongwith dog squad. PW-6 had deposed that on 22.02.2010 he came to the factory at around 9.00 A.M. and left at 6.15 P.M. Deceased had told him that he was going on his scooter somewhere and would return late, therefore, PW-6 should keep the key of the factory on upper side of machine after closing the doors. He had further deposed that on 23.02.2010 at around 9.00 A.M., he came to the factory and found that small gate of factory was open. He also found the room of Jaiveer in an open state. He called Jaiveer but there was no answer. On this, he went inside the room and found that blood was lying under the bed and Jaiveer was covered with blanket. He went to Rajesh Mishra, who worked in adjoining factory and called him. Rajesh Mishra was accompanied by Parvinder and others to All Knight factory. When they came to factory, they picked up the Kambal from the body of Jaiveer Singh and noticed that double bed was smeared with blood and Jaiveer had received injuries on his head and on his bodily parts. The family of Jaiveer was informed by Rajesh Mishra and police was also informed.

Circumstance No. 6 and 7 :

Disclosure statements of accused Nanhe Lal and Kanahiya Lal.

Recoveries effected pursuant to the said disclosure statements.

27. As per the prosecution, accused Nanhe Lal gave a disclosure statement under Section 27 of the Evidence Act in the presence of witnesses Rajesh Mishra and Harvir Singh in police custody to the effect that he can have the Danda recovered by demarcating Nali where he had thrown the same on the intervening night of 22/23.02.2010. On the basis of said statement of the accused, the recovery of Danda was made recovered vide Ext. PW1/F in the presence of witnesses Rajesh Mishra and Harvir Singh. Similarly, accused Kanahiya Lal also made a disclosure statement Ext. PW10/A under Section 27 of the Evidence Act while in police custody in presence of witnesses Jitender Singh and Jai Praksh to the effect that he could get recovered weapon of offence danda, one Pazama and one mobile phone of Jaiveer. As a result of this disclosure statement, accused Kanahiya Lal got recovered mobile phone Ext. P-4 from wheat field and handed over it to the police, which was taken into possession vide Memo Ext. PW2/A. He also got recovered Pajama bearing traces of blood, which was taken into possession vide Ext.PW3/A and one Danda was recovered from a Nali near Craft factory, which was taken into possession vide Memo Ext. PW4/A.

Circumstance No. 8:

Conduct of the accused after the commission of the offence.

28. PW-20 ASI Mool Raj had deposed that he was deputed by S.I. Dharam Singh to trace out accused Nanhe and Kanahiya from their respective native villages. He apprehended them, brought them to Nahan and handed over to S.I. Dharma Singh.

Circumstance No. 9:

Medical evidence.

29. Dr. A Chaturvedi stepped into the witness box as PW-9 and stated that on the request of police, he conducted the postmortem of dead body of Jaiveer Singh, which was identified by Heera Singh and Rajesh Mishra. The cause of death was multiple injuries. He also deposed that all the injuries were ante mortem and the injuries were caused with blunt weapon. He also stated that the injuries mentioned in postmortem report were sufficient to cause death.

30. Now, we will test all these circumstances vis-a-vis material which has been produced on record by the prosecution.

Circumstance No. 1:

31. As far as circumstances No. 1 is concerned, it stands proved on record that accused Nanhe and deceased were both working in All Knight factory and they were living in adjacent rooms. Therefore, this circumstance is concerned, the prosecution has been able to prove this circumstance.

Circumstance No. 2:

32. As far as circumstance No. 2 is concerned, it is also established from the record that Kanahiya Lal had shifted to the accommodation of Nanhe Lal in All Knight factory and he was residing with Nanhe Lal in the same premises. Thus, the prosecution has been able to prove that whereas deceased and accused Nanhe Lal were residing in adjacent room in All Knight factory, later on, Kanahiya Lal also joined them, who started residing alongwith accused Nanhe Lal.

Circumstance No. 3:

33. In our considered view, as far as this circumstance is concerned, the prosecution has not been able to prove beyond reasonable doubt that a dispute erupted between the deceased and accused regarding payment of charges of ration. According to the State, this circumstance has been proved by PW-1, PW-5 and PW-8. As far as PW-1 is concerned, in our considered view, his testimony on the said circumstance is nothing more than hearsay. PW-1 Rajesh Mishra was serving as Supervisor in Vesta Appliances Company situated at Kala Amb on Trilokpur road. He was neither an employee in All Knight factory nor he was residing in the premises of All Knight factory. Similarly, as far as PW-5 is concerned, her deposition is to the effect that she was told on telephone by her husband that he alongwith Nanhe and Kanahiya are living together in factory premises and they cook food jointly. In her cross-examination, she has deposed that her husband used to consume liquor and the accused and her husband might have shared their meals for about 7-8 days. She has also stated that she does not know as to what amount Nanhe and Kanahiya had to pay to her husband on account of ration. PW-8 Parvidner had stated that he worked as a labourer in Vesta Company in Kala Amb. Thus, he also was neither an employee of All Knight factory nor he was residing in the same premises as the deceased and the accused. Neither PW-1 nor PW-8 have disclosed as to from where they gathered this information that there was a dispute relating to payment of charges of ration. Moreover, it is not the case of the prosecution that except the deceased and the accused no other person was residing in the premises of All Knight factory. Therefore, the factum of the deceased and the accused having a joint kitchen and a dispute existing intra them with regard to payment of charges of ration could have been best proved by a worker of All Knight factory who was also residing in the premises of the factory. Not only this, the prosecution has also not produced any witness either in the form of shopkeeper etc. or otherwise from where it could be gathered that either the deceased and the accused were having joint kitchen or that the deceased was making payments of ration for accused also in lieu of which the accused owed him money. The factum of TV and other articles of the accused having been retained by the deceased have also not been proved on record by the prosecution. Therefore, in our considered view, this circumstance has not been proved beyond reasonable doubt by the prosecution.

Circumstance No. 4:

34. According to the prosecution, both the accused were having motive to do away the deceased. Accused Nanhe had a motive to kill deceased because deceased was having illicit relations with his wife and further, he had also withdrawn Rs.10,000/- from the account of Kanahiya through ATM which amount actually belonged to the deceased. Similarly accused Kanahiya also had a motive to kill deceased as there was a dispute with regard to payment of ration charges between them and the deceased had retained TV set and other belongings of Kanahiya.

35. In our considered view, the prosecution has miserably failed to prove beyond reasonable doubt that there was illicit relation between the deceased and the wife of the accused. **PW-1 has not only turned hostile but this witness in his examination-in-chief has no where mentioned that the deceased was having illicit relations with Nanhe's wife. All that he has deposed is this that after completion of the vacation of the children, wife of the deceased was reluctant to return Delhi as she suspected that Jaiveer was having some illicit relation with some lady**.

36. As far as statement of PW-5 is concerned, she is an interested witness, as the deceased was her husband. Therefore, her statement has to be scrutinized very carefully. In her examination-in-chief all that she has stated is this that during her stay at Kala Amb she noticed that her husband had some inclination for the wife of Nanhe and thus she suspected illicit relations between her husband and wife of Nanhe. She has also deposed that this was clarified by her to Rajesh Mishra. However, Rajesh Mishra in his cross-examination has denied this fact.

37. In our considered view, no cogent evidence has been produced on record by the prosecution to demonstrate that in fact there was illicit relation between the deceased and the wife of Nanhe. All that the prosecution has been able to place on record is the material which suggests that there was an apprehension in this regard in the mind of PW-5. There is not even an iota of evidence to suggest that Nanhe had any animus towards the deceased as he suspected that the deceased was having illicit relation with his wife. Therefore, in our considered view, the prosecution has not been able to prove beyond reasonable doubt that there was illicit relationship between the deceased and the wife of Nanhe.

38. Similarly, as far as the alleged amount due on account of ration towards deceased from the accused has also not been substantiated by cogent evidence by any material on record. This aspect of the matter we have already dealt with while discussing Circumstance No. 3. Therefore, in our considered view, this can also not be termed as a motive with the accused to do away with the deceased. The factum of an amount of Rs.10,000/- having been withdrawn by Nanhe from the account of Kanahiya through ATM which amount was deposited in the said account by Sonu on behalf of the deceased has also not been explained beyond reasonable doubt by the prosecution. The best witness to prove this factum was Sony, who had allegedly deposited the amount in the account of Kanahiya on behalf of the deceased. However, the prosecution has not produced Sonu in the witness box. Therefore, in our considered view, the prosecution has not been able to prove beyond reasonable doubt that the accused were having motive to do away with the deceased.

Circumstance No. 5:

39. As far as the factum of recovery of the dead body of the deceased is concerned, this stands proved by the prosecution. However, we again reiterate that the prosecution has not been able to bring home the guilt of the accused to the effect that the deceased was killed by them.

Circumstances No. 6 and 7:

40. Now we will be dealing with the issue of the disclosure statements made by Nanhe Lal and Kanahiya Lal and the recoveries effected by the prosecution on the basis of these disclosure statements. It is settled principle of law that no confession made to a police officer shall be proved as against a person accused of any offence. This is provided in Section 25 of the Evidence Act. Section 26 of the said Act further lays that no confession made by any person while he is in the custody of a police officer, shall be proved as against such person unless it be made in the immediate presence of a Magistrate. Section 27 of the said Act provides how much of an information received from accused may be proved.

41. The Hon'ble Supreme Court in ***Mehboob Ali & Another Vs. State of Rajasthan***, ***(2015) 9 J.T. 512***, has held as under:-

"**[13]** For application of section 27 of Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the Police before disclosure statement of the accused is recorded, is admissible in the evidence.

[14] Section 27 of Evidence Act refers when any "fact" is deposed. Fact has been defined in section 3 of the Act. Same is quoted below :

"Fact" means and includes'

(1) any thing, state of things, or relation of things, capable of being by the senses;

(2) any mental condition of which any person is conscious. Illustrations:

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact. "Relevant". "One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."

[16] This Court in State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru, 2005 11 SCC 600 has considered the question of discovery of a fact referred to in section 27. This Court has considered plethora of decisions and explained the decision in Pulukuri Kottaya & Ors. V. Emperor, 1947 AIR(PC) 67 and held thus :

"125. We are of the view that Kottaya case, 1947 AIR(PC) 67 is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of Kottaya case. The ratio of the decision in Kottaya case reflected in the underlined passage extractedwas highlighted in several decisions of this Court.

127. The crux of the ratio in Kottaya case was explained by this Court in State of Maharashtra v. Damu. Thomas J. observed that: (SCC p. 283, para 35)

"The decision of the Privy Council in Pulukuri Kottaya v. Emperor is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In Mohd. Inayatullah v. State of Maharashtra, 1976 1 SCC 828, Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in Pulukuri Kottaya case . The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)

"Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kottaya v. Emperor ; Udai Bhan v. State of U. P., 1962 Supp2 SCR 830)."

[17] In State of Maharashtra v. Damu Gopinath Shinde & Ors., 2000 AIR(SC) 1691 the statement made by the accused that the dead body of the child was carried up to a particular spot and a broken glass piece recovered from the spot was found to be part of the tail lamp of the motorcycle of co-accused alleged to be used for the said purpose. The statement leading to the discovery of a fact that accused had carried dead body by a particular motorcycle up to the said spot would be admissible in evidence. This Court has laid down thus :

"36. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor, 1947 AIR(PC) 67 is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

37. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. In this case, the fact discovered by PW 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

38. How did the particular information led to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the Investigating Officer discovered the fact that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot.

39. In view of the said discovery of the fact, we are inclined to hold that the information supplied by A-2 Guruji that the dead body of Dipak was carried on the motorcycle up to the particular spot is admissible in evidence. That

information, therefore, proves the prosecution case to the abovementioned extent."

[18] In Ismail v. Emperor,1946 AIR(Sind) 43 it was held that where as a result of information given by the accused another co-accused was found by the police the statement by the accused made to the Police as to the whereabouts of the co-accused was held to be admissible under section 27 as evidence against the accused.

[19] In Subedar & Ors. v. King-Emperor,1924 AIR(All) 207 it was held that a statement made by the accused implicating himself and others cannot be called "first information report". However it was held that though it could not be treated as first information report but could be used as information furnished under section 27 of Evidence Act. It was held thus :

> "The approver and one of the appellants were arrested practically red- handed. They made statements to the officer who arrested them involving admissions of guilt. They went further and gave a list of the other members of the gang. Thereupon the officer made a report in writing to his superior, containing the information which he had received, including the names of those other persons received from the two men arrested. Somehow or other, the learned Judge has described this police report, which is merely the report of a confession, as "the first information report." Now the first information report is a well known technical description of a report under section 154, Criminal Procedure Code, giving first information of a cognizable crime. This is usually made by the complainant, or by some one on his behalf. The language is inapplicable to a statement made by the accused. The novelty of a statement by an accused person being called the first information report was to me so strange, that when counsel for the appellants addressed the argument to me attacking the Judge's use of the first information report, I took no notice of the argument. The learned Judge realized that he was dealing with a confession, but he momentarily failed to appreciate that the document itself was inadmissible, and that the only way in which the information relied upon could be used was by section 27. That is to say, with regard to the other accused, the officer giving evidence might say : "I arrested them in consequence of information received from Narain and Thakuri. When I arrested them they made a statement to me which caused me to arrest these people". The use which can legitimately be made of such information is merely this, that when direct evidence is given against the accused at the trial and there was evidence against the accused, it is open to the defence to check such evidence by asking whether the name of a particular accused was mentioned or not at the time?"

42. In the present case, in our considered view, there are major discrepancies with regard to the alleged disclosure statements made by the accused and the recovery of the alleged weapon of offence and other material on the basis of the said disclosure statements. Disclosure statement of accused Nanhe is Ext. PW1/F. This disclosure statement has been made by the accused in the Police Station on 17.03.2010 in the presence of witnesses Rajesh Mishra and Harvir Singh. PW-1 Rajesh Mishra in his statement has denied that during interrogation Nanhe Lal had made any disclosure statement and any such statement was recorded in his presence. He has also denied that on the basis of the said disclosure statement the weapon of offence i.e. Danda was recovered from the spot where the same was concealed by the accused. He has stated that Danda was shown to him by the police after calling him from the factory on the shop of Tersam. It is pertinent to mention that Ext.PW1/F is the memo of recovery pursuant to the

disclosure statement made by accused Nanhe Lal and it also bears the signatures of Rajesh Mishra as a witness. The second witness to Exts. PW1/E and Ext. PW1/F is Harvir Singh. If we peruse the statement of this witness carefully it will reveal that there are lot of discrepancies in his statement. In one breath he says that he, Hitender and Heera (brother of deceased) went to Police Station Nahan and accused Nanhe at Police Station Nahan made a statement that he had used iron rod, thereafter, he stated that he (Nanhe) had used Danda. He has further deposed that disclosure statement of accused Nanhe was recorded between 9-9.30 A.M., whereas the proceeded for recovery during evening hours. Keeping in view the fact that one of the witnesses to the disclosure statement as well as recovery memo has not supported the story of the prosecution and the second witness is not trustworthy. PW-7 happens to be the brother-in-law of the deceased, therefore, he is an interested witness. In our considered view, it cannot be said that the prosecution has been able to prove the factum of the accused Nanhe having made a disclosure statement which led to the recovery of weapon of offence beyond reasonable doubt. Similarly, the disclosure statement of accused Kanahiya is Ext. PW10/A. Witnesses to the same are Jitender Singh and Jai Prakash. Jitender has appeared as PW-10. A perusal of his testimony reveals that his statement is not trustworthy. This is for the reason that according to him he went to the Police Station on that day on his own when he came to know that Jaiveer had been murdered. According to him, during the course of interrogation accused Kanahiya made a disclosure statement that he can get recovered one Danda, one Pajama and one mobile of Jaiveer. On the basis of his disclosure statement, recovery of the aforesaid articles was effected. As per him, Danda is Ext. P-6, which was recovered from a Nali near Craft factory. Incidentally, as per the prosecution, Danda Ext. P-2 which was recovered on the basis of the disclosure statement of accused Nanhe was also recovered from a Nali near Craft factory. We fail to understand that if both Ext. P-2 and Ext. P-6, were hidden in a Nali near Craft factory by the accused then why were the same not recovered by the police when they first visited the spot on the basis of the disclosure statement of either of the accused. All these facts shroud clouds of suspicion over the story of the prosecution and this also shrouds the testimony of PW-10 with suspicion. Similarly, recovery of other alleged articles on the basis of the disclosure statement of accused Kanahiya does not inspire confidence. Accordingly, in our considered view, the prosecution has not been able to establish beyond reasonable doubt that either any disclosure statement was made by accused Kanahiya or the articles alleged to have been recovered on the basis of the disclosure statement made by the accused were actually so recovered. Therefore, in our considered view, the prosecution has not been able to prove this circumstance also.

Circumstance No. 8:

43. It is a matter of record that after the death of the deceased, accused Nanhe and Kanahiya have been arrested by police from their native villages. However, the prosecution has not been able to establish either the presence of the accused at the place of occurrence of the incident or that they actually ran away from the spot after the commission of the offence. Onus in this regard was heavily on the prosecution to have proved this circumstance against the accused. In the absence of prosecution having discharged its onus, we do not deem it proper to hold this circumstance against the accused.

Circumstance No. 9:

44. Dr. A Chaturvedi, who conducted postmortem on the body of the deceased has deposed that the cause of the demise of the deceased was on account of the deceased sustaining multiple injuries, which head injury led to intracraniam Haemarrage. He has deposed that the injuries suffered by the deceased were inflicted or sustained on account of use of blunt weapon on the head of the deceased. On this basis, it has been urged before us by the State that the medical evidence clearly demonstrated that the deceased was killed with blows of Danda and the said blows were inflicted on his head by the accused. In our considered view, even this circumstance has not been proved by the prosecution beyond reasonable doubt to connect the accused with the commission of the offence because the prosecution has not been able to prove on the basis of evidence on record that accused were present at the spot and the deceased was

physically attacked by the accused with Danda and it was on account of the blows so given to the deceased by the accused that he died.

45. Therefore, in view of what we have discussed above, according to us, the prosecution has not been able to bring home the guilt of the accused. It has not been able to establish beyond reasonable doubt that the accused are guilty of the offences alleged against them. In view of this, we find neither any infirmity nor any perversity in the trial Court judgment.

46. We place on record our appreciation for the assistance rendered to the Court by learned Amicus Curiae.

47. Therefore, we uphold the judgment passed by the learned trial Court and dismiss the appeal being without merit. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ..... Appellant
Versus
Surjeet Kumar .....Respondent

Cr. Appeal No. 125/2009
Reserved on: June 22, 2016
Decided on: June 23, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a bag on his shoulder- he tried to run away on seeing the police- he was apprehended and his search was conducted- 810 grams charas was found in his possession- he was tried and acquitted by the trial Court- held, in appeal that accused was apprehended at an isolated and deserted place – there was no possibility of associating independent witnesses- trial Court had wrongly held that police had not associated independent witnesses- testimonies of police officials are corroborating each other- trial Court had wrongly acquitted the accused- appeal allowed and accused convicted. (Para-13 to 17)

Case referred:
Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311

For the appellant : Mr. P.M. Negi, Deputy Advocate General.
For the respondent : Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 18.9.2008 rendered by the learned Special Judge-II, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 11-S/7 of 2008, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 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 12.4.2008, police personnel were on patrol duty from Police Station, Darlaghat and were proceeding towards Kararaghat. At about 6.30 PM, when they were near hotel known as Sapna Hotel, accused was found carrying a bag on his left shoulder. On seeing the police, the accused tried to flee away. He was overpowered. The bag contained a bundle wrapped in green coloured *Dupatta*. It contained *Charas* in the shape of sticks. It weighed 810 grams. Police took samples of 10 grams each out of the *Charas*. Sample and the bulk were packed and sealed separately. NCB form was filled in. *Rukka* was sent to the Police Station. Contraband was sent to FSL Junga. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as ten 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. Tara Singh Chauhan, Advocate, has supported Judgment dated 18.9.2008.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. Constable Yash Pal (PW-1) testified that he alongwith Constable Vishal, MHC Bali Ram and HC Rishi Ram, was on patrolling duty on 12.4.2008. When they were proceeding towards Kararaghat and approached Harish Sapna Hotel, accused was found carrying a black coloured bag on his left shoulder. He tried to run away. He was overpowered. There was no person available nearby hence the bag was placed on the road side and checked in the presence of accused. It contained *Charas*. It weighed 810 grams. Two samples of 10 grams each were taken out and put in two empty match boxes. Match boxes were placed in cloth parcel and were sealed with seal impression 'H' at three places. Remaining *Charas* was also packed and sealed with seal 'H' at three places. Seal was handed over to HHC Bali Ram, after use. Seizure memo Ext. PW-1/A was prepared. In his cross-examination, he admitted that the Police Station, Darlaghat was situate on roadside. Place was busy.

8. Bali Ram (PW-2) and Vishal Verma (PW-3) have also corroborated the statement of PW-1 Shri Yash Pal, about the manner in which accused was apprehended, *Charas* was seized from the bag carried by the accused on 12.4.2008. Vishal (PW-3) has taken *Rukka* Ext. PW-3/A.

9. HHC Ram Lal (PW-4) testified that on 16.4.2008, MHC Ram Pal handed over to him one parcel, sealed with seal 'S' at three places, two samples of seal 'S' and 'H', NCB form and relevant papers vide RC No. 3/08. He deposited the same at FSL Junga on the same day and receipt thereof was handed over to the MHC.

10. HC Ram Pal (PW-7) testified that on 12.4.2008, at 9.20 PM, SI Amar Chand deposited with him one parcel re-sealed with four seals of 'S', which was bearing Mark P, two samples bearing marks P1 and P2 and sealed with seal 'S', one black bag, NCB form in triplicate, samples of seals 'H' and 'S', which were recorded in the Malkhana Register. Contraband was sent for chemical analysis at FSL Junga through Constable Ram Lal. Receipt was handed over by him after depositing the contraband.

11. HC Rishi Ram (PW-8) also testified the manner in which accused was apprehended, all the codal formalities were completed on the spot including filling up of NCB form, preparation of *Rukka* etc. He recorded the statements of witnesses. Case property was produced by him before the learned Judicial Magistrate 1st Class, Arki on 16.4.2008. Magistrate issued certificate Ext. PW-8/E. Case property was handed over to the MHC thereafter.

12. SI Amar Chand (PW-10) deposed that the case property was produced before him by HC Rishi Ram. Parcels were resealed with 'S'. Impressions of seals were taken separately vide Ext. PW-10/B. He filled in columns No. 9 to 11 of the NCB form.

13. What emerges from the statements, as noticed above, is that the accused was apprehended on 12.4.2008 carrying a bag on his left shoulder. Bag was searched. It contained *Charas*. It was sent to FSL Junga and found to be *Charas*. Accused was apprehended at 6.30 PM on 12.4.2008. Place, where accused was apprehended, was an isolated and deserted place. There was no possibility of independent witnesses being available at the spot. Merely that Yash Pal (PW-1) in his statement has stated that the place was busy, would not infer that independent witnesses were readily available on the spot. Learned trial Court has erred in law by coming to a wrong conclusion that the police should have associated somebody from Harish Sapna Hotel. Case property was duly sealed and was produced before SI Amar Chand (PW-10). Seals were found intact when the samples have reached their destination i.e. FSL Junga as per Ext. A1. Samples were carried to FSL Junga by Constable HHC Ram Lal. These were duly received on 16.4.2008. One sealed cloth parcel Ext. A-1 bearing three seals of 'H' and resealed with three seals of 'S' was deposited by Ram Lal with FSL Junga. Statements of official witnesses inspire confidence and are to be treated at par with other witnesses.

14. 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."

15. Prosecution has duly explained that the samples, from the date of seizure till production before FSL, Junga, were in safe custody. They were never tampered with. Contraband was duly deposited in the Malkhana and thereafter it was sent to FSL Junga. The learned trial Court has come to a wrong conclusion that the prosecution has not explained that where the case property remained from 12.4.2008 to 16.4.2008. Case property was sent to FSL Junga. In column No. 12 also, date of seizure is shown as 12.4.2008 and same was dispatched to FSL Junga on 16.4.2008. Ext. PW-8/E also lends credence to the prosecution case, vide which case property was produced before Judicial Magistrate 1st Class.

16. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the conscious and exclusive possession of the accused.

17. Accordingly, the appeal is allowed. Judgment dated 18.9.2008 rendered by the learned Special Judge-II, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 11-S/7 of 2008 is set aside. The accused is convicted for offence punishable under Section 20 of the Act. Accused be produced to be heard on quantum of sentence on 29.6.2016.

18. 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. HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA

Vinod alias Dinesh .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 95 of 2016
Reserved on: June 22, 2016.
Decided on: June 23, 2016.

Indian Penal Code, 1860- Section 376 and 506- **Protection of Children From Sexual Offences Act, 2013-** Section 6- Prosecutrix was called by accused in his room and was raped- she became pregnant- DNA sample of the child was matched- child was found to be biological son of the accused- accused was convicted by the trial Court- held, in appeal that date of birth of prosecutrix was proved to be 15.05.2000 – incident had taken place on 27.7.2013- thus, she was minor on the date of incident- skeletal/radiological age of the prosecutrix was between 12 ½ and 15 ½ years- she was opined to be 12 to 14 years of age medically- child was found to be biological son of the accused- accused had undergone mental treatment subsequent to the incident but it cannot be said that he was of unsound mind at the time of incident or was incapable of knowing the nature of his act- testimony of prosecutrix was satisfactory- appeal dismissed- H.P. State Legal Services Authorities directed to pay Rs.10,000/- per month as victim compensation in addition to Rs. 50,000/- awarded to her by way of fine- State directed to provide education to girl child up to post graduate level. (Para-31 to 45)

Cases referred:

Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat, AIR 1964 SC 1563
Ratan Lal v. The State of Madhya Pradesh, AIR 1971 SC 778
Sheralli Wali Mohammed v. State of Maharashtra, AIR 1972 SC 2443

Elavarasan vs. State represented by Inspector of Police, (2011) 7 SCC 110
Surendra Mishra vs. State of Jharkhand, (2011) 11 SCC 495
Mariappan vs. State of Tamil Nadu, (2013) 12 SCC 270
Tekan alias Tekram vs. State of Madhya Pradesh (Now Chhattisgarh), (2016) 4 SCC 461

For the appellant: Mr. Partap Singh Goverdhan, 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 and order dated 15.12.2015 and 19.12.2015, respectively, rendered by the learned Special Judge, Shimla, H.P. in Sessions Trial No. 6-S/7 of 2014, whereby the appellant-accused (hereinafter referred to as the accused), was charged with and tried for offences punishable under Sections 376 (F) and 506 of IPC and Section 6 of the Protection of Children From Sexual Offences Act, 2013 (hereinafter referred to as POCSO Act). The accused was sentenced to undergo rigorous imprisonment for a period of fourteen years and to pay fine of Rs. 50,000/- under Section 6 of the POCSO Act and in default of payment of fine he was ordered to further undergo simple imprisonment for a period of one year. The accused was also sentenced to undergo simple imprisonment for a period of six months for the offence punishable under Section 506 IPC. Both the sentences were ordered to run concurrently. The prosecutrix was also held entitled for a sum of Rs. 2,00,000/- as compensation in addition to the amount of Rs. 50,000/- as awarded separately. The amount was ordered to be given to the prosecutrix out of the State Government's Victim Compensation Fund for the purpose of rehabilitation. The copy of the judgment was sent to the Member Secretary, H.P. State Legal Services Authority, Shimla.

2. The case of the prosecution, in a nut shell, is that the prosecutrix (PW-1), appeared before the Police Station, Rohroo along with her father on 1.12.2013. She moved an application stating therein that she has been raped by the accused. She is a Nepali national and residing with her parents in the rented house at Rohroo. The accused happened to be her maternal Uncle. He also used to reside in a room in the building in which the prosecutrix along with her parents used to reside. The accused was running a Dhaba. On 27.7.2013, the prosecutrix was called by the accused in his room on the pretext of some work. She was raped. When she tried to scream, the accused gagged her mouth. The accused threatened her that she and her parents would be finished in case she disclosed this fact to anyone. Thereafter, the victim stopped working in the hotel of the accused. She also became pregnant. Thereafter F.I.R. No. 94/2013 was registered. The prosecutrix was sent to DDU Hospital, Shimla for medico legal examination. The doctor opined that the age of the prosecutrix was between 12 to 14 years. The spot was visited by the I.O. The doctor also found the evidence that the prosecutrix was subjected to coitus. She was also found to be pregnant carrying pregnancy of 21 weeks and 4 days. According to the date of birth certificate, the prosecutrix was born on 15.05.2000 and at the time of incidence she was about 13 years 2 months and 12 days. The police also filed the supplementary challan on 10.08.2014 by stating therein that during the investigation, the blood samples of accused were taken and when on 07.03.2014 the victim gave birth to a male child then the blood sample of the victim and her newly born child were also taken for DNA profiling. In the DNA profiling, the child victim was found to be the biological mother of the male child whereas the male child was found to be the biological son of the accused. The matter was investigated and on completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 18 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the

prosecution case. The accused has examined as many as 12 witnesses in defence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Partap Singh Goverdhan, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, for the State has supported the judgment and order of the learned trial Court dated 15.12.2015 and 19.12.2015, respectively.

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

6. The prosecutrix (name withheld) has appeared as PW-1. She deposed that the accused was related to her as her maternal uncle (Mama). He was also residing in Kanwar Singh Building. He was running a Dhaba at Maindhli. She was working in the Dhaba for the last one year. On 27.07.2013 she was present in the Dhaba of the accused. The accused called her in his quarter at about 10:00 p.m. He shut the door of the room and also put curtain on the window. She enquired from the accused as to why he has closed the door and put on the curtains. The accused told that he would tell her later on. The accused caught hold of her and untied the string of her Salwar and made her to lie on the bed. He subjected her to sexual intercourse. He also gagged her mouth. Near the bed, one knife was lying on the floor. The accused after performing sexual intercourse threatened her not to disclose the incident to anybody otherwise he would kill her. Thereafter, he left the room. She also left work after this incident from the Dhaba of the accused. After some time her menstruation stopped and she felt pain in her stomach. She also felt giddiness. She disclosed the incident to her parents. She was not knowing that she was pregnant. Thereafter, she went to the police station Rohroo where application Ext. PW1/A was filed. Her statement was also recorded under Section 164 Cr.P.C. vide Ext. PW1/B. In her cross-examination, she stated that in the ground floor of the building there were 6-7 tenants, out of which three rooms were occupied by the family of the accused. The accused was residing in one corner of the ground floor. Her school was at a distance of 10 minutes walk from her residence. There were 6-7 persons working in the Dhaba of accused. They used to work in the Dhaba from 7:00 AM to 7:00 PM. The accused was having wife and two children aged 6 and 8 years. She has studied up to 5th standard at Government School Gangtoli. Her parents have also lodged missing report at Police Post, City Rohroo. She along with her friend Chameli had gone to Kullu prior to the incident. The accused had forcible intercourse with her only on 27.07.2013. She denied the suggestion that she had physical relations with Rahul also. She denied the suggestion that her grand-father pressurized the accused and his family to pay Rs.20,00,000/- to settle the matter.

7. PW-2, Tek Bahadur is the father of the prosecutrix. According to him, the prosecutrix was born on 15.05.2000 at Rohroo. She studied up to 5th standard. On the request of the accused he directed the prosecutrix to attend some work in the Dhaba. On 1.12.2013, the prosecutrix complained of pain in her stomach. Her menstruation also stopped. She became pregnant. The matter was brought to the notice of the police on the basis of application Ext. PW-1/A. He denied the suggestion in his cross-examination that they concocted false story of working of prosecutrix in the Dhaba of the accused. He denied the suggestion that his father-in-law demanded Rs.20,00,000/- from the accused. He also stated that on 27.07.2013 his daughter was at home and not in the Dhaba of the accused. He further stated that she might have worked up to 11:00-12:00 at midnight at the Dhaba of the accused.

8. PW-3, Laxmi Machan has proved school living certificate of the prosecutrix vide Ext. PW-3/A. The entry of the admission of the prosecutrix was made in the admission and withdrawal register of the school at Sr. No. 5329. The date of birth of the prosecutrix was recorded as 15.05.2000. Certificate Ex.PW3/A was prepared by her on the basis of admission register of the school.

9. PW-4, Dr. Sunil Sharma has examined the accused. He issued MLC Ext.PW-4/B. The prosecutrix was produced before him by LC Inna. The consent of the guardian (father)

of the prosecutrix was obtained as the prosecutrix was minor. He had drawn her blood sample for DNA profiling on F.T.A. card and sealed the same and handed over the sample to the police. He issued report Ext.PW-4/D. On the same date i.e. 1.07.2014 he had drawn blood sample of three months old baby of prosecutrix on F.T.A. card. The consent of the grandfather of the baby was also obtained. In his cross-examination, he admitted that in Exts. PW-4/D and PW-4/E, there is no mention of sealing of F.T.A. card. Volunteered that they used to mention sealing of sample on the F.S.L. form.

10. PW-6, Dr. Shikha Sood has issued report Ext.PW-6/A. She also examined the prosecutrix for pregnancy. The ultrasound gestational age of the foetus was 21 weeks and 4 days. The skeletal/radiological age of the prosecutrix was between 12 ½ and 15 ½ years.

11. PW-7, Dr. Nishi Sood testified that she conducted the medico legal examination of the prosecutrix with alleged history of sexual intercourse on 27.07.2013 at 10:00 PM. According to the case history, the prosecutrix was in the house of the accused along with three other children. The victim was called by her uncle to his room. Her hands were tied behind her back with clothes. Her clothes were removed. The episode lasted for 2-3 hours according to the victim. Her uncle showed her knife and told her not to tell anything otherwise he would kill her. The period of gestation was 19 plus one week. The expected date of delivery was 28th April. She has not noticed any physical or violence injury on the body of the prosecutrix.

12. PW-8 Dr. Ansul Mokta is the Dental Surgeon. He opined the age of the prosecutrix within a range of 12 to 14 years. He appended his opinion on the back side of the MLC Ext. PW-7/A which is Ext.PW-8/A.

13. PW-9 Rakesh Thakur has brought the birth register maintained in KNH, Shimla. According to the record, the prosecutrix gave birth to male child on 07.03.2014 at about 12:30 AM.

14. PW-12 L.C. Inna deposed that on 1.07.2014, as per the direction of SHO, Police Station Rohroo, she took prosecutrix and her new born baby to Civil Hospital, Rohroo for preserving their blood for DNA profiling.

15. PW-14 Insp. Amar Chand deposed that on 1.07.2014 he sent the prosecutrix and her newly born baby to Civil Hospital Rohroo through LC Inna for taking their blood samples for DNA profiling.

16. PW-15 ASI Balraj deposed that on the direction of SHO Police Station, Rohroo, he took the accused to Civil Hospital for taking his blood for DNA profiling as also for F.T.A. card on 07.12.2013.

17. PW-16 Dr. Himanshu testified that on 7.12.2013 the police of Police Station, Rohroo moved an application before him for taking blood samples of accused for DNA profiling. He filled in the identification form of the accused vide Ex.PW-16/C. He obtained the blood samples of the accused on the FTA cards. Thereafter, he sealed the FTA cards and handed over the same to the police along with MLC and identification form.

18. PW-17 Dr. Aparna Sharma, Senior Scientific Officer, State Council for Science, Technology and Environment, Shimla testified that three sealed parcels were received in DNA division for DNA profiling on 03.07.2014. The seals on the parcels were intact and tallied with the specimen seals sent along with docket. After DNA profiling, she gave her opinion at point "A" encircled in report Ex.PW-14/A. According to her opinion, the prosecutrix was the biological mother of the male child whereas accused was biological father of the baby of the prosecutrix. In her cross-examination, she deposed that the science relating to D.N.A. is 99.99% perfect.

19. PW-18 Insp. Chander Sekhar testified the manner in which the application was filed before him and F.I.R. Ext. PW-18/A was registered. He got the prosecutrix medically examined. In his cross-examination, he specifically stated that during his tenure no dispute

arose between the parties. It also did not come during the investigation that the accused at the relevant time was having any ailment. He also denied that at that time the accused was under the treatment of doctor for his mental ailment. He also denied that during treatment electric shock was also applied upon the accused. He also denied that the accused was falsely implicated.

20. DW-2 Vicky testified that the accused was known to him. The accused had a quarrel with Prem Singh Nepali. Prem Singh Nepali has filed a complaint against the accused and later on the matter was compromised. The complaint was moved in the month of September, 2013.

21. DW-3 Ramesh testified that the mental condition of the accused was not good. He took the accused to his house due the mental derailment, number of times.

22. DW-4 Sher Singh deposed that he knew the prosecutrix. On 24.05.2013 two girls fled away from Rohroo. Missing report was lodged. The accused and his maternal grandfather had lodged the report.

23. DW-5 Sandeep testified that the accused was his real brother. In the year 2006-07, the accused was suffering mental ailment. At that time he was taken to hospital at Dharmpur. During his treatment, electric shocks were given to the accused, as and when the accused faced the problem and he always remained with him. The accused was running a Dhaba.

24. DW-6 Dr. Virendra Mohan deposed that the accused was his patient. He was admitted in his hospital on 06.11.2006 and discharged on 9.11.2006. He was suffering from psychiatric disorder (Mania and Bhang/Cannabis abuse). As per the history given by the patient, he was suffering from this disease for the last 3 months. The patient was again admitted on 17.02.2007 and discharged on 12.03.2007. During his admission, he was given Electro Convulsive Therapy (E.C.T) six times. He was again admitted on 14.12.2009 and discharged on 19.12.2009. He was given two time E.C.T. Thereafter, the patient visited his hospital as outdoor patient five times and lastly he attended his hospital on 18.09.2010. In his cross-examination, he specifically admitted that when the patient lastly visited his hospital, he had improved a lot.

25. DW-7 Chameli deposed that the prosecutrix was her class fellow as well as her friend. About two year ago, on 25th she and prosecutrix had stayed in a hotel at Kullu along with two boys. The grandfather of the prosecutrix filed a complaint. Thereafter, she informed her father who brought them back.

26. DW-8. Ms. Soni deposed that the accused has converted his religion. He was Christian on 27.07.2013. She along with accused was sitting in a restaurant at Rohroo market. She obtained a room on rent. They both stayed there and left the room next day. In her cross-examination, she admitted that the house of the accused was situated at a distance of about 1- 1 ½ Kms away from the restaurant namely, Bethak. She informed her family regarding her stay at Rohroo. They made entry in the visitor register of the hotel in which they stayed. She had not taken the accused to hospital when he fell ill.

27. DW-9 Kamla deposed that there was quarrel between the family of Prem Bahadur and her brother and father. Thereafter, compromise took place between the parties.

28. DW-10 Ajay Sharma, Pharmacist deposed that the accused had remained under treatment with psychiatry department. They used to supply medicine. As per the record, the accused was getting the treatment from the month of March, 2015.

29. DW-11 Moti Lal deposed that according to the record, on 27.07.2013 a guest namely, Dinesh Karki stayed in their hotel. The abstract of register is Ext. DW-11/A. In his cross-examination, he admitted that Rohroo is a big village and he had not mentioned the specific

address of the visitor. He did not remember whether any ID proof of the person was taken into possession who stayed in their hotel.

30. DW-12 Dr. Ramesh Kumar deposed that during his visit to Model Central Jail, Kanda, he examined the accused. He continued the medicine, which was earlier prescribed to him. He examined the patient on 23.10.2015 for bi-polar affective disorder. He was already under treatment for the said disease. He could not comment with certainty that the patient of such disease could harm any person. In his cross-examination he deposed that the treatment of the accused started with the IGMC on 18.03.2015.

31. PW-1 is the prosecutrix. According to the date of birth certificate, duly proved on record, the date of birth of the prosecutrix was 15.5.2000. The accused had employed her in his hotel (Dhaba). The prosecutrix has categorically testified in her examination-in-chief that she was present in the Dhaba on 27.7.2013 and accused called her to his quarter. He raped her. He also threatened her. She did not disclose this incident to her parents. She felt pain in her stomach and thereafter she was taken to the hospital. She also disclosed that she was pregnant. The testimony of the prosecutrix has not at all been shattered in her cross-examination.

32. The statement of the prosecutrix has been duly corroborated by PW-6, Dr. Shikha Sood. PW-6 Dr. Shikha Sood has examined the prosecutrix for pregnancy. According to her, the skeletal/radiological age of the prosecutrix was between 12 ½ and 15 ½ years. The ultrasound gestational age of the foetus was 21 weeks and 4 days. PW-7, Dr. Nishi Sood has conducted the medico legal examination of the prosecutrix with alleged history of sexual intercourse on 27.07.2013 at 10:00 PM. According to her, as per reports received from Dentist and Radiologist, the age of the prosecutrix was between 12 to 14 years. PW-8 Dr. Ansul Mokta has issued MLC Ext. PW-7/A. He has opined that the age of the prosecutrix was within the range of 12 to 14 years. PW-3 Laxmi Machan has proved the date of birth of the prosecutrix vide Ext. PW-3/A. The date of birth of the prosecutrix as per the admission register was 15.05.2000.

33. PW-9 Rakesh Thakur has testified that a male child was born on 7.3.2014 at 12:30 AM in the KNH, Shimla. PW-12 LC Inna has taken the prosecutrix and her new born baby to Civil Hospital, Rohroo for preserving their blood for DNA profiling. PW-14 Insp. Amar Chand has sent PW-12 LC Inna for collecting blood samples for DNA profiling of the newly born baby of the prosecutrix. PW-16 Dr. Himanshu has taken the blood of the accused for DNA profiling. PW-17 Dr. Aparna Sharma has proved her report vide Ext. PW-14/A. According to her, the prosecutrix was the biological mother of the male child whereas accused was biological father of the baby of the prosecutrix. She has deposed categorically that the blood samples were taken on the FTA card. The seals and the parcels were intact and tallied with the specimen seal sent along with the docket. Thus, there is no merit in the contention of Mr. Partap Singh Goverdhan, Advocate, that the seals were not put on the parcels.

34. Mr. P.S.Goverdhan, Advocate, has also argued that his client was insane at the time of commission of offence. This plea cannot be accepted. DW-3 Ramesh has only stated that the mental condition of accused was not good. He took the accused to his house due to mental derailment, number of times. This is a general statement. DW-5 Sandeep has deposed that the accused was suffering from mental ailment. He has also taken the accused to hospital at Dharampur. The electric shocks were given to the accused. DW-6 Dr. Virendra Mohan deposed that the accused was his patient. He was admitted in his hospital on 06.11.2006 and discharged on 9.11.2006. He was suffering from psychiatric disorder (Mania and Bhang/Cannabis abuse). As per the history given by the patient, he was suffering from this disease for the last 3 months. The patient was again admitted on 17.02.2007 and discharged on 12.03.2007. During his admission, he was given Electro Convulsive Therapy (E.C.T) six times. He was again admitted on 14.12.2009 and discharged on 19.12.2009. The incident is dated 27.7.2013. In his cross-examination, DW-6 Dr. Virendra Mohan has admitted that he has noticed improvement at the time of discharge of the accused.

35. In the instant case, it cannot be said that accused was incapable of knowing the nature of act or that he was doing what was either wrong or contrary to law. There is no evidence or circumstance that accused was having unsoundness of mind at the time of commission of offence. There is no evidence that accused was having unsoundness of mind before the occurrence and at the time of commission of crime.

36. Their Lordships of the Hon'ble Supreme Court in ***Dahyabhai Chhaganbhai Thakkar*** vs. ***State of Gujarat***, AIR 1964 SC 1563 have held that that when a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Their Lordships have held as under:

> "9. When a plea of legal insanity is set up, the court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime.
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> 14. The subsequent events leading up to the trial make it abundantly clear that the plea of insanity was a belated afterthought and a false case. After the accused came out of the room, he was taken to the chora and was confined in a room in the chora. P. W. 16, the police sub-inspector reached Bherai at about 9.30 a.m. He interrogated the accused; recorded his statement and arrested him at about 10.30 a.m. According to him, as the accused was willing to make a confession, he was sent to the judicial magistrate. This witnesses described the condition of the accused when he met him thus:
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> > "When I went in the Chora he had saluted me and he was completely sane. There was absolutely no sign of insanity and he was not behaving as an insane man. He was not abusing. He had replied to my questions understanding them and was giving relevant replies. And therefore I had sent him to the Magistrate for confession as he wanted to confess."
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> There is no reason to disbelive this evidence, particularly when this is consistent with the subsequent conduct of the accused. But P. W. 9, who attested the panchanama, Ex. 19, recording the condition of the accused's body and his clothes, deposed that the accused was murmuring and laughing. But no mention of his condition was described in the panchnama. Thereafter, the accused was sent to the Medical Officer, Matar, for examination and treatment of his injuries. The doctor examined the accused at 9.30 p.m. and gave his evidence as P. W. 11. He proved the certificate issued by him, Ex. 23. Nothing about the mental condition of the accused was noted in that certificate. Not a single question was put to this witnesses in the cross-examination about the mental condition of the accused. On the same day, the accused was sent to the Judicial Magistrate, First Class, for making a confession. On the next day he was produced before the said Magistrate, who asked him the necessary questions and gave him the warning that his confession would be used against him at the trial. The accused was given time for reflection and was produced before the Magistrate on April 13, 1959. On that date he refused to make the confession. His conduct before the Magistrate, as recorded in Ex. 31 indicates that he was in a fit condition to appreciate the questions put to him and finally to make up his mind not to make the confession which he had earlier offered to do. During the enquiry proceedings under Ch.

XVIII of the Code of Criminal Procedure, no suggestion was made on behalf of the accused that he was insane. For the first time on June 27, 1959, at the commencement of the trial in the sessions court an application was filed on behalf of the accused alleging that he was suffering from an attack of insanity. On June 29, 1959, the Sessions Judge sent the accused to the Civil Surgeon, Khaira, for observation. On receiving his report, the learned Sessions Judge, by his order dated July 13, 1959, found the accused insane and incapable of making his defence. On August 28, 1959, the court directed the accused to be sent to the Superintendent of Mental Hospital, Baroda, for keeping him under observation with a direction to send his report on or before September 18, 1959. The said Superintendent sent his report on August 27, 1960 to the effect that the accused was capable of understanding the proceedings of the court and of making his defence in the court. On enquiry the court held that the accused could understand the proceedings of the case and was capable of making his defence. At the commencement of the trial, the pleader for the accused stated that the accused could understand the proceedings. The proceedings before the Sessions Judge only show that for a short time after the case had commenced before him the accused was insane. But that fact would not establish that the accused was having fits of insanity for 4 or 5 years before the incident and that at the time he killed his wife he had such a fit of insanity as to give him the benefit of S. 84 of the Indian Penal Code. The said entire conduct of the accused from the time he killed his wife upto the time the sessions proceedings commenced is inconsistent with the fact that he had a fit of insanity when he killed his wife."

37. Their Lordships of the Hon'ble Supreme Court in ***Ratan Lal*** v. ***The State of Madhya Pradesh***, AIR 1971 SC 778 have held that the crucial point of time at which unsoundness of mind has to be proved is the time when the crime is actually committed. The burden of proving this can be discharged by the accused from the circumstances which preceded, attended and followed the crime. their Lordships have held as under:

> "2. It is now well settled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the accused. (See State of Madhya Pradesh v. Ahmadullah, (1961) 3 SCR 583 = (AIR 1961 SC 998). In D. C. Thakkar v. State of Gujarat, (1964) 7 SCR 361 = (AIR 1964 SC 1563); it was laid down that "there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that which rests upon a party to civil proceedings." It was further observed:
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> > "The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."

38. Their Lordships of the Hon'ble Supreme Court in ***Sheralli Wali Mohammed*** v. ***State of Maharashtra***, AIR 1972 SC 2443 have held that law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. The mere fact that no motive has been proved why the accused murdered his wife and child, or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have the necessary *mens rea* for the commission of the offence. Their Lordships have held as under:

“12. To establish that the acts done are not offences under S. 84 of the Indian Penal Code, it must be proved clearly that, at the time of the commission of the acts, the appellant, by reason of unsoundness of mind, was incapable of either knowing the nature of the act or that the acts were either morally wrong or contrary to law. The question to be asked is, is there evidence to show that, at the time of the commission of the offence, he was labouring under any such incapacity? On this question, the state of his mind before and after the commission of the offence is relevant. The general burden of proof that an accused person is in a sound state of mind is upon the prosecution. In Dahyabhai Chhaganbhai Thakkar v. The State of Gujarat, (1964) 7 SCR 361 at p. 367 = (AIR 1964 SC 1563), Subba Rao, J., as he then was, speaking for the Court said

> "(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

13. With this in mind, let us consider the evidence to see whether the accused was in an unsound state of mind at the time of the commission of the acts attributed to him, P. W. 3, one of the brothers of the accused stated that the accused used to become excited and uncontrollable, that sometimes he behaved like a mad man, and that he was treated by Dr. Deshpande and Dr. Malville. P. W. 4, Hyderali, also a brother of the accused, has stated that the accused used to suffer from temporary insanity and that he was treated by Dr. Deshpande and Dr. Malville. The evidence of these two witnesses on the question of the insanity of the accused did not appeal to the trial Court and the Court did not, we think rightly, place any reliance upon it. No attempt was made by the defence to examine the two doctors. There was, therefore, no evidence to show that, at the time of the commission of the acts, the accused was not in a sound state of mind. On the other hand, P. W. 8, Rustom Mirja, has stated in his deposition that the accused has been working with him as an additional motor driver for the last 8 or 10 years and that his work and conduct were normal. He also stated that the accused worked with him on March 6, 1968, till 4 P.M. P. W. 16, Dr. Kaloorkar, who examined the accused at 7.20 A.M. on the day of the occurrence, has stated in his deposition that he found that the accused was in normal condition. His evidence has not been challenged in cross-examination.

We think that not only is there no evidence to show that the accused was insane at the time of the commission of the acts attributed to him, but that there is nothing to indicate that he had not the necessary mens rea when he committed the offence. The law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the

crime. The mere fact that no motive has been proved why the accused murdered his wife and child or, the fact that he made no attempt to run away when the door was broke open, would not indicate that he was insane or, that he did not have the necessary mens rea for the commission of the offence. We see no reason to interfere with the concurrent findings on this point either."

39. Their Lordships of the Hon'ble Supreme Court in ***Elavarasan*** vs. ***State represented by Inspector of Police***, (2011) 7 SCC 110 have held that the burden of bringing his/her case under section 84 of the Indian Penal Code lies upon person claiming benefit thereof. Standard of proof which accused has to satisfy for discharge of burden under section 105 is not same as is expected of prosecution. It is enough for accused to establish his defence on preponderance of probabilities as in a civil case. Their Lordships have held as under:

"22. The question, however, is whether the appellant was entitled to the benefit of Section 84 of Indian Penal Code which provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or who is incapable of knowing that what he is doing, is either wrong or contrary to law. Before adverting to the evidence on record as regards the plea of insanity set up by the appellant, we consider it necessary to refer to two aspects that bear relevance to cases where a plea of insanity is raised in defence by a person accused of a crime. The first aspect concerns the burden of proving the existence of circumstances that would bring the case within the purview of Section 84 of the I.P.C. It is trite that the burden of proving the commission of an offence is always on the prosecution and that the same never shifts. Equally well settled is the proposition that if intention is an essential ingredient of the offence alleged against the accused the prosecution must establish that ingredient also.

23. There is no gainsaying that intention or the state of mind of a person is ordinarily inferred from the circumstances of the case. This implies that, if a person deliberately assaults another and causes an injury to him then depending upon the weapon used and the part of the body on which it is struck, it would be reasonable to assume that the accused had the intention to cause the kind of injury which he inflicted. Having said that, Section 84 can be invoked by the accused for nullifying the effect of the evidence adduced by the prosecution. He can do so by proving that he was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. But what is important is that the burden of bringing his/her case under Section 84 of the IPC lies squarely upon the person claiming the benefit of that provision.

24. Section 105 of the Evidence Act is in this regard relevant and may be extracted:

"105. Burden of proving that case of accused comes within exceptions.- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

25. A careful reading of the above would show that not only is the burden to prove an exception cast upon the accused but the Court shall presume the absence of circumstances which may bring his case within any of the general exceptions in the Indian Penal Code or within any special exception or provision contained in any part of the said Code or in law defining the offence. The following passage from the decision of this Court in Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, (1964) 7 SCR 361 may serve as a timely reminder of

the principles governing burden of proof in cases where the accused pleads an exception:

> "The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:
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> (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
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> (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.
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> (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."
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> 26. The second aspect which we need to mention is that the standard of proof which the accused has to satisfy for the discharge of the burden cast upon him under Section 105 (supra) is not the same as is expected of the prosecution. A long line of decisions of this Court have authoritatively settled the legal proposition on the subject. Reference in this connection to the decision of this Court in State of U.P. v. Ram Swarup and Anr., (1974) 4 SCC 764 should suffice where this court observed:
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> > "The burden which rests on the accused to prove the exception is not of the same rigour as the burden of the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities is in his favour."
> >
> > To the same effect is the decision of this Court in Bhikari v. State of Uttar Pradesh (AIR 1966 SC 1)."

40. Their Lordships of the Hon'ble Supreme Court in ***Surendra Mishra*** vs. ***State of Jharkhand***, (2011) 11 SCC 495 have held that to discharge the onus under section 84, accused must prove his conduct prior to offence, at the time or immediately after offence, with reference to his medical condition. Whether accused knew that what he was doing was wrong or that it was contrary to law is of great importance and may attract culpability despite mental unsoundness having been established. Their Lordships have held as under:

> "13. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Indian Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order

to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him.

14. Reference in this connection can be made to a decision of this Court in the case of T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219, in which it has been held as follows:

> "9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.
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> 10. In State of M.P. v. Ahmadull,AIR 1961 SC 998, this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration (a)]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.
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> 11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."

41. Their Lordships of the Hon'ble Supreme Court in ***Mariappan*** vs. ***State of Tamil Nadu***, (2013) 12 SCC 270 have held that burden of proving the case of accused comes within exceptions under section 105 of the Evidence Act, 1872 lies on the accused. Their Lordships have held as under:

> “13. The evidence of PWs 1 and 2 - the eye-witnesses, the evidence of PWs 3 and 4, who saw the accused running after the occurrence with Aruval (M.O.I) and the recovery of the weapon at the instance of the accused which was found to be stained with human blood of "O" group, as per the serologist report (Ex.P.12), tallied with the blood group of the deceased as the clothes of the deceased viz., M.O.s 1 to 4 were also stained with human blood "O" group clearly prove the case of the prosecution. Further, the medical evidence through PW-9-the Doctor, who conducted the post-mortem and issued the report (Ex.P-3) strengthened the version of PWs 1 and 2.
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> 14. From the materials analyzed, discussed and concluded by the trial Court and the High Court, it clearly establishes that it was the accused-appellant who committed the murder.”

42. The plea of *alibi* also cannot be accepted since the statements of DW-8 Ms. Soni and DW-11 Moti Lal do not inspire confidence. The house of the accused was only at a distance of 1 ½ Km. from the Restaurant, namely, Bethak. The accused either should have been taken to his house by DW-8 Ms. Soni when he fell ill or he should have been taken to the hospital.

43. DW-12 Dr. Ramesh Kumar has deposed that he examined the patient on 23.10.2015 for bi-polar affective disorder. In his cross-examination, he admitted that the treatment of the accused started with IGMC Shimla on 18.3.2015. It is reiterated that the incident is dated 27.7.2013. Similarly, DW-10 Ajay Sharma, Pharmacist has deposed that according to the record, the accused was getting treatment from the month of March, 2015. The insanity has to be seen at the time of commission of offence. There is no enmity between the families of the accused and the prosecutrix. The suggestion made to the prosecutrix and her father PW-2 Tek Bahadur that ransom was demanded has been denied by both of them. There was no occasion for the prosecutrix's family to falsely implicate the accused, who is none other than the maternal uncle of the prosecutrix.

44. The prosecution has proved the case against the accused and the learned trial Court has correctly scanned the entire evidence available on record. There is no reason for us to interfere with the well reasoned judgment and order of the learned trial Court dated 15.12.2015 and 19.12.2015, respectively. Accordingly, there is no merit in this appeal, the same is dismissed. However, before parting with the judgment, it would be pertinent to mention here that the learned trial Court has also awarded compensation of Rs. 2,00,000/- to the prosecutrix to be paid through the agency of H.P. State Legal Services Authority in addition to Rs. 50,000/- imposed by way of fine. The prosecutrix is doubly in disadvantageous position since she has to maintain herself and her baby. She belongs to the lowest strata of the society. She has already suffered a lot. Thus, she needs a special rehabilitation. However, since the prosecutrix has to maintain herself and the male child, the judgment of the learned trial Court is modified to this limited extent that the prosecutrix will be entitled to a sum of Rs. 10,000/- per month as victim compensation in addition to Rs. 50,000/- awarded to her by way of fine till her life, instead of Rs. 2,00,000/- under the Himachal Pradesh (Victim of Crime) Compensation Scheme, 2012 framed under Section 357-A of the Code of Criminal Procedure, 1973 in view of the definitive law laid down by their lordships of the Hon'ble Supreme Court in the case of ***Tekan alias Tekram vs. State of Madhya Pradesh (Now Chhattisgarh),*** reported in ***(2016) 4 SCC 461,*** wherein it has been held as follows:

> "9. From the inquiry, it reveals that the victim (now aged about 37 years) lives alone in Village Nandini Kundini, District- Durg, Chhattisgarh. She is unmarried and lives in a kuccha house. She has two brothers who lives separately from her. One of the brothers Ishwari Sahu lives in a different village Dhour (distance 12 kms from Nandini Kundini). Another brother Baldau Sahu lives is district Bhila (distance 22 kms from Nandini Kundini) and works as a daily-labourer. She receives a pension of Rs.300/- per month from the State being a person with disability. She is also a BPL card holder which entitles her 35kg rice per month at the rate of Rs.1/- per kg. and free salt. The financial status of victim's brothers is also not good.
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> 15. Coming to the present case in hand, victim being physically disadvantaged, she was already in a socially disadvantaged position which was exploited maliciously by the accused for his own ill intentions to commit fraud upon her and rape her in the garb of promised marriage which has put the victim in a doubly disadvantaged situation and after the waiting of many years it has worsened. It would not be possible for the victim to approach the National Commission for Women and follow up for relief and rehabilitation. Accordingly the victim, who has already suffered a lot since the day of the crime till now, needs a special rehabilitation scheme.
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> 17. Indisputably, no amount of money can restore the dignity and confidence that the accused took away from the victim. No amount of money can erase the trauma and grief the victim suffers. This aid can be crucial with aftermath of crime.

19. In the result, we dismiss the appeal having no merit and issue the following directions:-

1) All the States and Union Territories shall make all endeavour to formulate a uniform scheme for providing victim compensation in respect of rape/sexual exploitation with the physically handicapped women as required under the law taking into consideration the scheme framed by the State of Goa for rape victim compensation;

2) So far as this case is concerned, the respondent State shall pay a sum of Rs.8,000/- per month as victim compensation to the victim who is physically handicapped, i.e. blind, till her life time."

45. The State Government is also directed to provide free education to the child of the prosecutrix/victim up to post graduate level. A copy of this judgment be sent to the Chief Secretary to the State of Himachal Pradesh/Member Secretary H.P. State Legal Services Authority within one week for necessary compliance.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Ajay Kumar .....Petitioner.

Vs.

Rita Devi .....Respondent.

Cr. Revision No.: 189 of 2009
Reserved on: 26.05.2016
Date of Decision: 24.06.2016

Code of Criminal Procedure, 1973- Section 125- Applicant filed an application stating that she had solemnized marriage with the respondent as per Hindu rites and customs – she was harassed and was forced to leave the matrimonial house- respondent denied that he had married the applicant- trial Court concluded that marriage was not proved- revision was preferred, which was allowed- order passed by the trial Court was set aside- held, in revision that photographs show bride, bridegroom and 2-3 girls- respondent admitted that he was a bridegroom in those photographs – girls behind bridegroom were sisters of the applicant- findings recorded by Revisional Court that marriage was duly proved cannot be interfered- revision dismissed.

(Para-9 to 20)

Cases referred:

Padminibai alias Panabai Vs. Sambaji Dhondiram Bhosle and another, Divorce and Matrimonial Cases Vol. 1 (1983) 264

Shibsankar Samanta Vs. Smt. Sobhana Samanta, 1992 Cri. L.J. 2196

Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit and another (1999) 7 Supreme Court Cases 675

For the petitioner: Mr. Neeraj Maniktala, Advocate.

For the respondent : Mr. Adarsh K. Vashista, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

This petition has been filed against order dated 20.10.2008 passed by the Court of learned Sessions Judge, Kangra at Dharamshala in Criminal Revision Petition No. 10-B/X-2006 vide which, the learned Revisional Court has set aside order dated 25.02.2006 passed by the Court of learned Additional Chief Judicial Magistrate, Baijnath, District Kangra in Petition No.

99-IV/2004 and directed the present petitioner to pay to the respondent/applicant maintenance @ Rs.800/- per month w.e.f. 15.07.2004.

2. Brief facts necessary for the adjudication of presence case are that wife of present petitioner (hereinafter referred to as 'the applicant') filed an application under Section 125 Cr. P.C. before the learned trial Court claiming maintenance from the respondent therein. The case put forth by the applicant was that she was wife of respondent and their marriage was solemnized on 06.07.1998 at Village Ghartholi according to Hindu rites and customs. As per the applicant, the present petitioner and his family members started maltreating her immediately after the marriage on the ground of bringing insufficient dowry. They used to ask for precious items like refrigerator. After six months of marriage, she was forced to leave the matrimonial house and since then she is living with her parents. Her parents tried to solve the matter amicably, but the petitioner refused to keep the applicant and also threatened to marry another woman. As per the applicant, the petitioner is living with another woman, named Lalita Devi, D/o Madho Ram since 27.02.2004 after marrying her and he was neglecting to maintain the applicant without any reasonable cause. He was also not paying any maintenance to her. As per the applicant, the petitioner was working as a Mason and was earning an amount of Rs.6000/- per month. According to the applicant, she was neglected and refused to be maintained by the petitioner. Therefore, she was entitled for the grant of maintenance allowance.

3. The husband in the reply so filed by him denied the factum of applicant being his wife. As per him, he was married to Lalita Devi as per Hindu rites and customs on 25.11.1997. The applicant was not his legally wedded wife and therefore, according to him, there was no question of paying any maintenance to her.

4. On the basis of evidence placed on record by the parties, the learned trial Court came to the conclusion that the relationship of husband and wife as required under Section 125 Cr. P.C. was not proved between the parties, as such, the question of willful neglect or refusal did not arise and in view of the findings so arrived at by the learned trial Court, the petition filed for maintenance of the applicant was dismissed.

5. Feeling aggrieved, the applicant filed Revision Petition in the Court of learned Sessions Judge, Kangra, which was decided on 20.10.2008. The Court of learned Sessions Judge, Kangra while allowing the Revision Petition so filed by the applicant, set aside the order passed by the learned trial Court. The learned Revisional Court held that on the basis of available evidence on record, applicant had been able to prove and establish her marriage with petitioner on 06.07.1998. It further held that applicant stood married to the present petitioner in 1998 and after marriage, the applicant started residing with her husband, i.e. present petitioner. However, the present petitioner started treating the applicant with cruelty and started demanding costly items of dowry from the parents of applicant and in such circumstances, she was compelled to leave her matrimonial house. Efforts were made to patch up difference between the parties, but were unsuccessful. Learned first Revisional Court also held that the applicant was married with the present petitioner in accordance with customary rites and rituals in 1998 and this fact stood proved by AW-1, Sikander Kumar, who had performed the ceremonies of marriage. The First Revisional Court further concluded that the present petitioner had not produced any documentary evidence in support of his alleged marriage on 25.11.1997 with RW-5 (Smt. Lalita Devi).

6. On the basis of this, it concluded that the applicant was entitled for maintenance @ Rs.800/- per month to be paid by the present petitioner from the date of institution of petition under Section 125 of the Code of Criminal Procedure.

7. Feeling aggrieved by the said order, the present petitioner has filed this petition praying for setting aside order dated 20.10.2008 passed by the Court of learned Sessions Judge, Kangra at Dharamshala.

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

9. In fact, learned trial Court had dismissed the petition under Section 125 Cr. P.C. by holding that no evidence has come on file that the applicant resided with the present petitioner as his wife and no documentary evidence has come on record to substantiate that the applicant was the wife of present petitioner. On these basis, learned trial Court came to the conclusion that the applicant was not entitled for maintenance from the petitioner under Section 125 Cr. P.C. as she had miserably failed to prove that she was wife of the petitioner and especially in the presence of Lalita Devi, she could not be termed to be the wife of present petitioner.

10. The findings so returned by the learned trial Court had been set aside by the learned first Revisional Court. The first Revisional Court has held that on the basis of material produced on record by the applicant, it stood proved that marriage had been solemnized between the applicant and the present petitioner. It has been held by the first Revisional Court that the contention of the applicant that she was married to the present petitioner and as his legally wedded wife she lived with him for about six months was substantiated by her in the Court as a witness and her deposition was duly supported and corroborated by four other witnesses, who in unison proved that applicant Rita Devi was in fact married to Ajay Kumar on 06.07.1998 as per Hindu rites and customs. On the other hand, the factum of the marriage of applicant with petitioner Ajay Kumar was not satisfactorily dispelled by the petitioner. Not only this, the petitioner in fact admitted that he was engaged with Rita Devi, but as Rita Devi was mentally unsound, therefore, marriage was not solemnized. In fact, his case was that he had rejected the proposal of his marriage with Rita Devi on this ground and the case filed by Rita Devi was in revenge.

11. Mark-X and Mark-Y are two photographs on record, which according to the applicant are of the time when she was married to petitioner Ajay. In these photographs, one can see a bride and a bridegroom and two-three girls standing behind bridegroom. Petitioner Ajay Kumar has not denied that he is the person who is a bridegroom in these photographs. However, according to him, the bride in these photographs is not the applicant. Incidentally, it is not even his case that the bride in these photographs is the lady whom he claimed to have married in the year, 1997. Further, it stands proved on record that the girls who are seen in the photographs behind the bridegroom are the sisters of applicant Rita Devi.

12. The first Revisional Court has also held on the basis of material on record that respondent Ajay, i.e. present petitioner was not married to Lalita on 25.11.1997 as alleged and marriage, if any, has taken place only on 27.02.2004. The first Revisional Court has also held that present petitioner has also not produced any documentary evidence in support of his alleged marriage with Lalita on 25.11.1997. The factum of the said marriage is not recorded anywhere nor there is an iota of material produced on record by the present petitioner to suggest that he was married with Lalita on 25.11.1997.

13. Lalita, who has entered into the witness box as RW-5 has stated that she was married to present petitioner in the month following the month of *lohari*. The learned first Revisional Court has taken note of the fact that this witness has said in her examination-in-chief that she stood married to Ajay on 25.11.1997, whereas subsequently she has stated that she was married to petitioner one month's after *lohari*. *Lohari* is celebrated in the month of January, which further proves the case of applicant that Ajay had married Lalita only in the year, 2004, i.e. on 27.02.2004.

14. In view of what I have discussed above, it cannot be said that the findings which have been arrived at by the first Revisional Court are either perverse or not borne out from the material produced on record by the applicant.

15. In support of his contention, learned counsel for the petitioner has also relied upon two judgments. These judgments are:

1. Padminibai alias Panabai Vs. Sambaji Dhondiram Bhosle and another, Divorce and Matrimonial Cases Vol. 1 (1983) 264; and

2. Shibsankar Samanta Vs. Smt. Sobhana Samanta, 1992 Cri. L.J. 2196.

16. Learned counsel for the petitioner by placing reliance on the judgment passed by the Bombay High Court in **Padminibai alias Panabai** Vs. **Sambaji Dhondiram Bhosle and another,** Divorce and Matrimonial Cases Vol. 1 (1983) 264 has argued that it was not open for the revisional Court to re-appreciate the evidence afresh, as has been done by the learned first Revisional Court in the present case.

17. I am afraid that the argument of learned counsel for the petitioner only merits rejection. It is settled law that though revisional Court ordinarily does not re-examine and re-appreciate the evidence, however, in exceptional cases where there is failure to appreciate the evidence on record or where there is mis-application of law or the finding is so perverse that it cannot be sustained on the record, it is always open for the Revisional Court to re-examine and re-appreciate the evidence. It is apparent from the perusal of the orders passed by the learned trial Court as well as learned first appellate Court that the findings returned by the learned trial Court on the issue were perverse and was a result of failure to consider the evidence on record. Therefore, in these circumstances, the learned first Revisional Court has rightly re-examined and re-appreciated the evidence in order to meet the ends of justice.

18. As far as the judgment passed by the Calcutta High Court in **Shibsankar Samanta** Vs. **Smt. Sobhana Samanta**, 1992 Cri. L.J. 2196 is concerned, in my considered view, it does not further the case of the petitioner because the said judgment has no bearing on the facts of the present case. The findings returned by the Calcutta High Court are on the basis of factual controversy involved in that case.

19. The Hon'ble Supreme Court in **Dwarika Prasad Satpathy** Vs. **Bidyut Prava Dixit and another** (1999) 7 Supreme Court Cases 675 has held as under:

> *"....The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 IPC. If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption."*

20. On the touch stone of the law laid down by the Hon'ble Supreme Court, it can be safely said that the applicant had placed sufficient material on record on the basis of which it could be determined that she was legally wedded wife of present petitioner and she and petitioner had lived together as husband and wife for six months after marriage. On the other hand, the present petitioner who in fact denied the marital status, could not rebut the presumption on the basis of evidence produced on record by him. In this view of the matter, in my considered view, there is neither any perversity nor any infirmity with the order passed by the learned first Revisional Court.

21. Accordingly, I do not find any merit in the present Revision Petition and the same is dismissed.

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

CWP No. 2479 of 2015 along with
CWP No. 2850 of 2015.
Decided on : 24th June, 2016.

1. CWP No. 2479 of 2015.

Bachittar Singh .....Petitioner.

Versus

H.P. Ex-servicemen Corporation and another ....Respondents .

2. CWP No. 2850 of 2015.

Parkash Chand .....Petitioner.

Versus

H.P. Ex-servicemen Corporation and another ....Respondents .

Constitution of India, 1950- Article 226- Petitioner attached his truck with the ACC Ltd., Barmana for carriage of cement on behalf of the respondent-Corporation- petitioner was appointed as Inspector Grade I with Food Civil Supplies Department- truck was detached by the Corporation- present writ petition was filed against the order- Court had directed earlier in CWP No. 2402 of 2008, titled as Baldev Singh versus H.P. Ex-Servicemen Corporation & Ors., that bye-laws will be amended providing inter alia that in case of re-employment of the Ex-servicemen, he will have to surrender his right to get the truck attached- it was contended that contractual appointment does not amount to re-appointment- held, that contractual appointment also means the re-employment and the petitioner does not have right of attachment of his truck- petition dismissed. (Para-4 to 8)

For the Petitioners: Mr. Onkar Jairath, Advocate and Mr. G.R. Palsra, Advocate in respective petitions.

For the Respondents: Mr. Vikas Chauhan, Advocate and Mr. Mukul Sood, Advocate in respective petitions.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

Both the aforesaid writ petitions are being disposed of by a common order as they involve common questions of facts and law.

CWP No. 2479 of 2015.

2. Briefly stated the facts of the case are that in the year 2002, the petitioner herein stood discharged from Army. In the year, 2008, as unfolded by Annexure P-4, truck No.HP-22-5591, financial assistance whereof for its purchase by the petitioner from one Shri Sher Mohammed son of Shri Alif Deen stood purveyed by the H.P. Pradesh State Co-operative Bank, stood attached on 31.7.2008 with the ACC Ltd., Barmana, for carriage of cement on behalf of the Himachal Pradesh Ex-Servicemen Corporation, Hamirpur (for short "respondent-Corporation"). In the year 2012, the petitioner on standing offered appointment by the Food Civil Supplies and Consumer Affairs, Department of the Government of Himachal Pradesh (for short "Food Civil Supplies Department"), accepted the aforesaid offer, whereupon he as submitted by the learned counsel appearing for the petitioner executed a contract with the authorized officer of the Food Civil Supplies Department. Contractual appointment of the petitioner as Inspector Grade-1 with the aforesaid department stood renewed vide Annexure P-5. The petitioner stands aggrieved by Annexure P-6, whereby the order qua enlistment of his truck bearing No. HP-22-5591 now with the respondent-Corporation for carriage of cement from ACC, Barmana stood recalled. The ground for the respondent-corporation, for recalling its previous order qua the apposite enlistment of the truck aforesaid owned by the petitioner stands underscored therein to be

stirred by his reemployment in government service. The writ petitioner stands aggrieved by Annexure P-6, hence, prays for its being be quashed and set aside.

CWP No. 2850 of 2015.

3. The facts necessary for adjudication of the instant writ petition are that the petitioner stood discharged from the Army. As unfolded by Annexure P-1, truck bearing No.HP-65A-7211 owned by the petitioner stood attached on 03.10.2011 with the J.P. Cement Plant, Bagga, for carriage of cement/clinker on behalf of the respondent-Corporation. In the year 2014, the petitioner on standing offered appointment by the Deputy Director Elementary Education, Mandi, (Education Department), accepted the aforesaid offer, whereupon he as submitted by the learned counsel appearing for the petitioner executed a contract with the authorized officer of the Education Department comprised in Annexure P-5. The petitioner stands aggrieved by Annexure P-6, whereby his truck bearing No. HP-65A-7211 enlisted with the respondent-Corporation for carriage of cement from ACC, Barmana stood delisted therefrom. The ground for the respondent-corporation, for recalling its previous order qua the apposite enlistment of the truck aforesaid owned by the petitioner stands underscored therein to be stirred by his reemployment in government service. The writ petitioner stands aggrieved by Annexure P-6, hence, prays for its being quashed and set aside.

4. The apposite orders qua the recalling of the hitherto orders qua enlistment of the respective trucks of the petitioners, orders whereof stand constituted in Annexures P-6, palpably stand generated by a verdict of this Court recorded in **CWP No. 2402 of 2008,titled as Baldev Singh versus H.P. Ex-Servicemen Corporation & Ors.,** preferred hereat by an ex-serviceman against the Himachal Pradesh Ex-servicemen Corporation, wherein the petitioner therein had asked for a relief of his second truck being directed to be attached by the respondent-Corporation, relief whereof stood declined to him. However, this Court had rendered certain directions upon the Himachal Pradesh Ex-Servicemen Corporation for ensuring its bye-laws, Rules and Regulations standing amended in the manner as delineated therein. The relevant paragraphs whereof stand extracted hereinafter:-

> 1.In future only one truck of an ex-serviceman shall be attached with
>
> the Corporation.
>
> 2. As far as the attachments already made are concerned, if there are
>
> more than two trucks of any ex-serviceman attached with the Corporation after 1.4.2011 only two trucks will be attached and the remaining trucks shall not be attached.
>
> 3. The Corporation shall ensure that on and w.e.f. 1.4.2012, only one truck of each ex-serviceman shall be attached. Thus, an ex-serviceman will have a period of one year to either dispose of the excess trucks or to make alternate arrangement for their plying.
>
> 4. The Corporation shall invite applications from all ex-servicemen of Himachal Pradesh by publishing advertisements in two English and two Hindi newspapers having wide circulation in the State. The advertisements be published on or before 31.1.2011 and last date for receipt of applications shall be 28.2.2011.
>
> 5. The ex-servicemen who are desirous of plying and attaching their truck with the Corporation shall file their applications latest by 28.2.2011.
>
> 6. The Corporation shall draw up a list of candidates and seniority shall be given in order of retirement, i.e., a person who has retired earlier shall be placed senior in the seniority. If two candidates have retired on the same date then the candidate who has put in longer service in the Armed Forces shall rank higher in seniority. Henceforth all attachments shall be made strictly in accordance with the seniority list, so maintained. This list be drawn up latest by 25.3.2011. The list shall be displayed on the Notice Board of the respondent No.1-Corporation and shall be

open for inspection to all ex-servicemen. The ex-servicemen can file their objections with the Corporation to the said list.

7. For the future every year, the respondent-Corporation shall invite applications from ex-servicemen for including their names in the list by issuing advertisement as aforesaid. These advertisements shall be published by 31stDecember of each year and applications shall be invited latest by 31stof January and the list shall be prepared by 28th of February of the subsequent years. These lists shall be applicable from 1st April of the subsequent years.

8. The vacant positions for the trucks which are detached only after 1.4.2011 will be offered to the ex-servicemen who are next in the waiting list.

9. In case an ex-serviceman dies, his widow shall be entitled to inherit the right to have a truck attached till her life time.

10. In case there is no widow or the widow voluntarily gives up her right, the attachment can be transferred to one son/daughter of the ex-serviceman but in such eventuality, the right to ply the truck shall only be for a period of 5 years. After the death of the widow or on expiry of 5 years, the attachment shall cease to exist and the slot shall be given on the basis of seniority.

11. No transfer of any attachment with the Corporation shall be permitted. Any ex-serviceman who does not want to ply the truck will have to surrender the attachment to the Corporation who shall offer it to the next person in the seniority list.

12. In case the ex-serviceman is re-employed, his truck will not be attached and if his truck has been already attached and the ex-serviceman re-employed in Government service/public sector undertakings, Banks etc. then he shall have to surrender his right to get the truck attached and the vacant slot shall be given to the ex-servicemen next in the waiting list.

13. In case a truck of an ex-serviceman is stolen or meets with an accident then the ex-serviceman shall have a right to replace his stolen/ unserviceable truck and get it attached with the Corporation. However, only one truck shall be attached at one time.

14. That when a truck of any ex-serviceman is attached with the Corporation, the Corporation shall give a distinctive year-wise number to every attached truck and on the body of the truck, the ex-serviceman shall ensure that the following information is depicted:-

"This truck No._____ is attached with the H.P Ex-Servicemen Corporation vide attachment No._____ of the year _____."

15. That if there are more than one Society for different cement plants, the ex-serviceman shall have a right to attach one truck with only one Society and it shall not be open for an ex-serviceman to become a member of more than one Society and thereby attach more than one truck."

5. The learned counsel appearing for the respondent state at bar that in pursuance to the decision of this Court recorded in CWP No.2402 of 2008 whereby a mandate was enjoined upon the respondent-Corporation to in consonance with the proposals incorporated therein, proposals whereof stand extracted herienabove beget amendments to its bye-laws, Rules and Regulations, it effectuating the relevant amendments therein. Consequently, with the rendition of this Court standing implemented by the respondent-Corporation, especially qua trite Clause 12 encapsulated therein, clause whereof bars re-employed ex-servicemen to, on theirs standing reemployed, in the year 2012 and in the year 2014, respectively, with their respective government departments, seek continuation of enlistment of their respective trucks with the respondent-Corporation for theirs plying goods thereon, whereupon given hence the attraction qua them of the embargo constituted therein against theirs holding any entitlement qua continuation of the

enlistment of their trucks by the respondent-Corporation, concomitantly rendered them disentitled to seek continuation of enlistment of their trucks by the respondent-Corporation for the purpose of goods standing carried thereon.

6. The respective learned counsel appearing for the petitioners contend of the parlance borne by the word "re-employed" occurring therein not taking within its ambit the contractual employment of the petitioners herein with their respective departments concerned. However, the aforesaid submission warrants its being rejected straightway as this Court in its decision recorded in CWP No. 2402 of 2008 wherein at clause 12, it had barred a re-employed ex-serviceman from sustaining any claim for his truck hitherto attached with the respondent-Corporation being unamenable for its being detached therefrom, besides had barred a reemployed ex-serviceman to stake any entitlement for any continuation qua its enlistment by the respondent-corporation, yet this Court not excluding from the purview of the phrase "re-employed" either any contractual reemployment of any ex-serviceman or his reemployment in any capacity other than of his reemployment against a substantive post, as a corollary, the bar aforesaid stood attracted even qua a reemployed ex-serviceman, even when, he stood not reemployed in a substantive capacity against a substantive post. For reiteration, also this Court in its decision recorded in CWP No.2402 of 2008 had not therein held of reemployment of an ex-serviceman against a substantive post only alone standing encompassed within the phrase "reemployed" occurring therein. Only when this Court in its decision recorded in CWP No. 2402 of 2008 had excepted contractual reappointment of an ex-serviceman from the purview of the phrase "re-employed" as constituted therein, would this Court hence proceed to hold of contractual reappointments of petitioners in their respective relevant departments of the Government of Himachal Pradesh not rendering them for theirs being construable to be "reemployed in service", also would constrain a conclusion from this Court of the embargo constituted therein against theirs holding any entitlement to seek continuation of enlistment of their trucks by the respondent-corporation, not holding any clout when they stand reemployed in service on a contractual basis, prominently only when the apposite phrase aforesaid standing pronounced by this Court in its judicial verdict recorded in the aforesaid CWP No.2402 of 2008 to exclude from its ambit their respective contractual re-employment. Contrarily, with this Court not excepting the contractual reappointments of the petitioners in their respective departments of the Government of Himachal Pradesh from theirs falling within the purview of "reemployment", renders their respective contractual reemployment in the relevant departments of the Government of Himachal Pradesh constituting theirs standing "reemployed" whereupon concomitantly this Court holds of theirs not holding any right or entitlement for claiming continuation qua enlistment of their trucks by the respondent-Corporation. Moreover they hold no right to contend of the embargo constituted in the aforesaid relevant clause of the verdict of this Court in CWP No.2402 of 2008, standing not attracted against them nor they can espouse thereupon of the respondent-corporation holding no clout to hence order qua the detachment or de-enlistment of their respective trucks. In aftermath, Annexure(s) P-6, in both the petitions, impugned before this Court at the instance of the petitioners, do not suffer from any legal infirmity. Conversely, they are in consonance with the decision recorded by this Court in CWP No.2402 of 2008 aforesaid, in pursuance whereof relevant amendments stand enacted in the apposite bye-laws, Rules and Regulations of the respondent-Corporation. Also the aforesaid inference constrains this Court to hold with formadibility of the submissions addressed before this Court by the respective learned counsel appearing for the petitioners, of the contractual reappointments of the petitioners under the Government of Himachal Pradesh while being amenable to theirs being not construed to be substantive appointments against substantive posts, hence, rendering their apposite reappointments to fall outside the purview of the phrase "reemployment" occurring in clause 12 of the verdict of this Court recorded in CWP No.2402 of 2008, holding no vigour and strength.

7. Be that as it may, the learned counsel appearing for the petitioner in CWP No. 2479 of 2015 contends with force of the apposite clause in the afore extracted verdict of this Court in the afore-referred writ petition enjoins its holding sway and operation in futuro whereas

his truck standing enlisted by the respondent-corporation in the year 2008, would in case this Court validates the impugned orders rendered by the respondent-Corporation tantamount to its inaptly affording retrospectivity to the apposite clause existing in the verdict of this Court recorded in CWP No. 2402 of 2008, verdict whereof stood rendered subsequent thereto. Even, the aforesaid submission addressed before this Court by the learned counsel appearing for the petitioner is grossly off the legal tangent as with an emphatic mandate with peremptoriness standing embodied therein of the truck of any reemployed ex-serviceman if already attached also suffering the ill-fate of its owner not holding any entitlement to stake any claim for any continuation qua its enlistment by the respondent-Corporation, whereupon hence with this Court validating the retrospective application of its decision qua any truck of any reemployed ex-serviceman attached by the respondent-corporation prior to his reemployment in service besides prior to the rendition recorded by this Court. In aftermath, even if, the enlistment of the truck of the petitioner in CWP No. 2479 of 2015 by the respondent-Corporation occurred prior to his re-employment, it yet did not preclude the respondent-Corporation to, on his subsequent reemployment in service, proceed to detach or delist it.

8. For the foregoing reasons, there is no merit in the instant petitions, hence, both the petitions are dismissed. All pending applications also stand disposed of. No order as to costs.

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

Chaman Lal .....Appellant.

Versus

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

Cr. Appeal No. 111 of 2016.
Reserved on: June 23, 2016.
Decided on: June 24, 2016.

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police- he was apprehended and 3.1 kg charas was recovered from him- he was tried and convicted by the trial Court- held, in appeal that accused was apprehended at an isolated place- Village was at some distance from the place, where accused was apprehended – non-association of the independent witnesses was neither deliberate nor intentional- official witnesses had no enmity with the accused- recovery was effected from boru- there was no requirement of complying the requirements of Section 50 of N.D.P.S. Act- seals were found intact when the case property reached FSL, Junga- link evidence was complete- appeal dismissed. (Para-12 to 16)

Case referred:
Karamjit Singh vs. State (Delhi Administration), reported in AIR 2003 SC 1311

For the appellant: Mr. Saurav Rattan, Advocate.
For the respondent: Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 15.2.2016, rendered by the learned Special Judge, Kullu, H.P., in Sessions trial No. 30/2015, 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, 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 in the year 2014, SI Basant Singh (PW-7) was posted in Crime Branch, Mandi. On 10.12.2014, as per rapat Ext. PW-3/G, PW-7 SI Basant Singh along with Insp. Chandra, ASI Harsh Kumar and others was present at Jagatsukh Project Road, near Dohangan *nullah* for patrolling and '*nakabandi*'. At about 3:35 PM, the team of CID police noticed accused coming towards them from the project area side. The accused tried to run away. He was overpowered. The place where the accused was apprehended was isolated. No independent witnesses were present. The I.O. apprised the accused of his legal right to be searched either before the Gazetted Officer or the nearest Magistrate. The accused gave his consent vide memo Ext. PW-1/A. The white coloured "Boru" (gunnysack) being carried by the accused in his right hand was searched. During search, one orange coloured carry bag, on which, inscription of 'Sagar General Store' was written, was recovered from it. On opening the orange coloured carry bag, black coloured substance in the shape of 'chapattis' and balls as well as sticks was found. It was found to be charas. It weighed 3 kg. 100 grams. The sealing proceedings were completed on the spot. NCB form in triplicate was filled in. The case property was taken into possession vide memo Ext. PW-1/E. The I.O. prepared the rukka Ext. PW-7/A, on the basis of which, FIR Ext. PW-9/A was registered. The case property was produced before SI Mangat Ram, who resealed the same. The case property was deposited in the malkhana. It was sent to the FSL Junga vide RC No. 253/14. The report of the Chemical Analyst is Ext. PX. The investigation was completed and the challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as nine witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Saurav Rattan, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Neeraj K. Sharma, Dy. AG, for the State, has supported the judgment of the learned trial Court dated 15.2.2016.

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 ASI Naresh Chand testified that he was posted as ASI in CID Sub Unit Banjar for the last two years. On 10.12.2014, Insp. Chandra, HC Om Parkash and other police officers/officials were on patrolling duty at Jagatsukh. At 3:35 PM, one person was noticed coming from project area side towards them on foot. He was carrying one white colour gunny sack in his right hand. On seeing the police party, he turned back. The person got scared. The spot was isolated. He tried to flee away. He was overpowered. On enquiry, the person disclosed his identity. The accused consented for search of his "boru" to be done by the police. The accused was also apprised of his legal right to be searched either before the Gazetted Officer or the nearest Magistrate vide memo Ext. PW-1/A. The 'boru' was opened. It contained charas. It weighed 3.100 kgs. The recovered charas was re-packed in the same manner and taken in cloth parcel by putting six seals of letter-A. Sample of seal A was drawn on four cloth pieces. NCB form in triplicate was filled in by the I.O. Facsimile of seal A was taken on the NCB form. He identified Ext. P-1. In his cross-examination, he admitted that project road bifurcates from main road Manali at place Jagatsukh. The vehicles were being usually checked there. Jagatsukh is a big village. They were at a distance of 400 mtrs. from the point where the road bifurcates. They started from the office at 1:00 PM. He also admitted that no efforts were taken by the I.O. to call for independent witnesses from village Jagatsukh and project barrier. It was day time.

7. PW-2 HHC Raj Kumar has corroborated the statement of PW-1 ASI Naresh Chand, the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He handed over the rukka to MHC and case property was handed over to SHO Mangat Ram. In his cross-examination, he admitted that Jagatsukh was big village. They reached at the spot at 3:35 PM. The accused was immediately apprehended. The '*jamatalashi'* of the accused was done after recovery of the bag. The cloth was cut with the scissors. The parcel was stitched with thread and needle.

8. PW-3 HC Balbir Singh testified that on 11.12.2014, Insp. Mangat Ram handed over to him the case property i.e. one sealed parcel sealed with six seals of A and six seals of S, along with form NCB in triplicate, copy of seizure memo, reseal certificate and sample seals "A" and "S". He entered the case property at Sr. No. 368 of the malkhana register vide Ext. PW-3/A. He sent the case property to FSL Junga, through HHC Bhagat Singh vide RC No. 253/2014.

9. PW-4 HHC Bhagat Ram testified that on 12.12.2014, MHC Balbir handed over to him one sealed parcel containing six seals of A and six seals of S, along with form NCB in triplicate, copy of seizure memo, reseal certificate and sample seals "A" and "S" vide RC No. 253 of 2014, Ext. PW-3/B for depositing the same with FSL Junga. He deposited the same on the same day under receipt.

10. PW-7 SI Basant Singh also deposed the manner in which the accused was apprehended on 10.12.2014 at 3:35 PM. He prepared rukka Ext. PW-7/A. It was sent to the Police Station through HHC Raj Kumar. In his cross-examination, he deposed that there was no prior information with the police of the incident. They went to the spot in private cars. They had laid nakka on the spot. They were in civil dress. The accused was informed vide memo Ext. PW-1/A about search of his '*boru'* and not of his personal search. He never gave option to the accused to be searched by the police on the spot. He filled in columns 1 to 8 of the NCB form on the spot.

11. PW-9 Insp. Mangat Ram deposed that he was posted as Insp. PS, CID, Bharari. On 11.12.2014, HHC Raj Kumar brought case property i.e. one sealed parcel sealed with six seals of A along with sample seal "A", form NCB in triplicate and original *rukka*. He resealed the case property with six seals of impression "S". He filled in column Nos. 9 to 11 of NCB form Ext. PW-1/D.

12. The case of the prosecution, precisely, is that the accused was seen coming on foot from project area side. He tried to run away. He was overpowered. He was carrying a '*boru'* in his hands. It contained charas. It was opened. The sealing proceedings were completed on the spot. Rukka Ext. PW-7/A was scribed and sent to the Police Station, on the basis of which, FIR was registered. The case property was produced before PW-9 Insp. Mangat Ram. He resealed the same with six seals of seal "S". He also filled in column Nos. 9 to 11 of the NCB form Ext. PW-1/D. The case property was sent to FSL Junga. The report of the Chemical Analyst is Ext. PX.

13. The accused was apprehended at 3:35 PM on 10.12.2014. It was an isolated place. Though village Jagatsukh is a big village but it was at some distance from the place where the accused was apprehended. The non-association of independent witnesses was neither deliberate nor intentional. There is no reason to disbelieve the testimony of official witnesses. PW-7 SI Basant Singh has given explanation. According to him, the independent witnesses could not be associated due to the topographical location and there was no *abadi*. The statements of the official witnesses can be relied upon if they inspire confidence. The official witnesses had no inimical relations with the accused.

14. Their lordships of the Hon'ble Supreme Court, in a recent decision 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."

15. Mr. Saurav Rattan, Advocate, for the accused has vehemently argued that Section 50 of the ND & PS Act has not been complied with in the present case. In fact, it was not required to be complied with since the recovery has been made from the '*boru*' (gunnysack) carried by the accused. Still, the accused has also been personally searched and Section 50 of the ND & PS Act has also been duly complied with as per Ext. PW-1/A. He was apprised of his legal right to be searched either before the Gazetted Officer or the nearest Magistrate. However, the accused has given consent to be searched by the police.

16. The report of the Chemical Analyst is Ext. PX. All the seals were found intact when the case property reached FSL Junga and tallied with specimen seals sent by the forwarding authority. The prosecution has proved beyond reasonable doubt that the accused was found in exclusive and conscious possession of charas weighing 3.100 kg. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 15.2.2016.

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

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

Sanjeev Prashar .....Petitioner.

Versus

Executive Engineer and another. .....Respondents.

Arbitration Case No. 92 of 2015
Date of decision: 24th June, 2016

Arbitration and Conciliation Act, 1996- Section 11- Petitioner was awarded work but failed to complete the same within the stipulated period- department imposed penalty @ 10 %- an appeal was preferred and penalty was reduced from 10% to 5%- petitioner disputed the imposed penalty – he filed an application for appointment of arbitrator- it was contended on behalf of respondent that petitioner is not entitled to invoke the arbitration clause after expiry of 90 days of the settlement of final bill- held, that application has been filed beyond period of 90 days- it was specifically stated in clause 25 of the agreement that in case of failure to challenge the payment within 90 days, his claim for the appointment of arbitrator will be deemed to have been waived – further, payment has been received without any protest- petition dismissed. (Para-6 and 7)

For the petitioner: Mr. Vivek Singh Thakur, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Virender Verma, Additional Advocate General.

The following judgment of the Court was delivered:

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

In this petition, a prayer has been made for appointment of Arbitrator.

2. The petitioner is a Government contractor. He was awarded the work namely, (C/o SNP (SH:- RCC Trough on ground & on pedestal for distribution system of distributor D-2 from RD 5210/0 to 2140 Mtr. i/c road crossing at RD, 500, 1300 and 1800 of LBC (CZ). He entered into an agreement after negotiation conducted on 8th June, 2011. He failed to complete the work within the stipulated period, therefore, the respondent-department has levied penalty upon the petitioner @ 10% of the contract amount vide Annexure Ab-10. He preferred an appeal and the Superintending Engineer has reduced the amount of penalty from 10% to 5% and the petitioner was informed accordingly vide order Annexure Ab-11 dated 24.01.2013. It is thereafter final settlement was made in the matter of payment of final bill to the petitioner on 27.07.2013.

3. It has now been claimed that no penalty could have been imposed upon the petitioner-contractor as the delay in execution of the work was not attributed to him but to the respondent-department, as the site was not handed over to him well in time. The petitioner, therefore, has disputed the levy of penalty upon him to the tune of Rs.6,19,862/- and 1% of the cost of awarded work i.e. Rs.1,23,972/-. The respondent-department has deducted the amount of penalty so levied and made the final payment.

4. The grouse of the petitioner is that this amount should have not been deducted from his bill. He has, therefore, approached this Court for appointment of Arbitrator under Section 25 of the contract agreement Annexure Ab-1 to resolve the dispute between the parties, he raised in this petition and also the legal notice Annexure Ab-15.

5. In reply, the stand of the respondent-department is that the payment of final bill was made to the petitioner on 27.07.2013 and now after the expiry of 90 days of the settlement of final bill, he is not entitled to invoke the provisions contained in Clause 25 of the contract agreement.

6. The petitioner in rejoinder has further come forward with the version that since the time was extended by the respondent-department on 27.03.2014 vide Annexure Ab-14, therefore, he has served the respondent with legal notice well before the expiry of the period of 90 days.

7. On hearing Mr. Vivek Singh Thakur, learned counsel for the petitioner and Mr. Virender Verma, learned Additional Advocate General on behalf of the respondent-State as well as going through the record of the case, it would not be improper to conclude that the prayer for appointment of Arbitrator has been made by the petitioner beyond the period of 90 days. In terms of Clause 25 of the agreement in case the Contractor fails to demand the appointment of Arbitrator in respect of any claims in writing within 90 days of receiving the information from the Government that the bill is ready for payment, his claim for appointment of Arbitrator will be deemed to have been waived and absolutely barred. Admittedly, the petitioner-Contractor has received the payment of final bill on 27.07.2013. The explanation as set forth, no doubt, is that he was in need of money as he has to make the payment of wages to labour, however, the same is hardly of any help to him because the payment of final bill has been received by him without any protest. Much has been said qua the extension granted vide letter Annexure Ab-14. The perusal of this document reveals that, no doubt, the extension of time was granted in his favour, however, for the past period i.e. w.e.f 4.1.2012 to 25.7.2013 viz., the period before the payment of final bill was made to him. Merely that such sanction has been granted *ex-post facto* and conveyed to him after the payment of final bill cannot be taken to arrive at a conclusion that he has approached for appointment of Arbitrator within the period of limitation. No doubt, the amount of penalty imposed upon him has been adjusted by the respondent-department while sanctioning the final bill and making the payment to him, however, such dispute cannot be raised beyond the period of 90 days from the date of receipt of final payment. Therefore, there is no merit in the present petition and the same is accordingly dismissed of course with liberty reserved to the petitioner to resort to any other and further remedy, if available to him in accordance with law.

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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.

Sh. Hemant Kumar .....Respondents

Cr. Appeal No.: 57 of 2009
Reserved on : 14.06.2016
Date of Decision: 24.06.2016

Indian Penal Code, 1860- Section 363, 366, 376 and 506- Prosecutrix had gone to Bazar for shopping but had not returned – prosecutrix and accused rang up father of the prosecutrix to inform him that they had married- FIR was registered- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix was more than 16 years on the date of incident- father of the prosecutrix had not entered into the witness box- there was delay in reporting the matter to the police- prosecutrix had not raised any hue and cry- possibility of the prosecutrix running away with the accused cannot be ruled out - testimony of prosecutrix does not inspire confidence- in these circumstances, trial Court had taken a reasonable view- appeal dismissed. (Para-22 to 32)

Cases referred:

Rameshwar Vs. State of Rajasthan AIR 1952 SC 54

State of M.P. Vs. Dayal Sahu (2005) 8 Supreme Court Cases 122

For the appellant : Mr. V.S. Chauhan, Addl. A.G., with Mr. Vikram Thakur, Dy. A.G.
For the respondent: Mr. Rakesh Manta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of present appeal, the State has challenged judgment dated 13.06.2008 passed by the Court of learned Additional Sessions Judge, Fast Track Court, Shimla, Camp at Rohru in Sessions Trial No. 9-R/7 of 2008 vide which, the learned trial Court has acquitted the accused for offences under Sections 363, 366, 376 and 506 of the Indian Penal Code.

2. The case of the prosecution was that a written complaint Ex. PW-10/B was lodged on 24th April, 2002 by Sh. Surinder Gupta, father of the prosecutrix with Station House Officer, Police Station, Rohru to the effect that he was a resident of Rohru and used to reside near Ram Leela Ground. He was father of two children and was having one daughter and one son. His daughter (prosecutrix) was about 16 years of age and her date of birth was 16.11.1985. On 29th April, 2002 at around 4-5 p.m., the prosecutrix had gone to Rohru Bazar for shopping. However, she did not return back in the evening. The complainant and his relatives searched for her in the evening. On 23rd April in the evening, the prosecutrix and accused Hemant Kumar rang him up from an unknown place and conveyed that they had tied the nuptial knot. The prosecutrix was minor and she had been enticed away by the accused. Accordingly, he requested that culprit be brought to book and action be taken against him.

3. On the basis of the said complaint, FIR No. 60 of 2002 Ex. PW-10/A was registered. The prosecutrix returned to her parental house. On 25.04.2002, she made a statement before the police under Section 161 Cr. P.C. that on 20.04.2002 in the evening, she had gone to the shop of the accused to make certain purchases. Accused allured her to marry him and took her to his room where they stayed for the night. Next day, i.e. on the morning of 21.04.2002, accused took her in a Van to Shimla, from where they went to Hotel Daily Darbar, Naldehra, which belongs to a friend of the accused. Accused and the prosecutrix stayed in the said Hotel on 21st and 22nd April, 2002. On both these days, the accused had coitus with her on the promise of marriage. In the afternoon on 23rd April, 2002, accused took her to the house of Maenka in village Mehali, Shimla. The prosecutrix rang her parents from the house of Maenka and informed them that she had married the accused. In the evening of 23rd April, 2002, Smt. Heena (wife of the accused) reached the house of Maenka and all of them stayed there during the night of 23rd April, 2002. On 24.04.2002, the accused and his wife brought the prosecutrix to the house of her parents and when they dropped her at Rohru, the accused proclaimed that in case she made any statement with the police, he will kill her.

4. The prosecutrix was got medically examined by the police and the accused was arrested. The Van in which the accused allegedly took the prosecutrix to Shimla was also taken into possession by the police. Certificates pertaining to the date of birth of the prosecutrix were also collected by the police. After completion of the investigation, final report for the trial of the accused was prepared and the same was presented before the Court.

5. As a prima facie case was found against the accused, he was charged for having committed offences under Sections 363, 366, 376 and 506 of the Indian Penal Code, to which he pleaded not guilty and claimed to be tried.

6. Learned trial Court on the basis of the material produced before it by the prosecution, came to the conclusion that it appeared that the prosecutrix had accompanied the accused of her own accord and free volition and her statement did not inspire confidence and on these basis, the learned trial Court held that it will not be safe to hold the accused guilty on the basis of the dubious and effete evidence led by the prosecution and accordingly, it acquitted the accused of the offence charge against him.

7. Feeling aggrieved by the said judgment of acquittal, the present appeal has been preferred by the State.

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

9. In order to substantiate its case, the prosecution in all examined 14 witnesses.

10. The prosecutrix deposed as PW-1. Her statement was recorded in Camera. As per PW-1, she knew accused Hemant Kumar, who ran a shop at Bus Stand, Rohru in the name and style of 'Hinna Garments'. She stated that she used to go to his shop as a customer and that is how she knew him. On 20.04.2002, she had gone to his shop and there were some other customers also at the shop at that time. After those customers left, she made her purchases. The accused earlier disclosed to her that he was distantly related to them (the prosecutrix). After she purchased the goods, he offered her cold drink. While she was drinking the same, she started feeling giddy. Accused advised her to take rest for some time and promised her that he would drop her at her house. Accused also told her that he will get a chance to see her grand mother, who was related to him. After some time, she and the accused came out of the shop and walked up to State Bank. There the accused arranged a vehicle and they proceeded on Chirgaon road. Accursed dropped her at his house in Rohru Bazaar beyond Ayurvedic Hospital and asked her to take rest in his house. He said that his mother and other persons were present in the house. There he started using force against her. He closed her mouth with her *chuni* and thereafter committed rape. Accused then came out of the room and asked him to sit in the room and not to make any hue and cry. He also threatened her that in case she will make any hue and cry, he would not spare her. After some time, accused made her to sit in a vehicle and took her towards a Petrol Pump. From Pertol pump, accused brought her back to his house and again had sexual intercourse with her against her wish. He kept her at his house for the night. On 21.04.2002, he took her in the morning to Baldiyan. There he kept her in Delhi Darbar Hotel for two days, i.e. on 21st and 22nd April, 2002. During these two days also, he forced her to have physical relations with him. There under threat, he obtained a writing from him to the effect that she voluntarily accompanied him and he had not abducted her. She further deposed that he also threatened to cause harm to her parents. On 23.04.2002, accused took her to Mehli in a girl's home whom he knew. The accused left the room saying that he was going to bring his wife. After some time, he also brought his wife. While accused was taking her from Rohru, on her way at Mashobra, she was made to make a phone call from the STD booth to her father informing him that she had voluntarily accompanied the accused and that no FIR would be lodged against him. From Mehli also, that is from the house of the girl named Menka, the accused had asked her to make a similar call. She further deposed that on 24.04.2002, the brother of the accused and 2-3 other persons came at Mehli and she was taken to Samli near Rohru and was made to sit in the inner room while they were sitting in the outer room. Due to fear, she did not run away. Then, they brought her to the house of Hari Nand, which was near to the Police Station. From there, they took her to her house. The mother of the accused also came with her. There the accused offered to settle the matter amicably, but her father was not ready with any such settlement because for marriage she was under age and the accused was already married. Thereafter, when settlement could not take place, accused left the house and threatened them (prosecutrix) that he had done what he wanted to do and that they (prosecutrix) could do nothing. Thereafter, her father lodged FIR against the accused. In her cross-examination, the said witness has deposed that she was born on 16.11.1985. She was admitted for the first time in Rohru in Balbharti, but she did not remember the date, month or year of the said admission. She stated that she studied in Balbharati for one year and thereafter, she was admitted in Monal Public School Sanjauli, Shimla for one year. Thereafter, she was admitted in S.D.A. Mission School, Rohru. According to her, she was not aware whether birth certificate Ex. PW-1/A was obtained by the police from Nagar Panchayat, Rohru or her father procured it and handed over it to the police. She denied the suggestion that she was more than 18 years old when her father lodged FIR. She stated that she did not remember whether she had a talk with her father on 24.04.2002 before the FIR was

lodged. She admitted that at the Petrol Pump, she did not speak to anyone about her abduction nor she made any telephonic call to anyone. She volunteered that she was threatened by the accused. She deposed that she had visited the shop of the accused person 3-4 times. She has denied the suggestion that she wanted to marry the accused and when she came to know that he was already married, a false case was planted against the accused. She also stated the following in her cross-examination:

> *"It is correct that I talked to my father about marriage, but I do not remember if I told my father that we had contracted the marriage. Volunteered, I went on stating what the accused dictated to me."*

11. She also deposed that she was medically examined on 25th or 26th April, 2002 and her maternal uncle and father were present at the hospital. They were also present when her statement was recorded at the Police Station. She admitted that at Hari Nand's quarter, she did not tell anyone that the accused had used force against her. She also stated that she was married to Rajeev Sharma of Garli Paragpur, who was living in Rohru for the last 20-22 years.

12. PW-2 Rajinder Chauhan deposed that prosecutrix was his niece and on 22.04.2002, the father of the prosecutrix telephonically called him to Rohru. He remained at the house of the father of the prosecutrix from 21.04.2002 to 24.04.2002. He further stated that on 22.04.2002, accused Hemant telephonically informed Surinder Gupta that prosecutrix was with him. According to him, Hemant also stated that they had committed a mistake. Prosecutrix was brought to her father's house by the mother, wife and maternal aunt of accused on 23rd or 24th April, 2002. As per him, the mother and maternal aunt of the accused were saying that the children had committed a blunder, but let them be married. Hemant's wife was ready to divorce him. According to him, age of the prosecutrix was 16 years and she was a student of 10th class. He further deposed that her parents and grand parents declined the offer of marriage. According to him, thereafter accused came out of the house threatening to see the complainant party and threatened that he would destroy the entire family of the prosecutrix. As per him, prosecutrix disclosed that accused took her to Shimla on the pretext of marrying her. She also disclosed that accused threatened her not to disclose this to anyone or she would be killed by throwing out of the vehicle. He also deposed that prosecutrix had disclosed that she was forcibly taken away and raped by the accused.

13. PW-3 Constable Kamal Dass has deposed that on 02.05.2002, he went to Shimla alongwith Additional SHO, Rohru and in his presence Additional SHO took into possession of the vehicle of the accused.

14. PW-4 Menka has deposed that she was working as Clerk in H.P. Secretariat and the accused had come to her quarter in Mehli in the year 2002. She further deposed that he had come alone and no girl was accompanying him. She was declared as a hostile witness and in her cross-examination, she stated that prosecutrix had come to her on that very evening, but she had come alone. According to her, she did not know the prosecutrix, who stated to her that she had some business with Hemant, who was her God brother. She stayed with her for the night and left in the morning.

15. PW-5 Surat Singh has deposed that he was working as Secretary, Nagar Panchayat, Rohru and that he had brought the family register of Liaq Ram and in this register, Shikha Gupta, daughter of Surinder Kumar was shown to have been born on 16.11.1085.

16. PW-6 Shanti Kumar Tiru, Principal, St. Josphs School, Rohru has deposed that as per admission register, the prosecutrix was admitted in St. Josphs School, Rohru on 23.05.1994 and in the said register, her date of birth was mentioned as 16.11.1985.

17. HHC Kuldeep Singh has deposed as PW-7 and stated that he was working as a driver in the office of SDPO, Rohru and on 9th May, 2002, Additional SHO, Police Station Rohru handed over a Maruti Van to its owner Hemant Kumar on Sapurdari, which was signed by him.

18. PW-8 Sh. Bihari Lal Justa, Radiographer has deposed that he took X-rays of Shikha Gupta (prosecutrix). PW-9 Constable Nihal Singh has deposed with regard to handing over of the parcels at FSL, Junga. PW-10 Ram Saran has deposed that the FIR was registered by him at the instance of Surinder Gupta which bears his signature. PW-11 HC Mohan Singh has deposed that he had handed over the case property to Nihal Singh to be deposited at FSL, Junga and Nihal Singh handed over the RC to him.

19. PW-12 Lok Nath Gupta deposed that Shikha Gupta was his grand daughter and that on 20.04.2002 at about 5:00 p.m., she had gone to the market to make some purchases. She did not return home in the evening. She was residing with them. They searched for her throughout night, but she was not traceable. In the morning, he rang his son Surinder Gupta, who lived in village Dhara. Then, Surinder Gupta came to Rohru and searched for his daughter, but in vain. Thereafter, Surinder Gupta went to Police Station and lodged a complaint Ex. PW-10/B. When prosecutrix returned home, he (PW-12) did not had any talk with her as to how and under what circumstances she left the house. She had a talk in this regard with her father. In his cross-examination, he stated that he used to look after Shikha as she was residing with them and he was her guardian. He further deposed that Police Station, Rohru was very near to his house. He denied the suggestion that in the evening they did not search for Shikha.

20. PW-13 Prakash Dutt has deposed that he was posted as SI/Additional SHO, Police Station, Rohru. He recorded the statement of Shikha as per her version and also sent her for medical examination. Accused was arrested by him. The Van which was used in the commission of the crime was also taken into possession by him. He also recorded the statement of Menka Ex. PW13/B. After investigation, he handed over the file to Inspector/SHO Ram Saran for preparation of challan. He also recorded the statement of Sanjeev Sharma, son of Sh. Rattan Chand. He also deposed that statement of Rajeev Sharma, brother of Sanjeev was not written by him. The name of Sanjeev was wrongly written by him as Rajeev since Surinder Gupta (complainant) told him the name of Sanjeev as Rajeev. He denied the suggestion that he had recorded the statements of the witnesses as per his own convenience.

21. PW-14 Sanjeev Sharma deposed that the house of the complainant was near to their house. On 24.04.2002, he had gone to the house of Surinder Gupta. The wife and mother of the accused came there and remarked that a mistake had been committed by accused and marriage of accused and Shikha be performed. He further deposed that the marriage could not be solemnized as accused was already married. Wife of the accused offered to divorce him. After some time, accused and Shikha also came there and then hot exchanges took place between both the families. Thereafter, accused remarked that he is ready to face the consequences. In his cross-examination, he has deposed that Shikha was married to his younger brother Rajeev and they knew prosecutrix from her birth. He denied the suggestion that no talks relating to the case took place in his presence.

22. This is the entire evidence which has been led by the prosecution to substantiate its case. Ex. PW1/A is the copy of birth register of the prosecutrix, as per which, the date of birth of the prosecutrix is 16.11.1985. The alleged incident has taken place on 20.04.2002. It is but obvious that if the alleged incident has taken place on 20.04.2002, the quietus took place only on or after 20.04.2002. Taking the date of birth of the prosecutrix to be 16.11.1985, it is evident that as on 20.04.2002, she was more than 16 years of age. The age of the prosecutrix as on 20.04.2002 was more than 16 years and 5 months.

23. FIR was lodged by Surinder Gupta, father of the prosecutrix. Incidentally, Suridner Gupta has not entered into the witness box. FIR was lodged on 24.04.2002, whereas the prosecutrix was missing as per her father from evening of 20th April, 2002. It is recorded in the FIR that on 23rd April, 2002 in the evening, his daughter and Hemant Kumar called him on phone and they told him that they had got married. It is further mentioned in the FIR that his daughter was minor and therefore, action be taken in this regard against the accused. As already mentioned above, the prosecutrix went missing w.e.f. 20.04.2002. However, the FIR was lodged

only on 24.04.2002 by the father and that too after as per his version he received a telephone call of his daughter and accused Hemant Kumar informing him that they had married. In other words, since 20th April, 2002, the factum of the prosecutrix being missing was not brought into the notice of the police by her family. The FIR has been lodged after a delay of four days. There is no cogent explanation as to why there was such a long delay in lodging the FIR when as per the grand father (PW-12) of the prosecutrix, Police Station, Rohru was quite near to his house. All these facts create doubt over the story of the prosecution.

24. Now, in this background when we peruse the statement of the prosecutrix, the same neither inspires any confidence nor the same seems to be trustworthy. The version which has been put forth by the prosecutrix in her statement does not seems to be cogent or reliable. According to her, she went to the shop of the accused to make certain purchases and he offered her cold drink and during the process of consuming the same, she felt giddy. Thereafter, it is her case that the accused asked her to take rest at his house on the pretext that he will later on drop her at her residence. She further stated that she went to the house of the accused where accused kept her for the entire night and sexually abused her against her wishes.

25. It is not the case of the prosecutrix that the house of the accused was situated at a secluded place or that there was neither any person residing in the house of the accused at the relevant time or no other person was there in the vicinity of the house of the accused. No cogent explanation has been given by her as to why she did not raise any hue and cry in case she was kidnapped by the accused and when she was also sexually assaulted against her wishes by the accused. She in fact in her statement has admitted that while at the Petrol Pump she did not raise any hue and cry. Her further version that it was under duress of the accused that she went with him in a Hotel Daily Darbar, Naldehra and thereafter to the residence of one Menka at Mehli again under duress of the accused is also not believable. This Court cannot presume that everyone was pitted against the prosecutrix and was hand in glove with the accused in the matter of kidnapping and sexually assaulting the prosecutrix. Her further version that the telephonic calls were made by her to her father as were dictated to her by the accused also do not inspire any confidence.

26. In fact, this possibility cannot be ruled out at all that she willfully ran away with the accused and thereafter returned back after 3-4 days. It is for this reason that as the family of the prosecutrix was aware that she had willfully ran away that no FIR etc. was immediately lodged with the police also. This factum further gains credence from the statement of PW-2 Rajinder Chauhan as well as that of PW-14 Sanjeev Sharma and the prosecutrix, who in unison have stated that after the prosecutrix returned back alongwith the accused, there were talks of marrying her with the accused, but the same did not materialize as the parents of the prosecutrix refused for this settlement as the accused was already married.

27. It is settled law that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. This is for the reason that the prosecutrix stands at a higher pedestal than an injured witness. However, the fact still remains that the testimony of the prosecutrix on the face of it has to be acceptable. {See State of U.P. Vs. Pappu alias Yunus and another (2005) 3 Supreme Court Cases 594}.

In the present case, the statement of the prosecutrix on the face of it does not seem to be acceptable nor does it seem to be trustworthy so as to be made basis for the conviction of the accused.

28. Though it is settled law that corroboration is not sine qua non for conviction in a rape case, however, it is relevant to refer to the judgment of Hon'ble Supreme Court in **Rameshwar** Vs. **State of Rajasthan** AIR 1952 SC 54, in which it has been observed as under:

> *"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of*

corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."

29. Despite the fact that the accused *inter alia* has been charged for committing an offence under Section 376 of the Indian Penal Code, the prosecution has not examined the doctor who medically examined the prosecutrix and issued the MLC. In the absence of this, it is not understood as to how the prosecution could have had proved the charges of rape against the accused.

30. It has been held by the Hon'ble Supreme Court in **State of M.P.** Vs. **Dayal Sahu** (2005) 8 Supreme Court Cases 122 that non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. In the present case, we have already held that the testimony of the prosecutrix and other prosecution witnesses do not inspire any confidence whatsoever. Therefore, in these circumstances, non-examination of the doctor, which has also resulted in the M.L.C. report not being placed on record as an exhibited document, also does not helps the case of the prosecution.

31. It is settled law that in cases under Sections 363, 366, 376 and 506 of the Indian Penal Code, the conviction of the accused can be based on the sole testimony of the prosecutrix, but for that the testimony of the prosecutrix has to be cogent, reliable, trustworthy and truthful. In our considered view, in the facts and circumstances of the present case, none of the above mentioned ingredients are present in the testimony of the prosecutrix. Neither her statement is cogent nor the same is reliable or trustworthy. On the contrary, it is apparent from the perusal of her statement that she had willfully eloped with the accused and she was not kidnapped by the accused as has been alleged by the prosecution.

32. A perusal of the statement which was initially recorded by the police of the prosecutrix under Section 161 of the Code of Criminal Procedure, demonstrates that the prosecutrix has narrated a totally different story while in the witness box. No cogent explanation whatsoever has been given by her as to why she did not raise any hue and cry both at the time of her alleged kidnapping or when she was sexually assaulted. All these facts taken together make it apparent that the prosecutrix accompanied the accused of her own accord and free volition. Therefore, on the basis of the material on record, in our considered view, the prosecution has miserably failed to prove a case under Section 363, 366, 376 and 506 of the Indian Penal Code against the accused beyond reasonable doubt. All these aspects of the matter have also been dealt with in detail by the learned trial Court and in our considered view, there is neither any perversity nor any infirmity with the judgment of acquittal and the findings returned in this regard by the learned trial Court. Accordingly, we uphold the said 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 TARLOK SINGH CHAUHAN, J.

Ved Prakash ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Revision No. 370 of 2015
Date of decision : 24th June, 2016.

Code of Criminal Procedure, 1973- Section 319- Trial Court summoned the petitioner as co-accused- he preferred revision, which was dismissed- held, that complainant had neither mentioned in the statement made under Section 154 of Cr.P.C nor in the statement before the

Court that petitioner was present at the spot or that he had abetted the commission of crime- power under Section 319 of Cr.P.C should be exercised sparingly to advance the criminal justice and not as a handle to harass the accused- petition allowed- orders passed by the Courts set aside. (Para-6 to 10)

Case referred:
Hardeep Singh vs. State of Punjab and others (2014) 3 SCC 92

For the Petitioner	:	Mr. S. C. Sharma, Advocate.
For the Respondents:		Ms. Meenakshi Sharma, Addl. Advocate General, with Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

This revision petition under Section 482 read with Sections 397/401 of the Criminal Procedure Code is directed against the order dated 16.7.2015 passed by learned Additional Sessions Judge-I, Kangra at Dharamshala, whereby he affirmed the order passed by learned trial Magistrate and allowed the application of the State for summoning the petitioner as a co-accused.

2. The instant case is one where the learned Courts below have completely misread the statement of the complainant under Section 154 Cr.P.C. and committed the same mistake while appreciating her statement recorded in the Court to come to the conclusion that the petitioner had been specifically named by her in both these statements. The relevant portion of the order passed by the learned Magistrate on 22.9.2007 reads as under:

> *"I have gone through the case file in view of the contention of Ld. APP made in the application. After perusal of the challan it is clear that the complainant had taken name of this Ved Parkash categorically while getting her statement recorded u/s 154 Cr.P.C. but if we go through the challan put forth by police no explanation has been given why this person has not been made accused. Now in deposition before the court the complainant has again asserted that this person has abetted the offence and it is on his instigation that the accused persons demolished the structure of temple and removed the idol of Goddess Baglamukhi which was worth Rs.12,000/-. The prosecution is also realized that this person should have been made accused which was not done by the Investigating Agency as evident from the fact of filing of this application...."*

3. Surprisingly, the learned Additional Sessions Judge, without caring to go through the records of the case concluded as follows:

> *"11. After having heard rival contentions of the parties, the arguments advanced on behalf of the revisionist appear to be not tenable in the eyes of law because the Ld. trial Court has taken into consideration entire facts of the case. In order to arrive at a right conclusion, the facts and circumstances of the case have been taken into consideration by the ld. trial Court. There are specific allegations against the revisionist in the FIR and his name had been disclosed to the police by the complainant, but interestingly he was not made accused by the police. The complainant in the court as PW-1 again stated against the revisionist, therefore ld. trial court has rightly summoned him vide order dated 22-09-2007. There is no illegality or perversity in the impugned order and order under challenge is well reasoned."*

4. In order to test the veracity and correctness of such findings, the records of the case were called for. The relevant portion of the statement of the complainant under Section 154 Cr.P.C. reads as under:

> "……आज दिनाक 30.8.2002 समय करीब 12 बजे दिन वेद प्रकाश के आदमी जिनमें दो तिल–विल्ल व वेद प्रकाश के नौकर जो कि कुल 10–15 आदमी थें। यह सारे हम मश्वरा व सलाह बनाकर इकटठे हो कर अपने हाथ में गेन्ती वगैरह लेकर आये और आते ही मेरे धर के पास बने हुए बगला माता के मदिर जिसे कि मैने 3–4 पहले बनाया था को तोड़ दिया व शैड टीन को भी गिरा दिया तथा बगला माता मूर्ति को उठा कर ले गये। जब मेरा भांजा बलविंदर सिंह मौका के फोटो लेने लगा तो उपरोक्त सभी लोग उसको जान से मारने के लिए ललकारने लगे जो बड़ी मुश्किल से जान बचाकर घर आ गया। इस हादसा को चैन सिंह, उषा, सवेता व प्रतीमा ने अपनी आंखों से देखा है। मेरा यही ब्यान है।..."

5. To similar effect is the statement given by the complainant before the Court on 17.5.2007, the relevant portion whereof reads as under:

> "...तो दिनांक 30.8.2002 समय 12 बजे दिन वेद प्रकाश के आदमी व उसके नौकर करीब 10–15 आदमी इकटठे हो कर आये। जिनके हाथों में गेन्तीयां थी और औजार भी थे। और आते ही यह लोग मेरे धर के पास बने बगुला माता मदिर की तरफ गये। जिसको मैने उस दिन से 4, 5 साल पहले बनाया था को उन लोगों ने तोड़ दिया और शैड टीन को भी उखाड़ दिया और यह लोग मुर्ति बगुला माता को ले गये। जब मेरा भांजा बलविंदर सिंह उनके मौका के फोटो लेने लगा तो यह लोग उसकी तरफ दौड़े और कहने लगे कि उसको पकडों–2 उसको जान से मार देंगे। उसको उनके डर से घर के अंदर कर लिया था अगर घर के अंदर न करते तो सायद ये लोग हो सकता है जान से मार देते। यह हादसा चैन सिंह उषा सवेता व प्रतिमा ने भी अपनी आंखों से देखा। फिर इस बारा मैने इतलाह थाना कांगड़ा को दी फिर कहा थाना वाले टेलीफोन उठा ही न रहा थे फिर मैने एस डी एम ऑफिस में फोन किया जिस पर पुलीस भी मौका पर आई थी।...."

6. Section 319 of the Code of Criminal Procedure, 1973 reads as under:

> ***"319. Power to proceed against other persons appearing to be guilty of offence.***
>
> *(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*
>
> *(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.*
>
> *(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.*
>
> *(4) Where the Court proceeds against any person under sub- section (1), then-*
>
> *(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;*
>
> *(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."*

7. The legal position regarding the aforesaid provision has been explained and clarified by the Constitution Bench of the Hon'ble Supreme Court in ***Hardeep Singh*** vs. ***State of Punjab and others (2014) 3 SCC 92,*** whereby it now stands settled that the standard of proof employed for summoning a person as an accused under Section 319 Cr.P.C., is higher than the standard of proof required for framing a charge against an accused.

8. Judged in light of the parameters laid down by the Hon'ble Supreme Court in ***Hardeep Singh's*** case (supra), it would be evident that the complainant has neither in her statement under Section 154 Cr.P.C. nor in her statement recorded before the Court made a mention regarding the petitioner being present at the spot or having abetted the crime as has erroneously held by the learned Magistrate and her statement is only to the effect that the people involved in the offence were of the petitioner. No role has been assigned or attributed to the petitioner. It is also not her case that it was at the instance or the behest of the petitioner that his so called men had committed the alleged offence.

9. It is more than settled that power of summoning an additional accused under Section 319 Cr.P.C. should be exercised sparingly. The key words in Section are "it appears from the evidence"...."any person"....."has committed any offence". The Court has to use the powers not only sparingly, but primarily with a view to advance the cause of criminal justice and not as a handle at the hands of the complainant to cause harassment to the person who is not involved in the commission of the crime.

10. As the order passed by the learned Courts below is based on a complete misreading of the statements of the complainant whereby they have wrongly inferred even that was not stated by the complainant, the orders passed by the Courts below cannot be withstand judicial scrutiny and to say the least are perverse and deserve to be set-aside. Ordered accordingly.

11. No other point was urged.

12. In view of the aforesaid discussion, the revision petition is allowed and the order dated 16.7.2015 passed by learned Additional Sessions Judge-I, Kangra at Dharamshala, whereby he affirmed the order passed by learned trial Magistrate and allowed the application of the State for summoning the petitioner as a co-accused, is set-aside and quashed. The revision petition is disposed of in the aforesaid terms.

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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
Sunil Kumar .....Respondent

Cr. Appeal No. 378/2010
Reserved on: June 24, 2016
Decided on: June 27, 2016

N.D.P.S. Act, 1985- Section 20- An information was received that a person was coming for sale of charas and huge quantity could be recovered from him – information was received in writing and was sent to SDPO- accused was apprehended- his search was conducted during which 250 grams charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that PW-1 and PW-2 had turned hostile but they had admitted their signatures on various documents - consent memo was proved- all formalities were completed at the spot- case property was produced before SHO who had re-sealed the same- contraband was examined at FSL and was found to be charas- prosecution has proved its case beyond reasonable doubt that contraband was recovered from 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-16 to 19)

For the appellant : Mr. Neeraj K. Sharma, Deputy Advocate General .
For the respondent : Mr. Bimal Gupta, Senior Advocate with Ms. Kusum Chaudhary, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 1.4.2010 rendered by the learned Sessions Judge, Solan, Himachal Pradesh in Case No. 15-NL/7 of 2008, whereby

respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 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 5.11.2007, ASI Police Station, Nalagarh alongwith ASI Kuldeep Singh, HC Pratap Singh, Constable Gurnaib and Constable Balwant Singh was on patrolling duty in Nalagarh Bazaar. When the patrolling party reached near Barfani Chowk, ASI Yusuf Ali received a secret information that a person namely Sunil Kumar had come for sale of *Charas* and he was seen near Telephone Exchange and, if nabbed, *Charas* in huge quantity could be recovered from him. On receipt of the information, reasons of belief were reduced into writing and sent to SDPO Nalagarh. Thereafter, raiding party proceeded towards the place near Telephone Exchange, Nalagarh where one person named Mohammad Rafi, a resident of Nalagarh met the said raiding party. He was associated as an independent witness. They proceeded ahead. At a distance of 70 metres ahead of the Telephone Exchange, raiding party spotted a youth wearing green sweater and grey pants, who on seeing the police tried to run away. He was chased and nabbed. At that place, one Suresh Kumar, who was standing outside his house was apprised about the facts and was associated as a witness. Thereafter, ASI apprised the accused that a secret information regarding his being in possession of *Charas* was received and that he wanted to search his person. Accused was apprised of his legal right to be searched before a Magistrate or a Gazetted Officer. Accused consented to give his search to the Police. Accused was searched and *Charas* was recovered from the polythene envelope under his shirt and sweater. It weighed 250 grams. Two samples of 25 grams each were drawn and sealed with seal impression of 'Y'. Remaining *Charas* was sealed with the same seal in a separate parcel. Sample parcels were marked as S1 and S2 whereas bulk *Charas* parcel was marked as P1. The sample impression of seal was taken on a piece of cloth and seal after use was given to witness Mohammad Rafi. Contraband was taken into possession vide seizure memo which was signed by the independent witnesses and the accused. A *Rukka* was sent to the Police Station through Constable Gurnaib Singh, on the basis of which FIR was registered. ASI Yusuf Ali produced the case property before SHO, who resealed the same and issued resealing certificate. ASI deposited case property with the MHC in the Malkhana. Case property was also produced before the Judicial Magistrate, Special report was prepared and sent to the Superintendent of Police, Solan. One of the parcels was sent to FSL for analysis. 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. Bimal Gupta, learned Senior Advocate, has supported Judgment dated 1.4.2010.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. Suresh Kumar (PW-1) testified that he was called to the Police Station and was made to sign certain documents. He has not gone through the documents. He was declared hostile and was cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he admitted that on 5.11.2007, at about 5.30 PM, he was at his home. He also admitted that one person was running and police caught him in his presence. He admitted that Mohammad Rafi was also present. He also admitted that Sunil Kumar was coming from Telephone Exchange, Ward No.2, Nalagarh. Police caught the accused. Police conducted search of the accused in his presence and in the presence of Mohammad Rafi. He denied the suggestion that option for search was given to the accused. He admitted that memo Ext. PW-1/A

was prepared. He put his signatures on the same in red circle. Volunteered that he was made to sign Ext. PW-1/A in the Police Station. He admitted that Ext. PW-1/A was prepared on the spot and he put his signatures on it. Volunteered that his signatures were obtained in the Police Station. He admitted that Ext. PW-1/B was prepared by the police and thereafter he put his signature on it. He also admitted that Mohammad Rafi and accused also put their signatures on the same. He also admitted that Ext. PW-1/C was prepared and he put his signatures on it. He denied the suggestion that Ext. PW-1/C was signed on the spot by him, Mohammad Rafi and accused. Volunteered that it was signed by them in the Police Station. He admitted later that it was prepared on the spot by the police. He denied that 250 grams of *Charas* was recovered from the accused. He did not know whether recovery memo of *Charas* was prepared. He admitted that he signed recovery memo Ext. PW-1/D whereby *Charas* was recovered. It was also signed by Mohammad Rafi and accused. In his cross-examination by the learned defence Counsel, he admitted that wherever, he put his signatures on the papers, he did so in the Police Station and no proceedings have taken place in his presence.

8. Mohammad Rafi (PW-2) was also declared hostile and cross-examined by the learned Public Prosecutor. He admitted that the incident took place at 5.30 PM on 5.11.2007. He denied the suggestion that accused was running and police was chasing him. Volunteered that accused was apprehended in a *Nallah*. He also admitted that the police gave option to the accused for his personal search. He admitted that accused opted to give his search to the police officials. Ext. PW-1/A was prepared on which he put his signatures. It was also signed by Suresh Kumar and Sunil Kumar. He denied that 250 grams of *Charas* was recovered from the accused. He denied that he had signed Ext. PW-1/D on the spot. Volunteered that it was signed by him in the Police Station. He denied that recovery was effected in his presence. He admitted his signatures on Ext. PW-1/E. Volunteered that he signed the same in the Police Station. In his cross-examination by the learned defence Counsel, he admitted that he signed the documents in the Police Station including Ext. PW-1/A. He admitted that nothing was recovered in his presence. No inquiry was made from the accused in his presence.

9. Constable Gurnaib Singh (PW-3) testified the manner in which accused was apprehended. Accused was asked to give option whether he wanted to be searched before a Magistrate or a Gazetted Officer. Accused has shown his willingness to be searched by the police. Memo Ext. PW-1/A was prepared. Accused has given consent in writing, in red circle. On the search of accused, a plastic envelope was recovered from the pocket inside the shirt. It contained *Charas*. It weighed 250 grams. Samples were drawn and duly sealed with seal impression 'Y'. *Rukka* was prepared by the Investigating Officer. It was handed over to him. He handed over the same to MHC Visesh Kumar, on the basis of which FIR was recorded. In his cross-examination, he testified that the reasons of belief were recorded at Barfani Chowk Bazaar, Nalagarh. He brought weights and scale from a shop 300-400 metres from the spot. He denied the suggestion that nothing was recovered from the accused in his presence.

10. ASI Kuldeep Singh Rathor (PW-4) testified the manner in which accused was apprehended, search, seizure and sampling proceedings were completed at the spot. Consent memo Ext. PW-1/A was prepared. Accused gave his option to be searched by the police. In his cross-examination, he has admitted that witnesses were associated in raiding party from the Telephone Exchange. Proceedings lasted till 8 PM.

11. Constable Balwant Singh (PW-5) testified that he was posted at Nalagarh since 2007. On 5.11.2007, he alongwith Constable Gurnaib Singh, HC Pratap Singh, ASI Kuldeep Singh and ASI Yusuf Ali was on patrolling near Barfani Chowk. ASI Yusuf Ali received a secret information that accused was dealing in *Charas* near the Telephone Exchange. On this, reasons of belief were prepared on the spot vide Ext. PW-3/A. Ext. PW-3/A was handed over to him to be produced before the SDPO Nalagarh. He handed over the same to Paramjeet Singh, Reader to the Dy.SP, Nalagarh.

12. Constable Jitender Kumar (PW-7) deposed that on 6.11.2007, MHC Visesh Kumar handed over to him one sealed parcel mark S1 and two sample seal impressions 'H' and 'Y' alongwith NCB form vide RC No. 74/2007 and docket No. 5318/SA to deposit in FSL. On 7.11.2007, he deposited the same at FSL and returned the receipt to MHC.

13. HC Visesh Kumar (PW-8) testified that on 5.11.2007, he received a *Rukka* through Constable Gurnaib Singh. It was produced before SHO. FIR Ext. PW-8/B was recorded. On the same day, at about 11.00 PM, SHO Som Dutt had deposited case property i.e. one sealed parcel Ext. P1, two sealed samples of *Charas* bearing seal impression 'H', before him. NCB form, seal impression of "H' and 'Y' were also handed over to him by the SHO. He made entry to this effect in the register at Sr. No. 562. Copy of Malkhana Register is Ext. PW-8/D. He handed over case property on 6.11.2007 to Constable Jitender Kumar, to deposit with FSL.

14. Inspector Som Dutt (PW-12) deposed that the case property alongwith samples and NCB form was produced before him on 5.11.2007. He resealed two parcels of samples and one parcel of bulk of *Charas* with seal impression 'H'. Seal impression was also taken on separate piece of cloth, which is Ext. PW-12/B. He filled in relevant columns of NCB form Ext. PW-12/C. Case property alongwith NCB form and sample was handed over to Visesh Kumar, on 5.11.2007.

15. SI Yusuf Ali (PW-14) deposed that on 5.11.2007, he was on patrolling alongwith ASI Kuldeep, HC Pratap Singh, Constable Gurnaib and Constable Balwant. At around 4.45 PM, when he was present near Barfani Chowk, he received a secret information that a person namely Sunil Kumar deals with selling and purchasing *Charas*. He was wearing green sweater and gray jean pants, sports shoes and was present near Telephone Exchange. If he was apprehended, *Charas*/ narcotic substance could be recovered from him. Information was reliable. There was no time to obtain the search warrant and in the event of delay, there was every possibility of the accused escaping. Reasons of belief were recorded and sent through Constable Balwant Singh to Dy.SP Nalagarh vide Ext. PW-3/A. Thereafter, he alongwith police officials proceeded towards that side. Accused was apprehended. He was apprised that there was information of some narcotic substance being in his possession and he had liberty to be searched in the presence of a Gazetted Officer or a Magistrate. Accused consented to be searched by the police party on the spot. Consent memo Ext. PW-1/A was prepared on the spot, which was signed by Mohammad Rafi and Suresh Kumar. *Charas* was recovered. All the codal formalities were completed on the spot. Accused and case property were brought to the Police Station and produced before SHO alongwith NCB form etc. SHO resealed the case property and deposited with Visesh Kumar. He denied in the cross-examination that he has not obtained consent of the accused before conducting his personal search.

16. Accused was apprehended. He was apprised that he had a liberty to be searched before a Magistrate or a Gazetted Officer. Ext. PW-1/A was prepared. Suresh Kumar (PW-1), though declared hostile, but has admitted his signatures on Ext. PW-1/A. He has admitted his signatures on Ext. PW-1/B, Ext. PW-1/C and Ext. PW-1/D also. Similarly, Mohammad Rafi (PW-2) was also declared hostile but he has also admitted his signatures on Ext. PW-1/A. He categorically admitted that the police gave option to the accused for his personal search and accused gave personal search to the police. Gurnaib Singh (PW-3) deposed that consent of the accused was obtained to the effect whether he wanted to be searched before a Magistrate or a Gazetted Officer. Accused gave willingness to be searched by the police party. He took *Rukka* to the Police Station. Statement of Gurnaib Singh (PW-3) has been corroborated by ASI Kuldeep Singh. He has testified that consent memo was prepared vide Ext. PW-1/A. It was signed by him. Yusuf Ali (PW-14) has also deposed that the accused was given liberty to be searched before a Magistrate or a Gazetted Officer. Consent memo was prepared. It was signed by Suresh Kumar (PW-1) and Mohammad Rafi (PW-2). We have already noticed that Gurnaib Singh (PW-3) and Yusuf Ali (PW-14) have also testified that accused was apprised of his legal right to be searched before a Magistrate or a Gazetted Officer vide Ext. PW-1/A.

17. All the codal formalities were completed by the police at the spot. Case property was produced before SHO Som Dutt (PW-12). He resealed the same with seal impression 'H'. He handed over the case property to Visesh Kumar (PW-8). He made entry at Sr. No. 562 of the Malkhana Register. Case property was handed over by PW-8 Visesh Kumar to Jitender Kumar (PW-7) vide RC No. 74/2007. He deposited the same with the FSL. Copy of FSL report is Ext. PX. Samples have reached FSL intact and contraband was found to be *Charas*.

18. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the conscious and exclusive possession of the accused.

19. Accordingly, the appeal is allowed. Judgment dated 1.4.2010 rendered by the learned Sessions Judge, Solan, Himachal Pradesh in Case No. 15-NL/7 of 2008 is set aside. The accused is convicted for offence punishable under Section 20 of the Act. Accused be produced to be heard on quantum of sentence on 30.6.2016.

20. Registry is directed to prepare and send the production warrant to the quarter concerned.

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

Shri Tilak Raj son of Shri Balak Ram ....Petitioner/Plaintiff

Versus

State of H.P. through the Commissioner Una & others .....Non-petitioners/Defendants

CMPMO No. 25 of 2016
Order reserved on 17th June 2016
Date of Order 27th June 2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendants from impeding the passage by raising construction over the same- defendants pleaded that construction was being raised by H.P. Tourism Development Board through Project Manager- land is owned by State which has not been impleaded as party- suit was filed for stopping the public work- application was partly allowed by the trial Court- an appeal was preferred, which was dismissed- held, that plaintiff had claimed the existence of the passage- land is recorded as non-cultivable road in the revenue record- urinal and lavatories are being constructed for the benefit of public - in case of conflict between the interest of general public and the individuals, interest of general public should prevail- order passed by the Court modified to the extent that urinals and lavatories will be constructed in such a manner that no part of waste water or sewerage would flow towards the land of plaintiff. (Para-11 to 16)

Cases referred:

State of Assam and another vs. M/s M.S.Associates , AIR 1994 Gauhati 105
Darshan Ram vs. Nazar Ram, AIR 1989 (P&H) 253

For Petitioner:	Mr. Ajay Kumar Sr. Advocate with Mr. Dheeraj K. Vashishat Advocate.
For Non-petitioners Nos. 1 and 4 :	Mr.R.K. Sharma Dy. Advocate General
For Non-Petitioners Nos. 2 and 3:	Mr. Anoop Rattan, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Article 227 of Constitution of India against order dated 17.10.2015 passed by learned Additional District Judge (II) Una H.P. Camp at Amb whereby learned Additional District Judge (II) Una H.P. affirmed order of learned Trial Court passed in civil miscellaneous application No. 65 of 2015 filed under Order 39 Rules 1 and 2 CPC.

Brief facts of the case

2. Tilak Raj plaintiff filed suit for permanent injunction restraining the defendants themselves through their employees, contractors from curtailing and impeding the passage of plaintiff by way of installing urinals and lavatories and raising any sort of construction over the land comprised in Khewat No. 268 min Khatauni No. 429 min Khasra No. 1085 situated in village Kotli Tehsil Amb District Una H.P. Additional relief sought restraining the defendants from causing any interference, encroaching or discharging the waste of urinals, lavatories and curtailing the access to the land comprised in Khewat No. 65 min Khatauni No. 86 min, Khasra No. 1035. It is pleaded that land situated in Khasra No. 1085 is Gair Mumkin sadak (Non cultivable road) and plaintiff and other co-sharers as well as other inhabitants of area are using the said road for the purpose of egress and ingress to their fields, cattle shed and other allied purposes. It is pleaded that land situated in Khasra No. 1035 is owned by plaintiff along with his brother Jagdish Ram. It is pleaded that Khasra No. 1085 and Khasra No. 1035 are adjoining. It is pleaded that Khasra No. 1035 could be accessed through Khasra No. 1085 only. It is pleaded that defendants are installing the urinals, lavatories in Khasra No. 1085 which would lead to emanating pungent smell which would cause substantial discomfort to the living of plaintiff and his ailing brother. It is pleaded that brother of plaintiff namely Jagdish Ram had recently undergone extensive treatment for brain hemorrhages and paralysis and he was shifted to residential house for later recovery. It is pleaded that plaintiff requested the defendants to desist from their unlawful and illegal act but defendants did not accept the request of plaintiff.

3. Per Contra written statement filed on behalf of defendants pleaded therein that suit is not maintainable and plaintiff has no cause of action. It is pleaded that suit is bad for non-joinder of necessary parties. It is pleaded that construction is being raised by H.P. Tourism Development Board through its Project Manager and not by defendants. It is pleaded that project is for development of general public and same is financed by Asian Development Bank. It is pleaded that Khasra No. 1085 is owned and possessed by State of H.P. and Collector is necessary party. It is pleaded that plaintiff did not approach the Court with clean hands and plaintiff suppressed the material facts from the Court. It is pleaded that Khasra No. 1035 is barren and uncultivated land and there is no residential or other building in Khasra No. 1035. It is pleaded that plaintiff has no locus standi to file the present suit. It is further pleaded that plaintiff is estopped by his act conduct and acquiesance to file the present suit. It is pleaded that plaintiff has filed the present suit with malafide intention just to halt the development work on spot relating to the welfare of general public. It is pleaded that State of H.P. has legal right to use Khasra No.1085 for the benefit of general public at large. It is pleaded that septic tank and soak pit would be constructed in Khasra Nos. 1085 and 1089 which is owned by State Government and possessed by PWD department. It is pleaded that no part of waste water or sewerage would be discharged in open land or towards the land of plaintiff comprised in Khasra No. 1035.

4. Plaintiff also filed application under Order 39 Rules 1 and 2 CPC for grant of ad-interim injunction restraining the defendants themselves through their employees or contractors from raising any construction over Khasra No. 1085 by way of installing urinals and lavatories and curtailing the access of plaintiff to Khasra No. 1035 till disposal of suit.

5. Per contra response filed on behalf of defendants and allegations mentioned in written statement re-asserted and prayer for dismissal of application filed under Order 39 Rules 1 and 2 CPC sought.

6. Learned Civil Judge (Junior Division) Court No. II Amb District Una partly allowed the application filed under Order 39 Rules 1 and 2 CPC and restrained the defendants from raising any sort of construction over land comprised in Khasra No. 1035. Learned Trial Court declined the relief sought relating to Khasra No. 1085.

7. Feeling aggrieved against order passed by learned Trial Court plaintiff Tilak Raj filed civil miscellaneous appeal No. 25 of 2015 which was disposed of by learned Additional District Judge (II) Camp at Amb District Una on 17.10.2015. Learned Additional District Judge (II) Camp at Amb District Una affirmed order passed by learned Trial Court.

8. Feeling aggrieved against order of learned Trial Court and order of learned first Appellate Court petitioner Tilak Raj filed the present petition under Article 227 of Constitution of India.

9. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf non-petitioners Nos. 1 and 4 and learned Advocate appearing on behalf of non-petitioners Nos. 2 and 3 and also perused the entire record carefully.

10. Following points arise for determination in present petition:-

Point No.1

Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

Point No.2

Relief.

Findings upon point No.1 with reasons

11. Submission of learned Advocate appearing on behalf of petitioner that Khasra No. 1085 is Gair Mumkin Sadak (Non-cultivable road) and petitioner and other villagers have been using the road for egress and ingress to their respective lands and there is no other passage or path for egress and ingress other than Khasra No. 1085 and said passage is in existence for more than 100 years and on this ground petition be allowed is decided accordingly for reasons hereinafter mentioned. Court has carefully perused Missal Hakiyat consolidation for the year 2007-2008 placed on record relating to Khasra No. 1085. In ownership column name of State Government recorded and in possession column name of Public Works Department recorded. Nature of Khasra No. 1085 is shown as Gair Mumkin sadak (Non-cultivable road). In remarks column it is specifically mentioned that vide mutation No. 183 ownership rights qua Khasra No. 1085 vested in Central Government. Court has also carefully perused jamabandi for the year 2007-2008 relating to Khasra No.1035 placed on record. Khasra No. 1035 is in ownership of Jagdish Ram and Tilak Raj and they are shown in possession of Khasra No. 1035. Nature of Khasra No. 1035 has been shown as Kharetar (Barren land). Court has also perused field map placed on record qua Khasra Nos. 1085 and 1035. As per field map placed on record boundaries of Khasra No. 1035 and boundaries of Khasra No. 1085 are adjoining to each other to the extent of 26 metres.

12. In jamabandi Missal Hakiyat consolidation for the year 2007-2008 nature of Khasra No. 1085 has been shown as Gair Mumkin Sadak (Non-cultivable road). It is well settled law that public has legal right of passage through public road. Learned Trial Court and learned first Appellate Court have not restrained the plaintiff from passing through Khasra No. 1085. It is prima facie proved on record that Khasra No. 1085 has been vested in Central Government and has been declared as National Highway under National Highways Act 1956. Plaintiff did not implead Central Government as co-party in present case.

13. It is well settled law that general public passing through National Highway would require urinals and lavatories. It is prima facie proved on record that urinal and lavatories are being constructed adjoining National Highway for welfare of general public. It is well settled law

that when there is conflict between welfare of individual and general public then interest of general public should prevail. Plaintiff is not owner of Khasra No. 1085. It was held in case reported in ***AIR 1994 Gauhati 105 title State of Assam and another vs. M/s M.S.Associates*** that when question of granting injunction against public authority arises not only the three ingredients for grant of injunction should be considered (i) Prima facie case (2) Balance of convenience (3) Irreparable loss but in addition public interest should also be considered. It was held that Court cannot be used as a tool to cause inconvenience to the society at large.

14. Submission of learned Advocate appearing on behalf of petitioner that if defendants would succeed in raising urinals and lavatories adjoining to plot of plaintiff comprised in Khasra No. 1035 then pungent smell would come in plot of plaintiff comprised in Khasra No. 1035 is partly accepted for the reasons hereinafter mentioned. It is well settled law that boundaries of Khasra Nos. 1085 and 1035 are adjoining to each other to the extent of 26 metres as per field map placed on record. It is well settled law that neighbour cannot use his own land in such a manner which would create nuisance to his neighbour. ***See AIR 1989 (P&H) 253 title Darshan Ram vs. Nazar Ram.*** Court is of the opinion that defendants cannot be permitted to raise urinals and lavatories in such a manner which would create pungent smell to the plaintiff. Non-petitioners would raise urinals and lavatories for welfare of general public in such a manner that same would not create any pungent smell to the plaintiff in any manner. The waste water and sewerage water would go underground.

15. Submission of learned Advocate appearing on behalf of petitioner that in view of the fact that Khasra No. 1085 vested in Central Government and declared as National Highway under National Highways Act 1956 defendants have no locus standi to raise construction and on this ground entire orders of learned Trial Court and learned first Appellate Court be set aside is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that Central Government did not file suit against the defendants. Court is of the opinion that plaintiff has no locus standi to plead the case of Central Government. In view of above stated facts point No. 1 is answered partly in yes and partly in no.

Point No. 2 (Relief)

16. In view of findings on point No. 1 above petition is partly allowed and orders of learned Trial Court and learned first Appellate Court are modified to the extent that in addition to original order passed by learned Trial Court defendants would raise urinals and lavatories and other construction over Khasra No. 1085 in such a manner that no part of waste water or sewerage would flow towards the land of plaintiff comprised in Khasra No. 1035 and no pungent smell would flow towards the plot of plaintiff comprised in Khasra No. 1035. It is further ordered that pipes of waste water and sewerage would be laid down by defendants under ground in order to prevent any nuisance to plaintiff who is owner of adjoining plot. Orders of learned Trial Court and learned first Appellate Court are modified to this extent only. Copy of misal Hakiyat for the year 2007-08 relating to Khasra No. 1085, copy of jamabandi for the year 2007-2008 relating to Khasra No. 1035 and field map issued by Consolidation department for the year 2007-2008 placed on record will form part and parcel of order. Observations will not affect the merits of case in any manner and will be strictly confined for disposal of present petition filed under Article 227 of Constitution of India. Files of learned Trial Court and learned first Appellate Court be sent back along with certified copy of order. Parties are directed to appear before learned Trial Court on ***22.7.2016.*** CMPMO No. 25 of 2016 is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Vivek Kumar .....Revisionist.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Revision No. 75 of 2015
Decided on : 27.06.2016

Indian Penal Code, 1860- Section 279 and 338- Complainant was going towards his vehicle- a car came and hit him- he sustained injuries- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that the persons named in the FIR as eye witnesses were not examined to prove the prosecution version- R, an eye-witness had not supported the prosecution version- site plan did not reflect the spot position correctly- in these circumstances, Courts had wrongly convicted the accused- revision accepted and accused acquitted. (Para-9 to 12)

For the Appellant: Mr. Ravinder Thakur, Advocate.
For the Respondent: Mr. Ravinder Singh Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant revision petition stands preferred hereat by the accused as he stands 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 offences punishable under Sections 279 and 338 of the Indian Penal Code.

2. The brief facts of the case are that Sanjeev Kumar and his other friends had come to Manali on a trip and were staying in the house of their another friend Raj Thakur. On 23.6.2010 at about 11 p.m after taking dinner Sanjeev Kumar was going towards his vehicle in order to sleep in it. He was on the side of the road when a car came from Rohtang side and hit him. On account of this collusion his left leg was fractured. He found that the car which had hit him was bearing No.HP-14B-7110 and its driver disclosed his name as Vivek Sharma. The victim was taken to Mission Hospital, Manali for treatment by his friends including Raj Thakur. On intimation of Medical Officer, Mission Hospital, Manali, a police party headed by ASI Daya Ram was dispatched to do the needful. On reaching there he recorded statement of Sanjeev Kumar and on its basis an F.I.R. was registered. During investigation ASI Daya Ram prepared site plan and recorded statements of witnesses 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, 337 and 338 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 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 did not choose to lead any evidence in defence.

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

6. The accused stands aggrieved by the findings of conviction recorded by both the Courts below for his committing offences punishable under Sections 279 and 338 of the Indian Penal Code. 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.

7. 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 Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

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

9. The victim in the F.I.R. lodged qua the occurrence by him has disclosed therein qua the ill fated occurrence standing witnessed by all persons who alongwith the accused were aboard vehicle bearing No. HP 14B 7110. The rash and negligent manner of driving of the vehicle aforesaid by the accused sequelled the victim suffering fracture of his left leg, factum whereof stands proven by the apposite MLC comprised in Ext.PW-1/A. The aforesaid enunciation by the victim in the F.I.R. qua the accident standing witnessed by Gurjit Singh, Harvinder Singh and Varender Singh warranted theirs standing joined by the Investigating Officer in the apposite investigations held by him qua the occurrence. However, the Investigating Officer omitted to solicit their participation in the apposite investigations conducted by him on the anvil of one Raj Kumar a purported eye witness to the incident disclosing therein of all the aforesaid not being ocular witnesses to the occurrence as at the relevant time they were inside their room. Also he has made a disclosure qua omission on his part to solicit the participation of the afore-named persons standing generated by his concerts made upon them for summoning them, proving abortive. However, there exists on record no material comprised in his issuing written communications to them, demonstrative of his hence soliciting the participation of the afore-named persons divulged by the victim in the F.I.R to witness the occurrence. Consequently, it appears of the Investigating Officer deliberately omitting to associate the afore-named ocular witnesses to the occurrence for facilitating him to smother its truth, in sequel a smothered version qua the occurrence cannot hold any credence. Furthermore, the Investigating Officer has recorded a recital in the F.I.R. of Raj Kumar making a disclosure to him of Gurjit Singh, Harvinder Singh and Virender Singh not witnessing the occurrence, disclosure whereof prodded him to not solicit their participation in the apposite investigations held by him qua the ill-fated occurrence. The aforesaid manifestations in the F.I.R per-se are dichotomous inasmuch as with the Investigating Officer suo moto disbelieving merely on one Raj Kumar dispelling their presence thereat, the version qua the road mishap spelt in the F.I.R by the victim wherein contrarily the victim has named the afore-named persons as witnesses thereto. Therefore, it was grossly inapt for the Investigating Officer to dispel the presence of the afore-named persons at the relevant time at the site of occurrence, also it was unwarranted for him to dispel the factum of theirs witnessing the occurrence merely on one Raj Kumar making a communication to him of theirs not witnessing the occurrence besides it appears of thereupon when for reasons aforesated his purported concerts to solicit their participation in the apposite investigations standing stained with a vice of falsity of hence his merely concocting specious reasons for his omitting to record the statements of the eye witnesses to the occurrence, statements whereof in case he had proceeded to record would have unearthed the truth qua the occurrence. As a corollary, it is to be held of his deliberately omitting to record their respective statements, as he intended to suo moto rear a false case against the accused.

10. Be that as it may, even Raj Kumar, the purported eye witness to the occurrence when has not supported the version of the victim qua the road mishap though the Investigating

Officer ascribes to him the role of an ocular witness thereto rather has disclosed in his recorded deposition on oath of his visiting the site of occurrence subsequent to its taking place thereat renders hence the genesis of the prosecution case anchored on his testimony to loose its force in its entirety also the factum of his reneging from his previous statement recorded in writing renders frail the enunciations in the apposite F.I.R. of his making a disclosure to the Investigating Officer qua the occurrence standing not witnessed by the aforesaid persons named by the victim in the F.I.R whereupon the Investigating Officer was constrained to not solicit their participation in the apposite investigations. In sequel, it appears of the entire investigations held by the Investigating Officer concerned qua the ill fated road mishap being both slanted and skewed for falsely implicating the accused.

11. Even the preparation of site plan whereupon much reliance has been placed by both the Courts to concurrently record findings of conviction against the accused appears to stand prepared suo moto besides in an arbitrary fashion by the Investigating Officer even when the ill fated vehicle was unavailable at the site of occurrence. The inference of site plan comprised in Ext.PW-8/B standing prepared under the mere ipse dixit of the Investigating Officer stands anvilled upon the factum of PW-7 underlining in his deposition of when he alongwith his friends visited the site of occurrence, the vehicle driven by the accused having departed therefrom. Since the arrival of the Investigating Officer at the site of occurrence was subsequent to the departure therefrom of the vehicle driven by the accused necessarily the depictions therein incriminating the accused respondent do not hold any efficacy.

12. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by both the Courts below suffers from a gross perversity and absurdity hence it can be held of both the Courts below in recording findings of conviction having committed a legal misdemeanor, inasmuch as theirs mis-appreciating the evidence on record or theirs omitting to appreciate relevant and admissible evidence. In aftermath this Court deems it fit and appropriate that the findings of conviction recorded by both the Courts below merit interference.

13. In view of the above discussion, I find merit in this petition, which is accordingly allowed and the judgements of conviction and sentence rendered by both the Courts below are set-aside. Bail bonds are discharged.

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

Ajay Kumar …Appellant

Versus

State of Himachal Pradesh …Respondent

Cr. Appeal No. 122/2016
Reserved on: June 27, 2016
Decided on: June 28, 2016

Indian Penal Code, 1860- Section 376- Complainant hired a taxi of the accused – accused raped the prosecutrix on the way- matter was reported to the police- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had narrated the incident to PW-1- accused was also apprehended by public- Medical Officer had noticed signs of vaginal penetration- DNA profile obtained from Pajami and vaginal swab of the prosecutrix matched with DNA profile of the accused- statement of the prosecutrix is duly corroborated by medical and DNA evidence- accused was rightly convicted by the trial Court- appeal dismissed. (Para-19 and 20)

For the Appellant: Mr. N.K. Thakur, Senior Advocate with Ms. Jamuna Devi, Advocat.

For the Respondent: Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge

This appeal has been instituted against Judgment dated 14.3.2016 rendered by the learned Sessions Judge, Una, HP in Sessions Trial No. 23 of 2015, whereby the appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Sections 376 and 506 IPC, has been convicted and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- for the offence punishable under Section 376 IPC and in default of payment of fine, to further undergo simple imprisonment for three months. He has further been sentenced to undergo simple imprisonment for six months for offence under Section 506 IPC. Both the sentences have been ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that on 6.12.2014, on receipt of information in Police Station, Amb, from Massa Singh (PW-2) of Gurudwara Mairi about rape, SI Darshan Singh (PW-22) went to Mairi Gurudwara where the prosecutrix got her statement recorded under Section 154 CrPC vide Ext. PW-1/A to the effect that she was a resident of Ropar in Punjab and was doing graduation. She reached Baba Bad Bhag Singh, Mairi at about 8.30 PM from her house in Ropar and stayed there till 4 AM. At 4 AM, she hired the taxi of accused for Dhaulidhar (Charanganga). She was all alone in the taxi. When she asked accused to take more passengers, he replied that he will take more passengers on the way to Dhaulidhar. But, on the way, he did not try to get any passenger and instead of taking the taxi to Dhaulidhar, took the same to a secluded place where he stopped the taxi and sat with her on the middle seat of the taxi and started assaulting her forcibly. When she resisted the acts of accused, he threatened her that he will call his 3-4 friends. Thereafter, accused forcibly committed rape upon her. Due to fear, she accompanied accused to Dhaulidhar in the same taxi and after taking bath at Charanganga, came back to Beri Sahib (Mairi) in the taxi in question and on her asking, accused, he told his name as Ajay Kumar alias Happy. After alighting from the taxi, she noted the number of the taxi as HP-07U-0140. she narrated the whole incident to Kulwant Kaur (PW-1). Thereafter, during investigation, prosecutrix produced her clothes. Seat cover of the middle seat of vehicle was also taken into possession. The prosecutrix as well as accused was medically examined vide Ext. PW-14/A and Ext. PW-5/B, respectively. Statement of the prosecutrix was also recorded under Section 164 CrPC, before the Judicial Magistrate. Report of the chemical examiner is Ext. PX. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution examined as many as twenty two 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. N.K. Thakur, learned Senior 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 14.3.2016.

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

7. Kulwant Kaur (PW-1) testified that she came to Baba Bad Bhag Singh, Mairi every month to pay obeisance. On 5.12.2014, at about 5.30 PM, she had come to Baba Bad Bhag Singh and performed service in *Gurudwara*. In the morning at about 7.30 AM, a girl who was weeping, met her outside the *Langar* hall. She was accompanied by a boy who was apprehended by the people. She told that said boy had committed sexual act with her. Girl disclosed her name. She was a resident of Ropar. In the meantime, people present there started beating accused. She brought boy and girl to the office of *Gurudwara*. Girl told that said boy had committed sexual

intercourse with her forcibly. She further disclosed that she hired taxi at about 4 AM to reach Dhaulidhar to take bath. She further disclosed that she had reached Baba Bad Bhag Singh on 5.12.2014 at about 8.30 PM. She also told that said boy who was a taxi driver, took her in taxi to Dhaulidhar and while travelling, he had closed all the doors of vehicle and did not allow any other person to sit in the vehicle and then took the vehicle to a lonely place and then committed rape on her forcibly. She also disclosed that she had resisted the act of the accused but he told that he would call other 4-5 friends and they will all commit forcible intercourse with her. Accused disclosed his name as Ajay Kumar alias Happy. At that time, one Swaran Kaur, Pradhan, Gram Panchayat Mairi and an official of *Gurudwara*, Massa Singh were also present. In her cross-examination, she admitted that large number of people gathered at *Gurudwara* on *Puranmashi*. She also admitted that on the occasion of *Puranmashi*, police arrangement is also there. She also admitted that the place from where taxi was hired was near to *Gurudwara*. There were shops on both the sides of road at *Gurudwara*. She admitted that there was only one road in case one had to go to Dhaulidhar Charanganga from *Gurudwara* and distance of Dhaulidhar from *Gurudwara* was about 1.5-2 kms. A large number of people remained present at Dhaulidhar.

8. Massa Singh (PW-2) testified that he was working in Dera Baba Bad Bhag Singh. On 6.12.2014, he was present in the office. At around 7.30 PM, a girl and a boy were brought by the people in the office. Boy was beaten up by the people and there were injury marks on his face. Girl disclosed her name and also that the boy had committed sexual intercourse with her. Boy disclosed his name as Ajay. Girl and the boy were brought to his office by Kulwant Kaur. Pradhan, Gram Panchayat also came there. She asked the girl separately and she disclosed entire incident to her. His statement was recorded by the police.

9. Avtar Singh (PW-3) testified that he was owner of vehicle No. HP-01U-0140. On 6.12.l2014, he produced RC, insurance and route permit of the aforesaid vehicle to the police. Police also took into possession the central seat cover of the vehicle. Girl disclosed that the accused had committed sexual intercourse with her on the central seat of the vehicle.

10. Smt. Swaran Kaur (PW-4) was the Pradhan of Gram Panchayat Mairi. She testified that on 6.12.2014, at 8.30 AM, she came to the office of *Gurudwara* Baba Bad Bhag Singh. At that time, some people had gathered. Employee of the *Gurudwara* Massa Singh and Kulwant Kaur with a boy and a girl were present there. She was called on phone to the office. Kulwant Kaur asked the girl in her presence that what had happened with her. Girl disclosed that she had come to *Gurudwara* in the evening and earlier she served in the *Langar* till 4 AM and then went to Dhaulidhar by taxi. She disclosed that the taxi, in which she went to Dhaulidhar, in that taxi, accused did not allow others to sit. Girl asked him to have some other passengers on which he said that he will take passengers a little ahead. But he did not allow any passenger and bolted the window of vehicle and took the vehicle to a lonely place. Boy committed rape upon her in the vehicle. Thereafter, he took the girl to Charanganga and after taking bath, he said to the girl to sit in the vehicle. Girl sat in the vehicle due to fear. However, on the way, she allowed other passengers to sit in the same.

11. Dr. Pankaj Prasher (PW-5) examined the accused. He issued MLC Ext. PW-5/B. The final opinion is Ext. PW-5/C. According to him, accused might have committed sexual intercourse on the basis of FSL report.

12. HC Vipan Kumar (PW-6) testified that on 6.12.2014, HHC Rajiv Kumar brought statement of prosecutrix Ext. PW-6/A, on the basis of which he entered FIR Ext. PW-6/B. On 6.12.2014, a sealed parcel alleged to be containing clothes of victim sealed with seven seals of 'M' alongwith specimen seal handed over by SI Darshan Singh. Another sealed parcel sealed with seven seals of seal 'H' alleged to be containing seat cover of the vehicle, one sealed parcel sealed with three seals of 'PLUS Amb' alleged to be containing two vials of smegma, pubic hair and slide, another parcel sealed with three seals of 'PLUS Amb' alleged to be containing undergarments (underwear and vest) of accused and other articles were handed over by SI Darshan Singh. He entered the same in Malkhana Register. On 12.2.2015, SI Darshan Singh deposited with him,

FTA form and cards of accused sealed with three seals of 'PLUS Amb' for the purpose of DNA analysis. On the same day, forms alongwith above said parcels which were received from RFSL Dharamshala were sent to FSL Junga through Constable Ajay Kumar vide RC No. 34/15 dated 12.2.2015. Similarly, on 18.2.2015, SI Darshan Singh deposited with him FTA Forms and cards of victim sealed with three seals of 'PLUS Amb' for the purpose of DNA analysis alongwith specimen seal. On the same day, he sent the same to FSL Junga through Constable Ajay Kumar vide RC No. 35/15.

13. HC Vipan Kumar (PW-6) deposed that on 10.9.2015, HHC Gopal Dass No. 135 who was deputed to collect parcels from SFSL Junga, had deposited with him one parcel stated to be containing blood for DNA analysis of accused sealed with three seals of DNA, one parcel sealed with two seals of DNA stated to be containing FTA card of victim. He also deposited with him one parcel stated to be containing shirt and *Pajami* of victim sealed with five seals of DNA, one parcel stated to be containing pubic hair and smegma sealed with three seals of DNA, another parcel stated to be containing undergarments of accused sealed with three seals of DNA and one parcel stated to be containing vaginal swab, slide and pubic hair of victim sealed with three seals of DNA. He made entry to this effect in the Malkhana Register.

14. HHC Rajiv Kumar (PW-9) deposed that he went to Baba Bad Bhag Singh, Mairi alongwith SI Darshan Singh and other police officials. SI Darshan Singh recorded the statement of the prosecutrix vide Ext. PW-6/A.

15. Dr. Usha Daroch (PW-14) has examined the prosecutrix. She issued MLC Ext. PW-14/A. Her final opinion is Ext. PW-14/B. After receipt of chemical examiner report, as well as physical examination of the prosecutrix, it was suggestive of vaginal penetration.

16. Prosecutrix was examined as PW-15. According to her, she came to Mairi from her house in Ropar to pay obeisance by train upto Amb. She reached at Amb at 7.30 PM and took bus to Mairi and reached there at 8.30 PM. She paid obeisance in *Gurudwara* and served a *Langar* for some time. Thereafter, she took rest in *Gurudwara*. At about 4 AM, she went to taxi stand and hired a taxi for Dhaulidhar. When she boarded taxi, she was all alone. She asked driver to take more passengers. He said that he will take passengers on the way. He took her to some other road instead of Dhaulidhar. It was dark. Driver stopped the vehicle and came to her in rear seat of vehicle. He started misbehaving with her. He tried to molest her. When she objected, he threatened that he will call his 4-5 friends and they will all commit sexual intercourse with her. She was frightened. Accused committed forcible sexual intercourse with her. Thereafter, he took her to Dhaulidhar and asked her to come back again to his vehicle. She took bath at Dhaulidhar and came back. Accused asked her to sit in the vehicle. She noted the number of the vehicle which was HP-01U-0140. She asked his name. He told his name as Ajay Kumar alias Happy. On reaching Mairi, she narrated the whole incident to Kulwant Kaur. Thereafter, she was taken to *Gurudwara*. One Massa Singh was also present in the office. Police recorded statement of the prosecutrix vide Ext. PW-6/A. She had shown the place of occurrence on 6.12.2014 to the police. Police also removed the seat cover of middle seat. She identified the vehicle in the presence of witnesses. In her cross-examination, she deposed that at the time of incident, she was unmarried and doing post-graduation. She admitted that there remains great rush in the *Gurudwara* particularly on the occasion of *Puranmashi*. It was *Puranmashi* on 6.12.2014. Taxi stand was just near to *Gurudwara*. She admitted that when any one has to go to Charanganga, then vehicle has to pass in front of *Gurudwara* and on both the sides, there are a number of shops. She also admitted that there was only one road which leads to Charanganga from taxi stand. She also admitted that due to rush, vehicle has to pass at a slow speed. Volunteered that on that day due to winter there was no rush on the road. There was hardly any devotee on that day on the road. Charanganga was about 1.5-2 kms from taxi stand. Many people go to Charanganga on foot and may by vehicles. Roads were *Pakka* roads. She admitted that on the Chowk, there was a parking place where all types of vehicles were parked. She also admitted that at bathing place, a number of people remain present on *Puranmashi* at Charanganga. She did not raise any alarm since she was terrorized by the accused. She has not received any injury.

Place of occurrence was 1.5-2 kms from Charanganga. After illegal act was committed with her, she asked accused to leave her at Charanganga. She paid obeisance and took bath. No other passenger was sitting in the vehicle when she was brought back to Mairi by the accused in his vehicle from Charanganga. She reached back at Mairi at 8.30 AM. She did not disclose about the incident to anyone.

17. Dr. Navdeep Joshi (PW-21) testified that on 12.2.2015, one application Ext. PW-21/A, he had taken blood sample of accused, Ajay Kumar son of Wattan Singh on FTA card. He had also filled the identification form of Ajay Kumar. He was identified by Investigating Officer and one witness. He verified the person from the photographs of the person affixed on identification form. Samples were handed over to the Investigating Officer.

18. SI Darshan Singh (PW-22) was the Investigating Officer. He recorded the statement of the prosecutrix under Section 154 CrPC. FIR was registered. Case property was taken into possession. Statements of Kulwant Kaur, Swaran Kaur, Massa Singh, Pawan Kumar, Naresh Chand and Bhagat Ram were recorded under Section 161 CrPC. Photographs of the spot were taken. Statement of the victim was also got recorded before the ACJM Amb, vide Ext. PW-22/C.

19. Prosecutrix had come to pay obeisance at Baba Bad Bhag Singh, Mairi on 5.12.2014 at 7.30 PM. She hired taxi for Dhaulidhar at 4 AM. Accused was the driver of the taxi. He committed sexual intercourse with her in the taxi. She came back to *Gurudwara* and narrated the incident to Kulwant Kaur (PW-1). Kulwant Kaur (PW-1) has categorically stated that the prosecutrix has narrated entire incident to her and accused was also apprehend by the people. PW-1 Kulwant Kaur has taken the prosecutrix and accused to PW-2 Massa Singh. He inquired the incident from the prosecutrix. She narrated the incident. In the meantime, Pradhan, Gram Panchayat Mairi, had also come. Pradhan also inquired from the girl. PW-4 Swaran Kaur has testified that she was called to the office of *Gurudwara*. She narrated entire incident and manner in which accused committed sexual intercourse with her. Prosecutrix has appeared as PW-15. Her statement was not shattered in the cross-examination. There are no contradictions in her statement. Statement of the prosecutrix was recorded under Section 164 CrPC. PW-14, Dr. Usha Daroch has medically examined the prosecutrix. Her final opinion is Ext. PW-14/B. Her final opinion was that there were signs of vaginal penetration. FSL report is Ext. PX. Human semen was detected in exhibit 2a vaginal swab, exhibit 2c vaginal smear slides (prosecutrix). Blood was not detected in the exhibit. DNA report is Ext. PY. According to the report, identical DNA profile was obtained from exhibit 1b (Pajami, prosecutrix) and exhibit 2a (vaginal swab, prosecutrix), and this DNA profile matched completely with the DNA profile obtained from exhibit 6 (blood sample on FTA card, accused). DNA profile obtained from exhibit 2c (vaginal slides, prosecutrix) matched completely with the DNA profile obtained from exhibit 1-1 (blood sample on FTA card, prosecutrix). Blood samples have been taken for DNA test by PW-21 Dr. Navdeep Joshi. Samples have reached FSL Junga intact.

20. Mr. N.K. Thakur, learned Senior Advocate vehemently argued that the story of the prosecution is not probable. He also argued that accused could not rape the prosecutrix in a crowded place. However, fact of the matter is that prosecutrix hired taxi at 4 AM. It was dark. Incident is of 6.12.2014. It has also come in the statement of the prosecutrix that there was no rush on that day. It has also come in the statement of PW-15, prosecutrix that accused had taken her to a secluded place and threatened her and it was due to fear that she could not disclose the incident to anyone at Charanganga. She came back to *Gurudwara* and has narrated the incident to Kulwant Kaur, PW-1 and PW-2 Massa Singh. Massa Singh informed the incident to PW-4, Pradhan, Gram Panchayat Mairi Smt. Swaran Kaur. Statement of the prosecutrix read with medical evidence and the report of DNA analysis conclusively proves that accused had committed rape upon the prosecutrix forcibly. Merely the fact that prosecutrix had again come in the taxi of accused will not dilute the case of the prosecution since she had no other alternative but to come in the same taxi to the *Gurudwara* in the odd hours.

21. Thus, there is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court.

22. 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 CHANDER BHUSAN BAROWALIA, J.

Anita Sharma & others. .....Appellants.

Versus

Dina Nath & others. .....Respondents.

RSA No. 169 of 2005
Reserved on: 23.06.2016
Decided on: 28.06.2016

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are joint owners in possession of the suit land and in exclusive possession of the house - defendants started raising construction despite request not to do so till partition- suit was decreed by the trial Court and mandatory injunction to demolish the construction raised during the pendency of suit was issued - an appeal was preferred, which was allowed- held, in second appeal that plaintiff had not placed on record police report to show that any construction was noticed by the police during the pendency of the suit – in these circumstances, plaintiffs are not entitled for decree of mandatory injunction- appeal dismissed. (Para- 7 and 8)

For the appellants: Mr. K.D. Sood, Sr. Advocate, with
Mr. Ankit Aggarwal, Advocate.
For the respondents: Mr. Neel Kamal Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellants (hereinafter called as "the plaintiffs") against the respondents (hereinafter called as "the defendants") assailing the impugned judgment and decree dated 11.01.2005, passed by learned District Judge, Mandi, H.P. in Civil Appeal No. 65 of 2003.

2. Briefly stating the facts giving rise to the present appeal are that the plaintiffs are joint owners-in-possession with the defendants of the suit land comprised in Khata No. 190, Khatauni No. 360, Khasras No. 530, 531, 533, 534, 535, 536, 537, 538, 540 and 541, Kitas 10, measuring 8966.0 square meters, situated in Mauja Bari, Tehsil Sundernagar, District Mandi, H.P. A house, having a room in the ground floor and verandah (courtyard) in front of it, which is in possession of the plaintiff, is situated in the suit land, which is denoted by Khasra No. 538/1. As per the plaintiffs, the defendants started raising construction of first floor over and above the room and verandah, which is in possession of the plaintiffs, therefore, the defendants were requested not to raise construction till partition of the property is carried out, but the defendants turned deaf ear to the request of the plaintiffs, hence the plaintiffs were compelled to file a suit for permanent prohibitory injunction and in the alternative for mandatory injunction restraining the defendants from raising any construction over Khasra No. 538/1 and to demolish the same, if they succeed in doing so, during the pendency of the suit.

3. The defendants, by filing written statement, admitted joint ownership and possession over the suit land, but they have denied that the house on Khasra No. 538/1 is jointly

owned by the parties. Defendants have further averred that they had completed the construction much prior to the filing of the suit.

4. The Learned Trial Court decreed the suit of the plaintiffs by passing a decree of mandatory injunction directing the defendants to remove the construction raised by them on the first floor of the house constructed on Khasra No. 538/1, however, in appeal, the Lower Appellate Court reversed the findings and the judgment of the Trial Court was set aside. Hence the present appeal.

5. The present appeal was admitted on 01.12.2005, on the following substantial questions of law:

1. ***Whether the findings of District Judge that the plaintiff had failed to establish that the construction was carried out after the grant of stay order dated 17.04.1997 is based on no evidence and is perverse, when pleadings, documentary evidence and court record raised a irresistible conclusion that the construction of 2nd storey was carried out on the building of appellant against their consent and objections raised by appellant/***
2. ***Whether in the facts and circumstances of the case, the plaintiffs were entitled to a decree of injunction and the construction was raised after filing of the suit and grant of interim injunction by the Court below to the knowledge of the defendants?***

6. I have heard the learned counsel for the parties and have also gone through the record in detail.

7. The plaintiffs have failed to place on record the action taken by the police, when police help was granted to the plaintiff after passing of interim order dated 02.05.1997 by the learned Trial Court. The report of the police, if brought on record by the plaintiffs should have been a piece of evidence to prove that the defendants have raised the construction after filing of the suit. It cannot be held that the defendants have raised construction during the pendency of the suit, merely because the plaintiffs managed to get police assistance and they also got *ex parte* interim order. The best evidence available for the plaintiffs was to prove the report of the police, which could have easily established that the police visited the spot and at that point of time construction work was going on. Later on, plaintiffs again moved another application, dated 06.10.1998, for grant of police assistance for implementing the said order and the learned Trial Court dismissed the same on 17.10.1998, as the learned counsel for the plaintiffs stated at the Bar that neither the defendants disobeyed any order nor they intended to disobey such order in future. It is not understandable that why application, dated 06.10.1998, was moved when the alleged construction had already been completed either in April, 1997 or in March, 1997. If these orders are scrutinized, it is found that even on 06.10.1998 the defendants were carrying out some construction over the suit land. However, it is not like this, as the statement of the plaintiff was recorded on 05.05.1999 and she has not stated even a single word to this effect.

8. So it is clear that the plaintiffs have failed to establish that the construction work was carried out after the grant of stay order, dated 17.04.1997, passed by the learned Trial Court and the conclusion arrived at by the learned First Appellate Court that the plaintiffs have failed to prove that the construction was raised after filing of the suit, is as per the evidence on record and after appreciating the evidence in its true perspective. So the substantial question No. 1 is answered accordingly, holding that the learned First Appellate Court has rightly appreciated the law, facts and the evidence on record that the construction was not raised by the defendants after filing of the suit and interim order dated 17.04.1997 by the Trial Court. As the construction was not raised after passing of the interim order dated 17.04.1997, by the learned Trial Court on which date the suit was also instituted. Accordingly, substantial question No. 2 is answered by holding that no mandatory injunction can be granted in favour of the plaintiffs and against the defendants.

9. The net result of the above discussion is that the appeal is devoid of merits and is required to be dismissed and is accordingly dismissed. However, in the peculiar facts and circumstances of the case, parties are left to bear their own costs.

10. In view of disposal of the appeal, as above, pending application(s), if any, shall also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

H.P. State Forest Corporation & another. .....Appellants.

Versus

Shri Kahan Singh (since dead), through LRs. .....Respondents.

RSA No. 311 of 2006
Reserved on: 20.06.2016
Decided on: 28 .06.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff had entered into an agreement for extraction of 374.952 quintals of resin @ Rs. 700/- per quintal - it was provided in the agreement that in case of extraction of resin at least 5% more than the fixed target , payment would be made on percentage basis – plaintiffs asserted that this clause was intentionally deleted by defendants without informing him - he had extracted more resin than the fixed target and was entitled to Rs. 4,29,233.05/-, whereas, he was paid Rs. 3,35,713/- Rs. 95,530/- were claimed by the plaintiff- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plea of the defendants that clause 18 was deleted at the time of execution of agreement was not believable as PW-3 specifically denied this fact in the cross-examination - each page of the agreement was duly signed by the parties- an inference can be drawn that clause 18 was a term of the agreement- plaintiff had extracted 134.472 quintals resin more than the fixed target- therefore, he is entitled to the amount- suit was rightly decreed by the Courts- appeal dismissed. (Para-11 to 22)

For the appellants: Mr. Bhupinder Pathania, Advocate.

For the respondents/LRs: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for the LRs of deceased respondent.

The following judgment of the Court was delivered

Chander Bhusan Barowalia, Judge.

The present regular second appeal arises out of concurrent findings of fact returned by both the courts below viz. Civil Judge (Senior Division) Mandi, District Mandi, H.P. and District Judge, Mandi, H.P, whereby the suit for recovery of Rs. 93, 520/- (rupees ninety three thousand five hundred twenty) filed by the respondent herein (hereinafter referred to as "the plaintiff") against the appellants herein (hereinafter referred to as "the defendants") was decreed by the learned trial Court vide judgment and decree dated 01.07.2005, which has been affirmed by the learned First Appellate Court vide judgment and decree dated 22.05.2006.

2. Brief facts of the case, as stated by the parties, can be summed up as follows:

3. According to the plaintiff (since dead through LRs), he was registered labour supply mate of Himachal Pradesh State Forest Corporation and was awarded the work of extraction of resin from Forest Sieuri-II in Tehsil Jogindernagar, District Mandi, H.P. Lot No.

7/2000, vide agreement dated 30.03.2000 and the rate of resin was fixed at Rs. 700/- per quintal and the target of extraction of resin from the said lot was fixed at 374.952 quintals, by the defendants. As per the agreement in question, one of the conditions in the above said agreement was that *'in case the plaintiff would extract resin more than the fixed target above 5% then he would be made the payment on percentage basis on the whole extraction'.*

4. The plaintiff has averred that clause 18 of the agreement, which was in existence at the time of execution of the agreement, was intentionally deleted with *mala fide* intention by the defendants and they wrote the word "deleted" over the said clause that too behind the back of the plaintiff. Even the plaintiff was not informed by the defendants about the said deletion. The plaintiff requested the defendants for payment as per Clause 18 of the agreement, but they refused, hence he was compelled to file Civil Suit in the Court of Civil Judge (Sr. Division) Mandi, H.P.

5. The plaintiff has averred that as per the condition in the agreement, in case he would extract resin more than the fixed target above 5% then he would be paid on percentage basis on the whole extraction. Following tabulated chart clearly depict the exact claim of the plaintiff:

1. Fixed Target of Resin.	2. Tins.	3. Rate fixed per quintal.	4. Resin extracted.	5. Excess Resin.	6. Percentage.
374.951 Quintals.	2846.	Rs. 700/-	479.590 Quintals.	104.638	27.90%
(a) Fixed rate upto target of 374.952 quintals. Rs. 700/- per quintal. In excess of fixed target i.e. 479. 590: (374.952 – 479-590 = 104.638, of which value on percentage basis comes to 27.90% which comes to 700 + 195.30 = Rs. 895/-. The net value of the extracted resin of 479.590 quintals at the above rate comes to Rs.4,29,233.5 paise. (b) Amount already paid by the Corporation Rs. 3,35,713/-. (c) Amount still recoverable from the defendants Rs. 95,520/-.					

6. Admittedly, the amount paid by the defendant-Corporation is Rs. 3,35,713/- (rupees three lac thirty five thousand seven hundred thirteen) and the plaintiff claims Rs. 4,29,233.05paise (rupees four lac twenty nine thousand two hundred thirty three and five paise), therefore, the balance amount, which the plaintiff is claiming by filing the Civil Suit, comes to Rs. 95,520/- (rupees ninety five thousand five hundred twenty).

7. On the other hand, defendants-Corporation resisted the claim of the plaintiff on the grounds of maintainability, estoppel by the act and conduct of the plaintiff and *locus standi*. On merits, the defendants admitted that a contract was awarded to the plaintiff for extraction of resin. Defendants have denied the existence of any clause and stated that the bonus clause stands deleted from 1999 in the meeting of the Board of Director held on 07.08.1999. It is further averred by the defendants that they have made due and admissible payment to the plaintiff and no more payment is due in favour of the plaintiff. Defendants have also prayed for dismissal of the suit.

8. On 27.03.2004, the learned Trial Court framed the following issues:

1. Whether the plaintiff is entitled to recover the suit amount. If so to what extent? OPP

2. Whether the suit is not maintainable? OPD

3. Whether the plaintiff is estopped by their act and conduct to file suit? OPD

4. Whether the plaintiff has no *locus standi* to file the present suit? OPD.

5. Relief.

9. The learned Civil Judge (Sr. Division) Mandi, decreed the suit of the plaintiff by deciding Issue No. 1 in favour of the plaintiff and issues No. 2 to 4 against the defendants. Feeling aggrieved by the judgment and decree of learned Civil Judge (Sr. Division) Mandi, the appellants (defendants-Corporation) filed appeal before the learned District Judge, Mandi, District Mandi, H.P., which was dismissed, vide impugned judgment dated 22.05.2006, hence the present regular second appeal, which were admitted on 17.04.2007, on the following substantial question of law:

> ***"Whether the findings of the courts below are vitiated in concluding that Clause No. 18 of the agreement exhibit PW-1/A was in existence at the time of the execution of agreement. Whether the courts below failed to construe and interpret the terms and conditions of the agreement Ex. PW-1/A properly."***

10. After going through the record in detail, this Court finds that this is the only question of law involved in the present appeal, which requires to be answered.

11. The plaintiff himself stepped into the witness-box as PW-1 and it is clear from his testimony that he has given maximum production of resin in order to get payment on percentage basis in the form of bonus. The plaintiff has averred that Clause 18 was not deleted by the defendants. Marginal witnesses, i.e., PW-3 Om Parkash, stated that an agreement, Ex. PW-1/A, was executed *inter se* the plaintiff and the defendants and Shri Ramesh Chand has also signed the same and there was no cutting in any clause, including Clause 18. The plaintiff was subjected to exhaustive cross-examination, but he has not divulged anything which is helpful to the defendants.

12. Shri Kundan Lal, Divisional Manager was examined as PW-2. He has stated that during his stint tender for extracting resin was invited and the plaintiff was allotted the work. The target was fixed at 374.952 quintals and the rate was agreed at Rs. 700/-, per quintal however, the plaintiff extracted 479.592 quintals of resin, which is 104.638 quintals more.

13. PW-3 Om Parkash, in his cross-examination, denied the suggestion that Clause 18 had already been deleted at the time of signing the agreement. PW-2 Thakur Singh has also denied the suggestion of the defendants that Clause 18 had been deleted at the time of signing the agreement.

14. Admittedly, the plaintiff and the defendants entered into agreements. The copy of agreement shows that extraction of resin @ Rs. 700/-, per quintal, was decided and as per Clause 18 of the agreement, which reads as under, in case the target is achieved, then the plaintiff was entitled to bonus:

> ***18. Incentive for giving higher net resin that the prescribed one will be given to the L.S.M.(s) in direct proportion to the increase in yield viz:***
>
> ***"No incentive will be given for increase in yield of resin upto 5%, 6% increase over targeted yield 6% bonus on total earnings, 7% increase over targeted yield, 7% bonus on total earning and so on".***

15. It is not disputed that in case Clause 18 was in existence, the plaintiff is entitled for the incentive for more yield. The perusal of agreement, Ex. PW-1/A, shows that Clause 18 was existing therein. The stand of the defendants is that Clause 18 stood deleted from the agreement. However, each page of the agreement has been duly signed by the parties, so the only

inference is that Clause 18 was a term of the agreement entered *inter se* the plaintiff and the defendants.

16. It is on record that the plaintiff has extracted resin more than the fixed target. The agreement is proved on record by the plaintiff. The defendants have examined DW-1, Shri R.S. Patyal, D.M. Forest Corporation Division, Mandi, and this witness has merely stated that after 1999, bonus clause has been deleted and decision qua deletion of this clause was taken in a meeting of Board of Directors at Shimla. In his cross-examination, he has stated that during his stint neither agreement, Ex. PW-1/A, was executed *inter se* the parties, nor any party has signed in his presence. Therefore, testimony of this witness is of limited value as to prove that Clause 18 was deleted at the time of execution of the agreement, Ex. PW-1/A. This witness, being official of the defendant-corporation, has taken the stand akin to that of the defendants. This witness has stated that the plaintiff extracted 104.638 quintals more resin than the target and the department made the payment accordingly. He has admitted that there is no record available with the department that the plaintiff was ever informed about the cutting made in the agreement.

17. DW-2, Shri S.K. Musafir, was posted as DFO from February, 1999 till February, 2002. He has deposed that a contract for extraction of resin was allotted to the plaintiff vide agreement, Ex. PW-1/A. He put his signatures beneath the cutting of Clause 18. This witness has further deposed that Clause 18 was deleted on the recommendations of High Power Committee, vide its report dated 07.08.1999. DW-2 has stated that the plaintiff signed the agreement, Ex. PW-1/A, after it was read over and explained to him and the plaintiff raised no objection to the deletion of Clause 18. This witness in his cross-examination has admitted that payment made to the plaintiff was on the basis of approved tender and it is also admitted that marginal witnesses were also present at the time of execution of the agreement. He has admitted that he had put his signatures on the cutting of Clause 18, however, no date was mentioned. He has further stated that the plaintiff was not informed about this cutting, as the condition had already been deleted in the tender itself. Conversely, defendants have averred in their written statement that they have informed the plaintiff qua Clause 18. Circulation of letter No. H.P.S.F.C/R-18/7876-83, dated 18.09.1999, finds mention in the written statement.

18. It can easily be construed from the testimony of above two witnesses that they did not produce any record pertaining to the letter No. H.P.S.F.C/R-18/7876-83, dated 18.09.1999. The onus lies on the shoulders of the defendants to prove that Clause 18 stood deleted when agreement, Ex. PW-1/A, was entered *inter se* the plaintiff and the defendants, especially when they specifically pleaded in their written statement that Clause 18 stood deleted in the meeting at Shimla. The marginal witnesses did not support the stand of the defendants. No independent witness has been examined to prove that Clause 18 stood deleted at the time when agreement, Ex. PW-1/A, was executed *inter se* the parties and moreover as per the official of defendant-corporation, the plaintiff was not informed of the cutting of Clause 18.

19. In the instant appeal, the defendants (applicants) have also maintained application under Order 41, Rule 27 CPC read with Section 151 CPC, for producing additional evidence. It is averred therein that the crucial issue involved in the present controversy *inter se* the parties is that Clause 18 was in operation at the time of execution of agreement, Ex. PW-1/A, or it was deleted prior to the execution of the agreement. The defendants further averred that the plaintiff, taking advantage of Clause 18 of the agreement, are claiming payment on percentage basis, which is an incentive given in the said clause. The defendants have reiterated that plaintiff avers that Clause 18 was in existence at the time of execution of the agreement and defendants with *mala fide* intentions deleted the same without his knowledge. The defendants (applicants) in their written statement have clearly taken the stand that Clause 18 was not in existence at the time of execution of the agreement and the same was deleted from 1999 in a meeting of Board of Directors held on 07.08.1999 at Shimla. The defendants have averred in the application that the learned Courts below non-suited them, as they did not produce on record the copy of the proceedings which could demonstrate their case that the bonus clause, i.e., Clause 18 no more

exists after 18.09.1999 and both the Courts have also drawn untoward inference against the defendants (applicants) for withholding the said document. It is further averred that in case the defendants place on record the said document, then the plaintiff (non-applicant) could have been out of the Court. The Courts have held that in case the said document was placed on record, it would have thrown light on the issue in controversy *inter se* the parties. With these averments, the application under Order 41 Rule 27 read with Section 151 CPC has been preferred before this Court.

20. Reply to the application has been filed and the respondent (plaintiff) has denied the contents of the application. This Court finds that the document, which the defendants (applicants) now wanted to place on record, is dated 18.09.1999, but the agreement was entered a year thereafter. If this letter was essential, the defendants (applicants) should have reflected this in the agreement or they should have not added Clause 18 while entering into agreement with the plaintiff. Had this document been in existence at the time of filing of the written statement or at the time of evidence, the defendants could have produced the same in the Court. Now, even if it is presumed that this document was in existence at that time, the defendants have failed to take care and due diligence to place the same on record and now, at this stage, the same cannot be allowed to be produced before the Court. The learned counsel for the defendants (applicants) has argued this piece of evidence is relevant for the adjudication of the issue involved in the appeal and this Court may allow the application to produce on record this evidence.

21. There is no merit in the arguments of the learned counsel for the defendants for the simple reason that it is the parties, including the defendants, who have executed the agreement and both of them signed the agreement, including Clause 18 thereof, which is specifically typed and which provides that the plaintiff is entitled for additional amount after achieving the target at the higher rates, which the plaintiff is now claiming. In the opinion of this Court, this document is not required for proper adjudication of the case and cannot be allowed to be produced at this belated stage. So, the application is devoid of merit and is accordingly dismissed.

22. For the reasons discussed hereinabove, there is no merit in the appeal and the learned Courts below have rightly appreciated Clause 18 of agreements, Ex. PW-1/A, in its true sense and the findings of the Courts below are in accordance with law. The terms of the agreement are properly interpreted by both the learned Courts below. Therefore, the substantial question of law is answered accordingly.

23. In view of the above, the present appeal is dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

H.P. State Forest Corporation & another .....Appellants.

Versus

Shri Kahan Singh (since dead), through LRs .....Respondents.

RSA No. 313 of 2006
Reserved on: 20.06.2016
Decided on: 28.06.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff had entered into an agreement for extraction of 126.900 quintals resin @ Rs. 576/- per quintal - it was agreed that in case of extraction of resin more than fixed target by 5%, payment would be made on percentage basis- plaintiff asserted that this clause was intentionally deleted by defendants without informing him -

plaintiff had extracted 175.590 quintals of resin and is entitled to Rs. 1,01,139.84/- whereas, he was paid Rs.1,39,769.64/- and is entitled to Rs. 38,629/- - suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plea of the defendants that clause 18 was deleted at the time of execution of agreement was not believable as PW-3 specifically denied this fact in the cross-examination - each page of the agreement was duly signed by the parties- an inference can be drawn that clause 18 was a term of the agreement- plaintiff had extracted 48.690 quintals resin more than the fixed target- therefore, he is entitled to the amount- suit was rightly decreed by the Courts- appeal dismissed. (Para-11 to 22)

For the appellants: Mr. Bhupinder Pathania, Advocate.
For the respondents: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for the LRs of deceased respondent.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal arises out of concurrent findings of fact returned by both the Courts below viz. Civil Judge (Senior Division) Mandi, District Mandi, H.P. and District Judge, Mandi, H.P, whereby the suit for recovery of Rs. 38,629 (rupees thirty eight thousand six hundred twenty nine) filed by the respondent (hereinafter referred to as "the plaintiff") against the appellants (hereinafter referred to as "the defendants") was decreed by the learned trial Court vide judgment and decree dated 01.07.2005, which has been affirmed by the learned First Appellate Court vide judgment and decree dated 22.05.2006.

2. Brief facts of the case, as stated by the parties, can be summed up as follows:

3. According to the plaintiff (since dead through LRs), he was registered labour supply mate of Himachal Pradesh State Forest Corporation and was awarded the work of extraction of resin from Forest Ghatta In Tehsil Jogindernagar, District Mandi, H.P. Lot No. 2/2000, vide agreement dated 16.03.2000 and the rate of resin was fixed at Rs. 576/- per quintal and the target of extraction of resin from the said lot was fixed at 126.900 quintals, by the defendants. As per the agreement in question, one of the conditions in the above said agreements was that *'in case the plaintiff would extract resin more than the fixed target above 5% then he would be made the payment on percentage basis on the whole extraction'.*

4. The plaintiff has averred that clause 18 of the agreement, which was in existence at the time of execution of the agreement, was intentionally deleted with *mala fide* intentions by the defendants and they wrote the word "deleted" over the said clause that too behind the back of the plaintiff. Even the plaintiff was not informed by the defendants about the said deletion. The plaintiff requested the defendants for payment as per Clause 18 of the agreement, but they refused, hence he was compelled to file Civil Suits in the Court of Civil Judge (Sr. Division) Mandi, H.P.

5. The plaintiff has averred that as per the condition in the agreement, in case he would extract resin more than the fixed target above 5%, then he would be paid on percentage basis on the whole extraction. Following tabulated chart clearly depicts the exact claim of the plaintiff:

1. Fixed Target of Resin.	2. Tins.	3. Rate fixed per quintal.	4. Resin extracted.	5. Excess Resin.	6. Percentage.
126.900.	1042.	Rs. 576/-	175.590.	48.690.	38.36%

(a) Fixed rate upto target of 126.900 quintals. Rs. 576/- per quintal.

In excess of fixed target i.e. 175.590: (126.900 – 175.590 = 48.690 of which value on percentage basis comes to 38.36% which comes to 576 + 220.95 = 796. The net value of the extracted resin of 175.590 quintals at the above rate comes to Rs. 1,39,769.64 paise.

(b) amount already paid by the Corporation Rs. 1,01,139.84paise.

(C) Amount still recoverable from the defendants Rs. 38,629.8

6. Admittedly, the amount paid by the defendant-Corporation in total is Rs. 1,01,139.84paise (rupees one lac one thousand one hundred thirty nine and eighty four paise) and the plaintiff claims Rs. 1,39,769.64 paise (rupees one lac thirty nine thousand seven hundred sixty nine and sixty four paise), therefore, the balance amount, which the plaintiff is claiming by filing the Civil Suit, comes to Rs. 38,629/- (rupees thirty eight thousand six hundred twenty nine).

7. On the other hand, defendants-Corporation resisted the claim of the plaintiff on the grounds of maintainability, estoppel by the act and conduct of the plaintiff and *locus standi*. On merits, the defendants admitted that a contract was awarded to the plaintiff for extraction of resin. Defendants have denied the existence of any clause and stated that the bonus clause stands deleted from the year 1999 in the meeting of the Board of Director held on 07.08.1999. It is further averred by the defendants that they have made due and admissible payment to the plaintiff and no more payment is due in favour of the plaintiff. Defendants have also prayed for dismissal of the suit.

8. On 27.03.2004, the learned Trial Court framed the following issues:

1. Whether the plaintiff is entitled to recover the suit amount. If so to what extent? OPP
2. Whether the suit is not maintainable? OPD
3. Whether the plaintiff is estopped by their act and conduct to file suit? OPD
4. Whether the plaintiff has no *locus standi* to file the present suit? OPD.
5. Relief.

9. The learned Civil Judge (Sr. Division) Mandi, decreed the suit of the plaintiff by deciding Issue No. 1 in favour of the plaintiff and issues No. 2 to 4 against the defendants. Feeling aggrieved by the judgment and decree of learned Civil Judge (Sr. Division) Mandi, the appellants (defendants-Corporation) filed appeal before the learned District Judge, Mandi, District Mandi, H.P., which was dismissed, vide impugned judgments dated 22.05.2006, hence the present regular second appeal, which was admitted on 17.04.2007 on the following substantial question of law:

"Whether the findings of the courts below are vitiated in concluding that Clause No. 18 of the agreement exhibit PW-1/A was in existence at the time of the execution of agreement. Whether the courts below failed to construe and interpret the terms and conditions of the agreement Ex. PW-1/A properly."

10. After going through the record in detail, this Court finds that this is the only question of law involved in the present appeal, which requires to be answered.

11. The plaintiff himself stepped into the witness-box as PW-1 and it is clear from his testimony that he has given maximum production of resin in order to get payment on percentage basis in the form of bonus. The plaintiff has averred that Clause 18 was not deleted by the

defendants. Marginal witnesses, i.e., PW-2, Thakur Singh and PW-3, Suneharu, have also signed the agreement, Ex. PW-1/A. The plaintiff was subjected to exhaustive cross-examination, but he has not divulged anything which is helpful to the defendants.

12. Shri Kundan Lal, Divisional Manager was examined as PW-4. He has stated that during his stint tender for extracting resin was invited and plaintiff was allotted the work. The target was fixed at 126.900 quintals and the rate was agreed at Rs. 576/- per quintal, however, the plaintiff extracted 175.590 quintals of resin, which is 48.690 quintals more.

14. PW-2, Thakur Singh has stated that the agreement, Ex. PW-1/A, was read-over and explained to the plaintiff and there was no cutting of any clause in the same, then only the plaintiff put his signatures thereon.

15. Admittedly, the plaintiff and the defendants entered into an agreement. The copy of agreement show that extraction of resin @ Rs. 576/-, per quintal, was decided and as per Clause 18 of the agreement, which reads as under, in case the target is achieved, then the plaintiff was entitled to bonus:

> ***18. Incentive for giving higher net resin that the prescribed one will be given to the L.S.M.(s) in direct proportion to the increase in yield viz:***
>
> ***"No incentive will be given for increase in yield of resin upto 5%, 6% increase over targeted yield 6% bonus on total earnings, 7% increase over targeted yield, 7% bonus on total earning and so on".***

16. It is not disputed that in case Clause 18 was in existence, the plaintiff is entitled for the incentive for the more yield. The perusal of agreement, Ex. PW-1/A, shows that Clause 18 was existing therein. The stand of the defendants is that Clause 18 stood deleted from the agreement. However, each page of the agreement has been duly signed by the parties, so the only inference is that Clause 18 was a term of the agreement entered *inter se* the plaintiff and the defendants.

17. It is on record that the plaintiff has extracted resin more than the fixed target. The agreement is proved on record by the plaintiff. The defendants have examined Shri R.S. Patyal, D.M. Forest Corporation Division, Mandi, and this witness has merely stated that after 1999, bonus clause has been deleted and decision qua deletion of this clause was taken in a meeting of Board of Directors at Shimla. In his cross-examination, he has stated that during his stint neither agreement, Ex. PW-1/A, was executed *inter se* the parties, nor any party has signed in his presence. Therefore, testimony of this witness is of limited value as to prove that Clause 18 was deleted at the time of execution of the agreement, Ex. PW-1/A. This witness, being official of the defendant-corporation, has taken the stand akin to that of the defendants. This witness has clarified that against Clause 18, there are no signatures of the plaintiff as well as there are no signatures of the official who has written the word "deleted". He has also shown his ignorance with respect to the cuttings of Clause 18 in the agreements and he has also deposed that there is no record available in the office to show that the plaintiff was informed regarding the cutting of Clause 18.

18. DW-2, Shri S.K. Musafir, was posted as DFO from February, 1999 till February, 2002 at Mandi. He has deposed that contract for extraction of resin was allotted to the plaintiff vide agreement, Ex. PW-1/A. He put his signatures beneath the cutting of Clause 18. This witness has further deposed that Clause 18 was deleted on the recommendations of High Power Committee, vide its report dated 07.08.1999. DW-2 has stated that the plaintiff signed the agreement, Ex. PW-1/A, after it was read over and explained to him and the plaintiff raised no objection to the deletion of Clause 18. This witness in his cross-examination has admitted that payment made to the plaintiff was on the basis of approved tender and it is also admitted that marginal witnesses were also present at the time of execution of the agreement. He has admitted that he had put his signatures on the cutting of Clause 18, however, no date was mentioned. He has further stated that the plaintiff was not informed about this cutting, as the condition had

already been deleted in the tender itself. Conversely, defendants have averred in their written statements that they have informed the plaintiff qua Clause 18. Circulation of letter No. H.P.S.F.C/R-18/7876-83, dated 18.09.1999, finds mention in the written statements.

19. It can easily be construed from the testimony of above two witnesses that they did not produce any record pertaining to the letter No. H.P.S.F.C/R-18/7876-83, dated 18.09.1999. The onus lies on the shoulders of the defendants to prove that Clause 18 stood deleted when agreement, Ex. PW-1/A, were entered *inter se* the plaintiff and the defendants, especially when they specifically pleaded in their written statement that Clause 18 stood deleted in the meeting at Shimla. The marginal witnesses did not support the stand of the defendants. No independent witness has been examined to prove that Clause 18 stood deleted at the time when agreement, Ex. PW-1/A, was executed *inter se* the parties.

20. In the instant appeal, the defendants (applicants) have also maintained application under Order 41, Rule 27 CPC read with Section 151 CPC, for producing additional evidence and it is averred that the pivotal issue involved in the present controversy *inter se* the parties is that Clause 18 was in operation at the time of execution of agreement, Ex. PW-1/A, or it was deleted prior to the execution of the agreement. The defendants further averred that the plaintiff, taking advantage of Clause 18 of the agreement, are claiming payment on percentage basis, which is an incentive given in the said clause. The defendants have reiterated that plaintiff avers that Clause 18 was in existence at the time of execution of the agreement and defendants, with *mala fide* intentions, deleted the same without his knowledge. The defendants (applicants) in their written statement have clearly taken the stand that Clause 18 was not in existence at the time of execution of the agreement and the same was deleted from 1999 in a meeting of Board of Directors held on 07.08.1999 at Shimla. The defendants have averred in the application that the learned Courts below non-suited them, as they did not produce on record the copy of the proceedings which could demonstrate their case that the bonus clause, i.e., Clause 18, no more exists after 18.09.1999 and both the Courts have also drawn untoward inference against the defendants (applicants) for withholding the said document. It is further averred that in case the defendants place on record the said document, then the plaintiff (non-applicant) could have been out of the Court. The Courts have held that in case the said document was placed on record, it would have thrown light on the issue in controversy *inter se* the parties. With these averments, the applications under Order 41 Rule 27 read with Section 151 CPC have been preferred before this Court.

21. Reply to the application has been filed and the respondent (plaintiff) has denied the contents of the applications. This Court finds that the document, which the defendants (applicants) now wanted to place on record, is dated 18.09.1999, but the agreement was entered a year thereafter. If this letter was essential, the defendants (applicants) should have reflected this in the agreement or they should not have added Clause 18 while entering into agreement with the plaintiff. Had this document been in existence at the time of filing of the written statement or at the time of evidence, the defendants could have produced the same in the Court. Now, even if it is presumed that this document was in existence at that time, the defendants have failed to take care and due diligence to place the same on record and now the same cannot be allowed to be produced before the Court at this stage. The learned counsel for the defendants (applicants) has argued that this is the piece of evidence which is relevant for the adjudication of the issue involved in the appeal and this Court may allow the application to produce on record this evidence.

22. There is no merit in the arguments of the learned counsel for the defendants for the simple reason that it is the parties, including the defendants, who have executed the agreement and both of them signed the agreement, including Clause 18 thereof, which is specifically typed and which provides that the plaintiff is entitled for additional amount after achieving the target at the higher rates, which the plaintiff is now claiming. In the opinion of this Court, this document is not required for proper adjudication of the case and cannot be allowed to

be produced at this belated stage. So, the application is devoid of merit and is accordingly dismissed.

23. For the reasons discussed hereinabove, there is no merit in the appeal and the learned Courts below have rightly appreciated Clause 18 of agreements, Ex. PW-1/A, in its true sense and the findings of the Courts below are in accordance with law. The terms of the agreement are properly interpreted by both the learned Courts below. Therefore, the substantial question of law is answered accordingly.

24. In view of the above, the present appeal is dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

H.P. State Forest Corporation & another. .....Appellants.

Versus

Shri Kahan Singh (since dead), through LRs. .....Respondents.

RSAs No. 312 of 2006
Reserved on: 20.06.2016
Decided on: 28.06.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff had entered into an agreement for extraction of 534.888 quintals resin @ Rs. 713/- per quintal - it was agreed that in case of extraction of resin more than fixed target by 5%, payment would be made on percentage basis- plaintiff asserted that this clause was intentionally deleted by defendants without informing him- plaintiff had extracted 669.360 quintals of resin and is entitled to Rs. 5,97,069.12 whereas, he was paid Rs. 4,77,253.69 and is entitled to Rs. 1,19,815/- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plea of the defendants that clause 18 was deleted at the time of execution of agreement was not believable as PW-3 specifically denied this fact in the cross-examination - each page of the agreement was duly signed by the parties- an inference can be drawn that clause 18 was a term of the agreement- plaintiff had extracted 104.638 quintals resin more than the fixed target- therefore, he is entitled to the amount- suit was rightly decreed by the Courts- appeal dismissed. (Para-11 to 22)

For the appellants: Mr. Bhupinder Pathania, Advocate.

For the respondents/LRs: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for the LRs of deceased respondent.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal arises out of concurrent findings of fact returned by both the Courts below viz. Civil Judge (Senior Division) Mandi, District Mandi, H.P. and District Judge, Mandi, H.P, whereby the suit for recovery of Rs.1,19,815/- (rupees one lac nineteen thousand eight hundred fifteen) filed by the respondent (hereinafter referred to as "the plaintiff") against the appellants (hereinafter referred to as "the defendants") was decreed by the learned trial court vide judgment and decree dated 01.07.2005, which has been affirmed by the learned First Appellate Court vide judgment and decree dated 22.05.2006.

2. Brief facts of the case, as stated by the parties, can be summed up as follows:

3. According to the plaintiff (since dead through LRs), he was registered labour supply mate of Himachal Pradesh State Forest Corporation and was awarded the work of extraction of resin from Forest Sieuri-I in Tehsil Jogindernagar, District Mandi, H.P. Lot No. 6/2000, vide agreement dated 16.03.2000 and the rate of resin was fixed at Rs.713/- per quintal and the target of extraction of resin from the said lot was fixed at 534.888 quintals, by the defendants. As per the agreement in question, one of the conditions in the above said agreement was that *'in case the plaintiff would extract resin more than the fixed target above 5% then he would be made the payment on percentage basis on the whole extraction'.*

4. The plaintiff has averred that clause 18 of the agreement, which was in existence at the time of execution of the agreement, was intentionally deleted with *mala fide* intentions by the defendants and they wrote the word "deleted" over the said clause that too behind the back of the plaintiff. Even the plaintiff was not informed by the defendants about the said deletion. The plaintiff requested the defendants for payment as per Clause 18 of the agreement, but they refused, hence he was compelled to file Civil Suit in the Court of Civil Judge (Sr. Division) Mandi, H.P.

5. The plaintiff has averred that as per the condition in the agreement, in case he would extract resin more than the fixed target above 5% then he would be paid on percentage basis on the whole extraction. Following tabulated chart clearly depict the exact claim of the plaintiff:

1. Fixed Target of Resin.	2. Tins.	3. Rate fixed per quintal.	4. Resin extracted.	5. Excess Resin.	6. Percentage.
534.888.	3977.	Rs. 713/-	669.360.	134.472	25.14%

(a) Fixed rate upto target of 534.888 quintals. Rs.713/- per quintal.

In excess of fixed target i.e. 669.360: (534.888 – 669.360 + = 134.472, of which value on percentage basis comes to 25.114% which comes to 713 + 179.24p = 892.24 paise.

The net value of the extracted resin of 669.369 quintals at the above rate comes to Rs. 5,97,069.12 paise.

(b) Amount already paid by the Corporation Rs. 4,77,253.69 paise.

(c) Amount still recoverable from the defendants Rs. 1,19,815/-.

6. Admittedly, the amount paid by the defendant-Corporation is Rs. 4,77,253/- (rupees four lac seventy seven thousand two hundred fifty three) and the plaintiff claims Rs. 5,97,069/- (rupees five lac ninety seven thousand sixty nine), therefore, the balance amount, which the plaintiff is claiming by filing the Civil Suit, comes to Rs. 1,19,816/- (rupees one lac nineteen thousand eight hundred sixteen).

7. On the other hand, defendants-Corporation resisted the claim of the plaintiff on the grounds of maintainability, estoppel by the act and conduct of the plaintiff and *locus standi*. On merits, the defendants admitted that the contract was awarded to the plaintiff for extraction of resin. Defendants have denied the existence of any clause and stated that the bonus clause stands deleted from the year 1999 in the meeting of the Board of Director held on 07.08.1999. It is further averred by the defendants that they have made due and admissible payment to the plaintiff and no more payment is due in favour of the plaintiff. Defendants have also prayed for dismissal of the suit.

8. On 27.03.2004, the learned Trial Court framed the following issues:

1. Whether the plaintiff is entitled to recover the suit amount. If so to what extent? OPP
2. Whether the suit is not maintainable? OPD
3. Whether the plaintiff is estopped by their act and conduct to file suit? OPD
4. Whether the plaintiff has no *locus standi* to file the present suit? OPD.
5. Relief.

9. The learned Civil Judge (Sr. Division) Mandi, decreed the suit of the plaintiff by deciding Issue No. 1 in favour of the plaintiff and issues No. 2 to 4 against the defendants. Feeling aggrieved by the judgment and decree of learned Civil Judge (Sr. Division) Mandi, the appellants (defendants-Corporation) filed appeal before the learned District Judge, Mandi, District Mandi, H.P., which was dismissed, vide impugned judgment dated 22.05.2006, hence the present regular second appeal, which was admitted on 17.04.2007, on the following substantial question of law:

"Whether the findings of the courts below are vitiated in concluding that Clause No. 18 of the agreement exhibit PW-1/A was in existence at the time of the execution of agreement. Whether the courts below failed to construe and interpret the terms and conditions of the agreement Ex. PW-1/A properly."

10. After going through the record in detail, this Court finds that this is the only question of law involved in the present appeal, which requires to be answered.

11. The plaintiff himself stepped into the witness-box as PW-1 and it is clear from his testimony that he has given maximum production of resin in order to get payment on percentage basis in the form of bonus. The plaintiff has averred that Clause 18 was not deleted by the defendants. Marginal witnesses, i.e., PW-2, Thakur Singh and PW-3, Suneharu, have also signed agreement, Ex. PW-1/A. The plaintiff was subjected to exhaustive cross-examination, but he has not divulged anything which is helpful to the defendants.

12. Shri Kundan Lal, Divisional Manager was examined as PW-5. He has stated that during his stint tender for extracting resin was invited and the plaintiff was allotted the work. The target was fixed at 534.888 quintals and the rate was agreed at Rs. 713/- per quintal, however the plaintiff extracted 669.360 guintals of resin, which is 134.472 quintals more.

13. PW-2 Thakur Singh has stated that in the year 2000 an agreement, Ex. PW-1/A, was entered into between the plaintiff and the defendants for carrying out the work of extraction of resin. PW-2 admits his signatures to agreement, Ex. PW-1/A. This witness has further deposed that contents of the agreement, Ex. PW-1/A, were explained to the plaintiff and then only he signed the agreement. PW-2 has further deposed that there was no cutting on any clause when the agreement was entered into and Kahan Singh and Sunehru also put their signatures in his presence.

14. Another witness, i.e., PW-3, Suneharu, has also stated that agreement, Ex. PW-1/A, was entered into between the plaintiff and the defendants in the year 2000 and he had also put his signatures thereon. Parties to the agreement also put their signatures in his presence and contents of every page were also read over and there was no cutting in the agreement on any clause.

15. Admittedly, the plaintiff and the defendants entered into agreement. The copy of agreement shows that extraction of resin @ Rs.713/- per quintal, was decided and as per Clause 18 of the agreement, which reads as under, in case the target is achieved, then the plaintiff was entitled to bonus:

18. Incentive for giving higher net resin that the prescribed one will be given to the L.S.M.(s) in direct proportion to the increase in yield viz:

"No incentive will be given for increase in yield of resin upto 5%, 6% increase over targeted yield 6% bonus on total earnings, 7% increase over targeted yield, 7% bonus on total earning and so on".

16. It is not disputed that in case Clause 18 was in existence, the plaintiff is entitled for the incentive for more yield. The perusal of agreements, Ex. PW-1/A, shows that Clause 18 was existing therein. The stand of the defendants is that Clause 18 stood deleted from the agreement. However, each page of the agreement has been duly signed by the parties, so the only inference is that Clause 18 was a term of the agreement entered *inter se* the plaintiff and the defendants.

17. It is on record that the plaintiff has extracted resin more than the fixed target. The agreement is proved on record by the plaintiff. The defendants have examined DW-1, Shri R.S. Patyal, D.M. Forest Corporation Division, Mandi, and this witness has merely stated that after 1999, bonus clause has been deleted and decision qua deletion of this clause was taken in a meeting of Board of Directors at Shimla. He has stated that during his stint neither agreement, Ex. PW-1/A, was executed *inter se* the parties, nor any party has signed in his presence. Therefore, testimony of this witness is of limited value, as to prove that Clause 18 was deleted at the time of execution of the agreements, Ex. PW-1/A. This witness, being official of the defendant-corporation, has taken the stand akin to that of the defendants. This witness has clarified that against Clause 18 there are no signatures of the plaintiff as well as there are no signatures of the official who has written the word "deleted". He has also shown his ignorance with respect to the cuttings of Clause 18 in the agreements and he has also deposed that there is no record available in the office to show that the plaintiff was informed regarding the cutting of Clause 18.

18. DW-2, Shri S.K. Musafir, was posted as DFO from February, 1999 till February, 2002. He has deposed that plaintiff was given the contract to extract resin vide agreement, Ex. PW-1/A, and he put his signatures beneath the cutting of Clause 18, but he did not mention the date. Clause 18 was deleted on the recommendations of High Power Committee, vide its report dated 07.08.1999. This witness has further deposed contents of the agreement were read over to the plaintiff and only then he put his signatures thereon and the plaintiff did not object for deletion of Clause 18, as this condition had already been deleted in the tender itself. This witness, in his cross-examination has stated that the plaintiff was paid as per the approved tender. He has further stated that marginal witnesses were present at the time of execution of the agreement. Information qua deletion of Clause 18 was not given, as the same stood deleted from the tender itself. Conversely, defendants have averred in their written statement that they have informed the plaintiff qua Clause 18. Circulation of letter No. H.P.S.F.C/R-18/7876-83, dated 18.09.1999, finds mention in the written statements.

19. It can easily be construed from the testimony of above witnesses that they did not produce any record pertaining to the letter No. H.P.S.F.C/R-18/7876-83, dated 18.09.1999. The onus lies on the shoulders of the defendants to prove that Clause 18 stood deleted when agreements, Ex. PW-1/A, was entered *inter se* the plaintiff and the defendants, especially when they specifically pleaded in their written statement that Clause 18 stood deleted in the meeting at Shimla. The marginal witnesses did not support the stand of the defendants. No independent witness has been examined to prove that Clause 18 stood deleted at the time when agreement, Ex. PW-1/A, was executed *inter se* the parties.

20. In the instant appeal, the defendants (applicants) have also maintained application under Order 41, Rule 27 CPC read with Section 151 CPC, for producing additional evidence and it is averred that the crucial issue involved in the present controversy *inter se* the parties is that Clause 18 was in operation at the time of execution of agreement, Ex. PW-1/A, or it was deleted prior to the execution of these agreements. The defendants further averred that the

plaintiff, taking advantage of Clause 18 of the agreement, are claiming payment on percentage basis, which is an incentive given in the said clause. The defendants have reiterated that plaintiff avers that Clause 18 was in existence at the time of execution of the agreement and defendants with *mala fide* intentions deleted the same without his knowledge. The defendants (applicants) in their written statement have clearly taken the stand that Clause 18 was not in existence at the time of execution of the agreement and the same was deleted from 1999 in a meeting of Board of Directors held on 07.08.1999 at Shimla. The defendants have averred in the application that the learned Courts below non-suited them, as they did not produce on record the copy of the proceedings which could demonstrate their case that the bonus clause, i.e., Clause 18, no more exists after 18.09.1999 and both the Courts have also drawn untoward inference against the defendants (applicants) for withholding the said document. It is further averred that in case the defendants place on record the said document, then the plaintiff (non-applicant) could have been out of the Court. The Courts have held that in case the said document was placed on record, it would have thrown light on the issue in controversy *inter se* the parties. With these averments, the application under Order 41 Rule 27 read with Section 151 CPC have been preferred before this Court.

21. Reply to the application has been filed and the respondent (plaintiff) has denied the contents of the application. This Court finds that the document, which the defendants (applicants) now wanted to place on record, is dated 18.09.1999, but the agreement was entered a year thereafter. If this letter was essential, the defendants (applicants) should have reflected this in the agreement or they should not have added Clause 18 while entering into agreement with the plaintiff. Had this document been in existence at the time of filing of the written statement or at the time of evidence, the defendants could have produced the same in the Court. Now, even if it is presumed that this document was in existence at that time, the defendants have failed to take care and due diligence to place the same on record and now the same cannot be allowed to be produced before the Court at this stage. The learned counsel for the defendants (applicants) has argued that this piece of evidence is relevant for the adjudication of the issue involved in the appeal and this Court may allow the application to produce on record this evidence.

22. There is no merit in the arguments of the learned counsel for the defendants for the simple reason that it is the parties, including the defendants, who have executed the agreement and both of them signed the agreement including Clause 18 thereof, which is specifically typed and which provides that the plaintiff is entitled for additional amount after achieving the target at the higher rates, which the plaintiff is now claiming. In the opinion of this Court, this document is not required for proper adjudication of the case and cannot be allowed to be produced at this belated stage. So, the application is devoid of merit and is accordingly dismissed.

23. For the reasons discussed hereinabove, there is no merit in the appeal and the learned Courts below have rightly appreciated Clause 18 of agreement, Ex. PW-1/A, in its true sense and the findings of the Courts below are in accordance with law. The terms of the agreement are properly interpreted by both the learned Courts below. Therefore, the substantial question of law is answered accordingly.

24. In view of the above, the present appeal is dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

Ludar Chand .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 523 of 2015.
Reserved on: June 27, 2016.
Decided on: June 28, 2016.

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police- he was apprehended and his search was conducted during which 800 grams charas was recovered from him- he was tried and convicted by the trial Court- held, in appeal that accused was apprehended at 3:30 P.M.- all the codal formalities were completed on the spot- contraband was produced before SHO who resealed the same and deposited it with HHC- it was sent to FSL, Junga for analysis- place from where the accused was apprehended was isolated- efforts were made to associate independent witnesses but they refused – prosecution case was duly proved against the accused- appeal dismissed. (Para-13 to 16)

For the appellant: Mr. Dalip K. Sharma, Advocate.
For the respondent: Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 5.10.2015, rendered by the learned Special Judge, Mandi, H.P., in Sessions trial No. 02/2012, 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 sentenced to rigorous imprisonment for a term of eight years along with fine of Rs. 80,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for a period of six months.

2. The case of the prosecution, in a nut shell, is that PW-10 ASI Ram Lal, PW-2 HC Narpat Ram, PW-3 HC Krishan Kumar and others were on patrolling duty in a private vehicle on 30.10.2011. The police party laid a *naka* at Sukki-Bain on National Highway No. 21, as per spot map Ext. PW-10/B. The accused came from Pandoh side on foot carrying a bag in his right hand. On seeing the police party, he turned around and tried to run away. He was apprehended. The place where the accused was apprehended was desolate and no independent witness was available. PW-10 requested the occupants of the vehicles crossing thereby to join the investigation, but all of them declined. He associated HC Krishan Kumar and Const. Dhameshwar Singh as witnesses. The carry bag carried by the accused was searched and black coloured substance in the shape of rectangle and chapattis wrapped in newspaper was found. It was found to be charas. It weighed 800 grams. The charas Ext P-5 along with carry bag Ext. P-2, news paper Ext. P-3 and wrapper Ext. P-4 were sealed in a cloth parcel Ext. P-1 with 9 seals of impression "A". The NCB form Ext. PW-8/A was filled in triplicate on the spot. Facsimile of seal "A" was taken on NCB forms. The case property along with the relevant documents was taken into possession vide seizure memo Ext. PW-10/A. Rukka Ext. PW-2/B was prepared and sent to the Police Station through LHC Narpat Ram, on the basis of which FIR Ext. PW-2/C was registered. The spot map was prepared. The case property was produced before PW-8 SHO Surender Pal who resealed the same with three seals of impression "C" and took facsimile of seal "C" on the NCB form. The case property was deposited with HHC Thakur Singh. He entered the same in the malkhana register vide Ext. PW-5/A. The case property was sent to FSL, Junga

through MHC Mansukh Ram vide RC Ext. PW-5/B. The report of the FSL is Ext. PX. The investigation was completed 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 eleven witnesses. The accused was also examined under Section 313 Cr.P.C. His case is of denial simplicitor. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Dalip K. Sharma, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Neeraj K. Sharma, Dy. Advocate General for the State has supported the judgment of the trial Court dated 5.10.2015.

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

6. PW-2 HHC Narpat Ram, testified that on 30.10.2011, he along with other police personnel was on patrolling duty on National Highway No. 21 at Sukki-Bain. A person came on foot from Pandoh side at 3:30 PM. He was carrying a bag in his right hand. He tried to run away. He was apprehended. The place was secluded and no independent witness was available. The I.O. stopped the vehicles crossing from that point and requested the occupants to join the investigation, however, all of them refused. Thereafter, the I.O. joined HC Krishan Kumar and Const. Dhameshwar Singh as witnesses. The bag carried by the accused was searched. It contained black coloured substance in the form of chapattis. It was weighed. It weighed 800 grams. The charas was re-packed in the same manner and was kept in a cloth parcel which was sealed with 9 seals of seal "A". NCB form-I was filled in triplicate on the spot. The case property was taken into possession. Rukka Ext. PW-2/B was scribed and sent to the Police Station, on the basis of which FIR Ext. PW-2/C was registered. In his cross-examination, he deposed that the place known as Badhanu was at a distance of 1 or 2 km from Sukki-Bain. They had checked two buses prior to the arrest of the accused. They had laid *naka* for detection of crime including contraband. The personal search of the accused was not conducted and only bag was searched.

7. PW-3 HC Krishan Kumar also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he deposed that the distance between Badhanu from the spot was approximately 2 kms. The personal search of the occupants of the bus was also conducted. No person was deputed to bring independent witnesses. No written *hukam nama* was issued to any persons who declined to join the investigation. He admitted that on Ext PW-3/B, FIR number was written as 263. In his statement also, FIR No. 263 has been mentioned.

8. PW-4 Mansukh Ram testified that on 1.11.2011, HHC Thakur Singh handed over to him one parcel sealed with 9 seals of seal "A" and three seals of seal "C" along with NCB form, sample seals and docket vide RC No. 240 of 2011 with direction to deposit the same at FSL, Junga. He deposited the same at FSL, Junga and handed over the receipt to HHC Thakur Singh.

9. PW-5 HHC Thakur Singh deposed that SHO Surender Pal deposited with him one parcel sealed with 9 seals of "A" and three seals of seal "C" along with NCB form in triplicate, seizure memo, re-seal memo and sample seals "A" and "C". He made entry at Sr. No. 1293 in the malkhana register vide Ext. PW-5/A. He sent the case property sealed with 9 seals of seal "A" and three seals of seal"C", sample seals, NCB form and other related documents through HHC Mansukh Ram vide RC No. 240 of 2011 on 1.11.2011. On 24.11.2011, the case property along with FSL report was brought by HHC Rashal Singh from FSL Junga.

10. PW-7 HHC Rashal Singh testified that he brought the parcel along with the report of FSL duly sealed and deposited the same with HHC Thakur Singh.

11. PW-8 SHO Surender Pal deposed that he was posted as SHO, PS Sadar Mandi. On 30.10.2011, the case property of this case was produced before him by ASI Ram Lal. The parcel was sealed with 9 seals of seal "A". He resealed the parcel with three seals of seal "C" and filled in the relevant columns of NCB form Ext. PW-8/A. The case property was deposited with HHC Thakur Singh along with relevant documents and sample seals "A" and "C".

12. PW-10 ASI Ram Lal also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot on 30.10.2011. He prepared Rukka Ext. PW-2/B. It was sent to the Police Station on the basis of which FIR Ext. PW-2/C was registered. In his cross-examination, he deposed that approximately 10 vehicles were stopped for joining of witnesses. No legal action was taken against the occupants of the vehicles who declined to join the investigation. The personal search of the accused was not taken at the time of search of the bag.

13. The accused was apprehended on 30.10.2011 at about 3:30 PM at Sukki-Bain. All the codal formalities were completed on the spot. The contraband was produced before PW-8 SHO Surender Pal. He resealed the same with seal impression "C". He also filled in the relevant columns of NCB-I form. He deposited the same with PW-5 HHC Thakur Singh. PW-5 HHC Thakur Singh made the entry in the malkhana register at Sr. No. 1293. The case property was sent to FSL, Junga vide RC No. 240/2011 through PW-4 Mansukh Ram. The case property was brought back from the FSL, Junga by PW-7 HHC Rashal Singh. The contraband was found to be charas.

14. FIR Ext. PW-2/C was registered. It was bearing No. 264 of 2011 as per Ext. PW-2/C. PW-3 HC Krishan Kumar though deposed in his statement that his statement was recorded in FIR No. 263 but the fact of the matter is that in all the documents, FIR No. 264 has been mentioned, including copy of malkhana register Ext. PW-/B, copy of road certificate and Ext. PW-8/A i.e. NCB-I form.

15. The place where the accused was apprehended was isolated. It has come in the statement of PW-2 HHC Narpat Ram that the I.O. tried to associate independent witnesses but they refused to join the investigation. PW-10 ASI Ram Lal has also admitted specifically that the place where the accused was apprehended was desolate and no witness was available. He stopped 10 vehicles for joining witnesses, however, they declined. In these circumstances, he associated HC Krishan Kumar and Const. Dhameshwar as witnesses. Const. Krishan Kumar has appeared as PW-3. The non-examination of Const. Dhameshwar as a witness is not fatal to the case of the prosecution.

16. Thus, the prosecution has proved the case against the accused beyond reasonable doubt. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 5.10.2015.

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

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

Sh. Manoj Chhabra & others. ...Petitioners

Versus

State of H.P. and Another. ...Respondents

Cr.MMO No. 99 of 2016
Judgment Reserved on 23.6.2016
Date of decision: 28.6.2016

Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioner and one I- trial Magistrate held that Courts at Shimla had no territorial jurisdiction as demand of dowry was made at Dehradun- revision was preferred before learned Sessions Judge, Shimla who held that Courts at Shimla had territorial jurisdiction- aggrieved from the order, present petition has been filed- held, that investigation has been completed and, therefore, all the documents have to be seen- statements of the witnesses recorded by police show that cruelty was also inflicted at Sanjauli- thus, there is prima facie material to show that offence was committed within local area of Shimla- petition dismissed. (Para-6 to 20)

Cases referred:
Y. Abraham Ajith & Others Vs. Inspector of Police, Chennai & Another, (2004) 8 SCC 100
Preeti Gupta & another Vs. State of Jharkhand & Another, (2010) 3 SCC 473
Amarendu Jyoti Vs. State of Chattisgarh (2014) 12 SCC 362
Nirasha Sharma Vs. State of M.P. and another (2015) 1 MPWN 65
Swaran Kalra and others Vs. State of H.P. and others 2015 (1) Him.L.R. 163
Sunita Kumari Kashyap Vs. State of Bihar and another (2011) 11 SCC 301
Nancy Bhatt & another Vs. State of Himachal Pradesh and another, 2015 (2) Him.L.R.
K. Ramakrishna and others Vs. State of Bihar and another (2000) 8 SCC 547

For the Petitioners:	Mr. Balwant Kukreja, Advocate.
For the Respondents:	Ms.Meenakshi Sharma, Additional Advocate General, with Mr.J.S. Guleria, Assistant Advocate General, for respondent No. 1. Ms.Bhawana Dutta, Advocate, vice Mr.Amit Vaid, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This petition under Section 482 of the Code of Criminal Procedure seeks quashment of the order passed by the leaned Additional Sessions Judge II, Shimla on 3.3.2016, whereby he set aside the order dated 26.5.2015 passed by learned trial magistrate in case titled State of Himachal Pradesh Vs. Manoj Kumar and others.

2. The facts leading to filing of this petition are that respondent No. 2 filed before Police Station Dhalli, Shimla a complaint under Section 498-A and 506 read with Section 34 of the IPC against the petitioner and one Smt.Ishwari Devi. The same culminated into a final report and thereafter arguments on charge were heard by the learned trial Magistrate and vide order dated 26.5.2015 held that the Courts at Shimla had no territorial jurisdiction to try the offence, as the cruelty and demand of dowry, if at all made was at Dehradun as there was no allegation of the alleged act of cruelty/demand of dowry having been committed/made at Shimla.

3. This order was assailed by the State by filing Revision Petition before the learned Additional Sessions Judge, Shimla, who vide judgment dated 3.3.2016 held that the offence under Section 498-A IPC was a continuing one and therefore, the Courts at Shimla had the jurisdiction.

4. It is this order, which has been assailed by the petitioner on the ground that the same is manifestly erroneous, as the bare reading of the complaint reveals that there are no allegations whatsoever regarding cruelty or demand of dowry having been made at Shimla.

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

5. Sh. Balwant Kukreja, learned counsel for the petitioner would vehemently argue that even if the offence under Section 498-A is considered to be a continuing offence as distinguishable to one which is committed once for all, even then once the complainant had left the house of the accused/husband on account of alleged cruelty/demand of dowry, even then in absence of any material to show that the complainant continued to be meted out with the cruelty and demand of dowry was even made at Shimla, the Courts at Shimla would have no jurisdiction.

6. In support of his submission reliance has been placed on the following judgments:

Y. Abraham Ajith & Others Vs. Inspector of Police, Chennai & Another, (2004) 8 SCC 100, Preeti Gupta & another Vs. State of Jharkhand & Another, (2010) 3 SCC 473, Amarendu Jyoti Vs. State of Chattisgarh (2014) 12 SCC 362, Nirasha Sharma Vs. State of M.P. and another (2015) 1 MPWN 65 and ***Swaran Kalra and others Vs. State of H.P. and others 2015 (1) Him.L.R. 163.***

7. In ***Y. Abraham Ajith & Others Vs. Inspector of Police, Chennai & Another, (2004) 8 SCC 100***, the Hon'ble Supreme Court held that in absence of their being any material to show that the demand of dowry had been made at Chennai, where the complaint resided, after leaving the house of her husband, then in such circumstances, the Courts at Chennai had no jurisdiction to deal with the matter and the proceedings were liable to be quashed. It is apt to reproduce the following observations:-

> *"**8**. Section 177 of the Code deals with the ordinary place of inquiry and trial, and reads as follows:*
>
> > *"Section 177: ORDINARY PLACE OF INQUIRY AND TRIAL:*
> >
> > *Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."*
>
> ***9**. Sections 177 to 186 deal with venue and place of trial. Section 177 reiterates the well-established common law rule referred to in Halsbury's Laws of England (Vol. IX para 83) that the proper and ordinary venue for the trial of a crime is the area of jurisdiction in which, on the evidence, the facts occur and which alleged to constitute the crime. There are several exceptions to this general rule and some of them are, so far as the present case is concerned, indicated in Section 178 of the Code which read as follows:*
>
> > *"Section 178 PLACE OF INQUIRY OR TRIAL*
> >
> > *(a) When it is uncertain in which of several local areas an offence was committed, or*
> >
> > *(b) where an offence is committed partly in one local area and partly in another, or*
> >
> > *(c) where an offence is continuing one, and continues to be committed in more local areas than one, or*
> >
> > *(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."*
>
> ***10.** "All crime is local, the jurisdiction over the crime belongs to the country where the crime is committed", as observed by Blackstone. A significant word used in Section 177 of the Code is "ordinarily". Use of the word indicates that the provision is a general one and must be read subject to the special provisions contained in the Code. As observed by the Court in Purushottamdas Dalmia v. State of West Bengal (AIR 1961 SC 1589), L.N.Mukherjee V. State of Madras (AIR 1961 SC 1601), Banwarilal Jhunjhunwalla and Ors. v. Union of India and Anr. (AIR 1963 SC 1620) and Mohan Baitha and Ors. v. State of Bihar and Anr. (2001 (4) SCC 350),*

exception implied by the word "ordinarily" need not be limited to those specially provided for by the law and exceptions may be provided by law on consideration or may be implied from the provisions of law permitting joint trial of offences by the same Court. No such exception is applicable to the case at hand.

***11**. As observed by this Court in State of Bihar v. Deokaran Nenshi and Anr. (AIR 1973 SC 908), continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all, that it is one of those offences which arises out of the failure to obey or comply with a rule or its requirement and which involves a penalty, liability continues till compliance, that on every occasion such disobedience or non-compliance occurs or recurs, there is the offence committed.*

***12.** A similar plea relating to continuance of the offence was examined by this Court in Sujata Mukherjee (Smt.) v. Prashant Kumar Mukherjee (1997 (5) SCC 30). There the allegations related to commission of alleged offences punishable under Section 498A, 506 and 323 IPC. On the factual background, it was noted that though the dowry demands were made earlier the husband of the complainant went to the place where complainant was residing and had assaulted her. This Court held in that factual background that clause (c) of Section 178 was attracted. But in the present case the factual position is different and the complainant herself left the house of the husband on 15.4.1997 on account of alleged dowry demands by the husband and his relations. There is thereafter not even a whisper of allegations about any demand of dowry or commission of any act constituting an offence much less at Chennai. That being so, the logic of Section 178 (c) of the Code relating to continuance of the offences cannot be applied.*

***13.** The crucial question is whether any part of the cause of action arose within the jurisdiction of the concerned Court. In terms of Section 177 of the Code it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused.*

***14.** While in civil cases, normally the expression "cause of action" is used, in criminal cases as stated in Section 177 of the Code, reference is to the local jurisdiction where the offence is committed. These variations in etymological expression do not really make the position different. The expression "cause of action" is therefore not a stranger to criminal cases.*

***15.** It is settled law that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.*

***16.** The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in "cause of action".*

***17.** The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or*

the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts.

18. *The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. (Black's Law Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In "Words and Phrases" (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.*

19. *In Halsbury Laws of England (Fourth Edition) it has been stated as follows:*

> *"Cause of action" has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. "Cause of action" has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter of grievance founding the action, not merely the technical cause of action".*

20*. When the aforesaid legal principles are applied, to the factual scenario disclosed by the complainant in the complaint petition, the inevitable conclusion is that no part of cause of action arose in Chennai and, therefore, the concerned magistrate had no jurisdiction to deal with the matter. The proceedings are quashed. The complaint be returned to respondent No.2 who, if she so chooses, may file the same in the appropriate Court to be dealt with in accordance with law. The appeal is accordingly allowed."*

8. In ***Preeti Gupta & another Vs. State of Jharkhand & Another, (2010) 3 SCC 473*** it was held by the Hon'ble Supreme Court that the powers under Section 482 Cr.P.C. should be exercised to prevent injustice and secure justice. It was further observed that the entire provision of Section 498-A requires serious relook by the legislation.

9. In ***Amarendu Jyoti Vs. State of Chattisgarh (2014) 12 SCC 362***, the Hon'ble Supreme Court held that the offence of cruelty in the fact situation obtaining in the said case cannot be said to be a continuing one as contemplated by Sections 178 and 179 of the Code and therefore, it was the Court at Delhi alone which would have the jurisdiction to try the said offence and not the Court at Ambikapur, where the proceedings had in fact been initiated, as would be evident from the following observations:-

> *"**7**. The core question thus is whether the allegations made in the F.I.R. constitute a continuing offence. We find from the F.I.R. that all the incidents alleged by the complainant in respect of the alleged cruelty are said to have occurred at Delhi. The cruel and humiliating words spoken to the 2nd respondent/wife by her husband, elder brother-in-law and elder sister-in-law for bringing less dowry are said to have been uttered at Delhi. Allegedly, arbitrary demands of lakhs of rupees in dowry have been made in Delhi. The incident of beating and dragging the respondent no. 2 and abusing her in filthy language also is said to have taken place at Delhi. Suffice it to say that all overt acts, which are said to have constituted cruelty have allegedly taken place at Delhi. The allegations as to what has happened at Ambikapur are as follows:*

No purposeful information has been received from the in-laws of Kiran even on contacting on telephone till today. They have been threatened and abused and two years have been elapsed and the in-laws have not shown any interest to call her to her matrimonial home and since then Kiran is making her both ends meet in her parental home. To get rid of the ill-treatment and harassment of the in-laws of Kiran, the complainant is praying for registration of an FIR and request for immediate legal action so that Kiran may get appropriate justice.

***8**. We find that the offence of cruelty cannot be said to be a continuing one as contemplated by Sections 178 and 179 of the Code. We do not agree with the High Court that in this case the mental cruelty inflicted upon the respondent no. 2 'continued unabated' on account of no effort having been made by the appellants to take her back to her matrimonial home, and the threats given by the appellants over the telephone. It might be noted incidentally that the High Court does not make reference to any particular piece of evidence regarding the threats said to have been given by the appellants over the telephone. Thus, going by the complaint, we are of the view that it cannot be held that the Court at Ambikapur has jurisdiction to try the offence since the appropriate Court at Delhi would have jurisdiction to try the said offence. Accordingly, the appeal is allowed."*

10. In ***Nirasha Sharma Vs. State of M.P. and another (2015) 1 MPWN 65***, the law laid down by the Hon'ble Supreme Court in *Y. Abraham Ajith* case (supra) was re-iterated.

11. In ***Swaran Kalra and others Vs. State of H.P. and others 2015 (1) Him.L.R. 163***, this Court was dealing with a complaint wherein the admitted allegations were that the offence had been committed at Dehradun, while proceedings had been instituted at Kangra only on the pretext that the search warrant has been issued by the said Court and on the basis of said admitted allegations, this Court quashed the proceeding by observing that the learned Magistrate at Kangra had no jurisdiction to entertain, much less issue process in the complaint. This would be evident from the following observations:-

*"**8.** Chapter-XIII of the Code of Criminal Procedure, 1973 (for short 'Code') relates to jurisdiction of Criminal Courts in inquiries and trials. Section 177 of the Code deals with the place where ordinarily the inquiry and trial would be held and reads thus:-*

*"**177. Ordinary place of inquiry and trial.**- Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."*

***9.** It is apparent from a bare perusal of the aforesaid Section that every offence is required to be ordinarily enquired into and tried by a Court within whose jurisdiction it was committed. Undisputedly, even as per allegations set out in the complaint, the alleged offences had been committed at Dehradun. The mere fact that warrants of search had been issued by the Court at Kangra would not clothe the Court at Kangra with jurisdiction to entertain the complaint as this would apparently be in violation and conflict with Section 177 of the Code.*

***10.** It has to be remembered that Civil law concepts are not strictly applicable to Criminal law when they specially relate to cause of action or place of suing. This was so held in a recent judgment by Hon'ble three judges bench of Hon'ble Supreme Court in **Dashrath Rupsingh Rathod v. State of Maharashtra and another JT 2014 (9) SC 81** in the following terms:-*

"CIVIL LAW CONCEPTS NOT STRICTLY APPLICABLE
14. We have already cautioned against the extrapolation of civil law concepts such as "cause of action" onto criminal law. Section 177 of the CrPC unambiguously states that every offence shall ordinarily be inquired

*into and tried by a Court within whose local jurisdiction it was committed. "Offence", by virtue of the definition ascribed to the word by Section 2(n) of the CrPC means any act or omission made punishable by any law. Halsbury states that the venue for the trial of a crime is confined to the place of its occurrence. Blackstone opines that crime is local and jurisdiction over it vests in the Court and Country where the crime is committed. This is obviously the raison d'etre for the CrPC making a departure from the CPC in not making the "cause of action" routinely relevant for the determination of territoriality of criminal courts. The word "action" has traditionally been understood to be synonymous to "suit", or as ordinary proceedings in a Court of justice for enforcement or protection of the rights of the initiator of the proceedings. "Action, generally means a litigation in a civil Court for the recovery of individual right or redress of individual wrong, inclusive, in its proper legal sense, of suits by the Crown" – [**Bradlaugh v. Clarke** [8 Appeal Cases 354 p.361]. Unlike civil actions, where the Plaintiff has the burden of filing and proving its case, the responsibility of investigating a crime, marshalling evidence and witnesses, rests with the State. Therefore, while the convenience of the Defendant in a civil action may be relevant, the convenience of the so called complainant/victim has little or no role to play in criminal prosecution. Keeping in perspective the presence of the word "ordinarily" in Section 177 of CrPC, we hasten to adumbrate that the exceptions to it are contained in the CrPC itself, that is, in the contents of the succeeding Section 178. The CrPC also contains an explication of "complaint" as any allegation to a Magistrate with a view to his taking action in respect of the commission of an offence; not being a police report. Prosecution ensues from a Complaint or police report for the purpose of determining the culpability of a person accused of the commission of a crime; and unlike a civil action or suit is carried out (or 'prosecuted') by the State or its nominated agency. The principal definition of "prosecution" imparted by Black's Law Dictionary 5 th Edition is "a criminal action; the proceeding instituted and carried on by due process of law, before a competent Tribunal, for the purpose of determining the guilt or innocence of a person charged with crime." These reflections are necessary because Section 142(b) of the NI Act contains the words, "the cause of action arises under the proviso to Section 138", resulting arguably, but in our opinion irrelevantly, to the blind borrowing of essentially civil law attributes onto criminal proceedings. We reiterate that Section 178 admits of no debate that in criminal prosecution, the concept of "cause of action", being the bundle of facts required to be proved in a suit and accordingly also being relevant for the place of suing, is not pertinent or germane for determining territorial jurisdiction of criminal Trials. Section 178, CrPC explicitly states that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. Section 179 is of similar tenor. We are also unable to locate any provision of the NI Act which indicates or enumerates the extraordinary circumstances which would justify a departure from the stipulation that the place where the offence is committed is where the prosecution has to be conducted. In fact, since cognizance of the offence is subject to the five **Bhaskaran** components or concomitants the concatenation of which ripens the already committed offence under Section 138 NI Act into a prosecutable offence, the employment of the phrase "cause of action" in Section 142 of the NI Act is apposite for taking cognizance, but inappropriate and irrelevant for determining commission of*

the subject offence. There are myriad examples of the commission of a crime the prosecution of which is dependent on extraneous contingencies such as obtainment of sanction for prosecution under Section 19 of the Prevention of Corruption Act 1988. Similar situation is statutorily created by Section 19 of the Environmental Protection Act 1986, Section 11 of the Central Sales Tax Act 1956, Section 279 of the Income Tax Act, Sections 132 and 308, CrPC, Section 137 of the Customs Act etc. It would be idle to contend that the offence comes into existence only on the grant of permission for prosecution, or that this permission constitutes an integral part of the offence itself. It would also be futile to argue that the place where the permission is granted would provide the venue for the trial. If sanction is not granted the offence does not vanish. Equally, if sanction is granted from a place other than where the crime is committed, it is the latter which will remain the place for its prosecution."

11. *It cannot be disputed that an order passed in a case, vitiated by the absence of jurisdiction, will be a nullity. Looking into the uncontroverted allegations set out in the complaint and accepted them to be true on its face value, it can safely be concluded that no part of the alleged offence was committed within the jurisdiction limits of any of the Courts in Himachal Pradesh. Therefore, the learned Magistrate at Kangra had no jurisdiction to entertain much less issuing process in the complaint instituted by the respondent No.2.*

12. *In view of the aforesaid discussion, the impugned order dated 25.06.2012 issuing process against the petitioners and further consequent proceedings pending before the learned Judicial Magistrate Ist Class (II), Kangra in Complaint No.16-I/2014, titled State of H.P. through Paramjit Singh versus Swaran Kalra and others, under Sections 186 and 189 IPC, are quashed and set aside.*

13. *Accordingly, the petition stands allowed in the aforesaid terms. Pending application, if any, also stands disposed of."*

12. On the other hand Mr.J.S. Guleria, Assistant Advocate General has vehemently argued that the offence under Section 498-A is a continuing offence and has relied upon the judgment rendered by Hon'ble Supreme Court in ***Sunita Kumari Kashyap Vs. State of Bihar and another (2011) 11 SCC 301***, wherein it was held that once the offence was continuing one and committed on more than one local area, then the same was triable by Courts having jurisdiction over any such local area. It is apt to reproduce the relevant observations, which reads thus:-

*"**9**. Keeping the above provisions in mind, let us consider the allegations made in the complaint. On 17.10.2007, Sunita Kumari Kashyap - the appellant herein made a complaint to the Inspector In-charge, Magadh Medical College Police Station, Gaya. In the complaint, the appellant, after narrating her marriage with Sanjay Kumar Saini, respondent No.2 herein on 16.04.2000 stated that what had happened immediately after marriage at the instance of her husband and his family members' ill-treatment, torture and finally complained that she was taken out of the matrimonial home at Ranchi and sent to her parental Home at Gaya with the threat that unless she gets her father's house in the name of her husband, she has to stay at her parental house forever. In the said complaint, she also asserted that her husband pressurized her to get her father's house in his name and when she denied she was beaten by her husband. It was also asserted that after keeping her entire jewellery and articles, on 24.12.2006, her husband brought her at Gaya and left her there warning that till his demands are met, she has to stay at Gaya and if she tries to come back without meeting those demands she will be killed. It was also stated that from that date till*

the date of complaint, her in-laws never enquired about her. Even then she called them but they never talked to her.

***10**. A perusal of the entire complaint, which was registered as an FIR, clearly shows that there was ill-treatment and cruelty at the hands of her husband and his family members at the matrimonial home at Ranchi and because of their actions and threat she was forcibly taken to her parental home at Gaya where she initiated the criminal proceedings against them for offences punishable under Sections 498A and 406/34 IPC and Sections 3 and 4 of the D.P. Act. Among the offences, offence under Section 498A IPC is the main offence relating to cruelty by husband and his relatives. It is useful to extract the same which is as under:*

> *"**498-A. Husband or relative of husband of a woman subjecting her to cruelty** -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.*
>
> *Explanation: For the purpose of this section, "cruelty" means-*
>
> *(a) any wilful 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; or*
>
> *(b) 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."*

***18.** We have already adverted to the details made by the appellant in the complaint. In view of the specific assertion by the appellant-wife about the ill-treatment and cruelty at the hands of the husband and his relatives at Ranchi and of the fact that because of their action, she was taken to her parental home at Gaya by her husband with a threat of dire consequences for not fulfilling their demand of dowry, we hold that in view of Sections 178 and 179 of the Code, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the learned Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. In other words, the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment of illtreatment meted out to the complainant, clause (c) of Section 178 is attracted. Further, from the allegations in the complaint, it appears to us that it is a continuing offence of illtreatment and humiliation meted out to the appellant in the hands of all the accused persons and in such continuing offence, on some occasion all had taken part and on other occasion one of the accused, namely, husband had taken part, therefore, undoubtedly clause (c) of Section 178 of the Code is clearly attracted.*

***19.** In view of the above discussion and conclusion, the impugned order of the High Court holding that the proceedings at Gaya are not maintainable due to lack of jurisdiction cannot be sustained. The impugned order of the High Court dated 19.03.2010 in Criminal Misc. No. 42478 of 2009 and another order dated 29.04.2010 in Criminal Misc. Case No. 45153 of 2009 are set aside. In view of the same, the SDJM, Gaya is permitted to proceed with the criminal proceedings in trial Nos. 1551 of 2008 and 1224 of 2009 and decide the same in accordance with law."*

13. As observed earlier, the FIR has culminated into a charge sheet and therefore, it is not the contents of the FIR alone, but the entire charge sheet accompanied by the documents under sub-section (5) of Section 175 of Cr.P.C., which will now form the basis of the charges and

therefore, it is impermissible at this stage to only consider and refer to the FIR, without looking into the documents and statements of witnesses recorded under Section 161 Cr.P.C and quash the proceedings. This was so held by me in ***Nancy Bhatt & another Vs. State of Himachal Pradesh and another, 2015 (2) Him.L.R. 1095,*** in the following terms:-

> *"**2**. A preliminary objection has been raised by the respondents that once the FIR has culminated in charge-sheet, the present petition has been rendered infructuous, because it is not the FIR but the chargesheet which forms the basis of criminal trial.*
>
> ***3**. I have heard learned counsel for the parties and gone through the records of the case carefully.*
>
> ***4**. In State of Punjab vs. Dharam Vir Singh Jethi 1994 SCC (Cri.) 500, the Hon'ble Supreme Court held that when the chargesheet was submitted, quashing of FIR is not permissible since it would be open to the Court to refuse to frame charge. It was observed*
> *as under:*
>
> > *"2. Heard learned counsel for the State as well as the contesting respondent. We are afraid that the High Court was not right in quashing the First Information Report on the plea that the said respondent had no role to play and was never the custodian of the paddy in question. In fact it was averred in the counter-affidavit filed in the High Court that the said respondent had acted in collusion with Kashmira Singh resulting in the latter misappropriating the paddy in question. At the relevant point of time the respondent concerned, it is alleged, was in overall charge of the Government Seed Farm, Trehan. This allegation forms the basis of the involvement of the respondent concerned. The High Court was, therefore, wrong in saying that the respondent concerned had no role to play. A specific role is assigned to him, it may be proved or may fail. In any case, pursuant to the First Information Report the investigation was undertaken and a charge sheet or a police report under Section 173(2) of the Code of Criminal Procedure was filed in the court. If the investigation papers annexed to the charge sheet do not disclose the commission of any crime by the respondent concerned, it would be open to the court to refuse to frame a charge, but quashing of the First Information Report was not permissible.*
>
> ***5**. In Vineet Narain and others vs. Union of India and another (1996) 2 SCC 199, the Supreme Court after refusing to quash the FIR, held that when a chargesheet was filed in the competent Court, it is that Court alone which will then deal with the case on merits, in accordance with law.*
>
> ***6**. This legal position has been reiterated in number of cases. (See: Anukul Chandra Pradhan vs. Union of India and others (1996) 6 SCC 354 and Jakia Nasim Ahesan and another vs. State of Gujarat and others (2011) 12 SCC 302).*
>
> ***7.** Admittedly the FIR is not a substantive piece of evidence. It is information of a cognizable offence given under Section 154 of the Code of Criminal Procedure (for short 'Code'). The legislature in its wisdom under the provisions of the Code has given limited/restrictive power to the Court to intervene at the stage of investigation by the police. Investigation is the exclusive domain of the police. Ordinarily, it is only when the charge sheet is filed that the Court is empowered either to take cognizance and to frame charge or to refuse to do the same.*
>
> ***8**. The FIR is the sheet anchor on the basis of which the investigation ensues. However, once the FIR on the basis of which the investigation was initiated has culminated into a chargesheet, the FIR does not remain the sheet anchor because*

the same alone then cannot be read and has to be read along with the material gathered by the investigating agency during the course of the investigation."

14. The case is at the stage where investigation has been completed and final report has been lodged, but the trial has not yet started. No doubt, the appellants have got every right to approach this Court under Section 482 Cr.P.C and need not wait for the trial, provided that there is no material to believe, hold or infer that they have not prima facie committed any offence. But if the material gathered by way of investigation discloses the commission of offence, then this Court will not interfere at this stage to quash the proceedings.

15. However, learned counsel for the petitioners would still argue that statements of witnesses recorded under Section 161 Cr.P.C. at this stage is inadmissible in evidence and therefore, on the strength of inadmissible evidence the petitioners cannot be compelled to undergo agony of facing the trial at Shimla, more particularly when the First Information Report does not make a whisper about any offence having been committed within the territorial jurisdiction of the Courts at Shimla.

16. In so far as the admissibility of the statements of witnesses recorded under Section 161 Cr.P.C at the stage of quashing is concerned, one only needs to refer to the judgment of Hon'ble Supreme Court in ***K. Ramakrishna and others Vs. State of Bihar and another (2000) 8 SCC 547***, wherein the Hon'ble Supreme Court has held as follows:-

*"**5**..... We have perused all those paras and other parts of the case diary and find that the Trial Magistrate was not justified in his observations so far as the appellants are concerned. In paragraph 48 of the case diary the investigation officer has mentioned the fact of his visiting the branch office of the United Bank of India on 29.11.1987 at 11 a.m. where despite notice, the officers of the bank were not present. Thereafter he served notice upon the Assistant Manager asking him to cause the presence of all the officers in the police station on 15.12.1987. In paragraph 63 a fact is mentioned about the presence of the officers of the bank at the police station. In Paragraphs 64 and 71 the statement of appellant No.1 is stated to have been recorded. In paragraph 79 it is recorded, "diary should be perused because documents of United Bank has not been received and proceedings is being initiated for finding it". In paragraph 82 it is mentioned that on number of occasions person was sent to the United bank, Bokaro for getting the papers of the case but papers were not received. In paragraph 83 a mention is made of "documents or papers have been received about which the proceedings should be initiated after the discussion with the ASP City". Paragraph 84 mentions the compliance of order of ASP City. Paragraph 86 records that the documents received were shown to S/Shri Balakrishna Rai and Ram Kishore Rai who after seeing the papers and documents told that they do not bear the signature of Shri Sanjay Kumar Roy. In paragraph 110 it is recorded that IO reached the office of the bank at Bokaro and searched Shri Ram Deo Yadav, Branch Manager but what was recovered upon search is not noticed. In paragraphs 112-113, the IO has recorded "I proceeded from Dhanbad in connection with the investigation of other case". On perusal of the other paragraphs of the case diaries we noticed not an iota of evidence against any appellants. We are conscious of the fact that in the normal circumstances, this Court or the High Court while deciding the sufficiency of the evidence would not resort to the perusal of the case diary and sit in appeal over the judgment of the investigating officer but as the Trial Magistrate is apparently shown to have recorded wrongly with respect to the facts allegedly noticed in the case diary, this Court vide order dated 17.7.1998 had no option but to direct the counsel of the respondent-State to produce the documents referred to in the report filed under Section 173 of the Code of Criminal Procedure.*

***6**. On perusal of FIR, the final report under Section 173 of the Code of Criminal Procedure and all other documents accompanying it, we are satisfied that no case*

is made out against any of the appellants and the pendency of the proceedings against them before the Magistrate is an abuse of process of court....."

17. It is clearly evident from the above that the documents accompanying the final report can always be looked into for the purpose of ascertaining as to whether a prima facie case against the petitioners within the territorial jurisdiction of Shimla has been made out, so as to compel them to face the trial at Shimla. Undoubtedly, the statements recorded under Section 161 Cr.P.C. are not substantial piece of evidence for the purpose of basing a conviction in a criminal trial but at the same time, for the purpose of ascertaining whether a prima facie case has been made out against the concerned accused either at the time of framing of charges or to quash the proceedings under Section 482 Cr.P.C., the statements recorded of the witnesses under Section 161 Cr.P.C. have to be taken into consideration and they are valid documents insofar as this stage is concerned and it is only during the course of trial that those documents loses their importance and significance except for the purpose of contradicting the witnesses who made the earlier statements.

18. In light of the above, this Court can look into the statements of witnesses also and on perusal of the same it would be apparent that some of them have clearly stated that the complainant was meted out with cruelty at Sanjauli, within the territorial jurisdiction of Shimla. (Such statements are found at pages 33 to 35 of the final report.) However, these statements are not being discussed in detail, lest it causes prejudice to either of the parties, more particularly the accused.

19. The judgments relied upon by learned counsel for the petitioner are not at all applicable to the case in hand, as in the instant case, there is prima facie material available on record to suggest that some part of the offence was committed within the local area of Shimla.

20. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed. Consequently, the interim order passed by this Court on 12.4.2016 is ordered to be vacated.

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

CMPMO No.136 of 2014 alongwith CMPMO No.188 of 2014.
Date of Decision: 28th June, 2016.

1. CMPMO No.136 of 2014.

Municipal Commissioner, Shimla .. Petitioner.
Versus
Bhanu Dutt Sharma .. Respondent.

For the petitioner: Mr. Hamender Chandel, Advocate.
For the respondent: Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.

2. CMPMO No.188 of 2014.

D.R. Setia .. Petitioner.
Versus
Bhanu Dutt Sharma and another .. Respondents.

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.
For respondent No.1: Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.
For respondent No.2: Mr. Hamender Chandel, Advocate.

H.P. Municipal Corporation Act, 1994- Section 253 (2)- Learned Commissioner, Municipal Corporation, Shimla has been directed to record the statement of Architect Planner on oath and to afford an opportunity of his cross-examination as well as to record the statement of the respondent and its witnesses and to allow their cross-examination- held, that proceedings under Section 253 of the Act are quasi judicial in nature and principle of natural justice should be followed- it was held previously that cross-examination of witnesses is not part of natural justice- therefore, case remanded to District Judge, Shimla for a fresh decision in accordance with law.

(Para-2 and 3)

Case referred:

A.S. Motors Private Limited v. Union of India and others (2013) 10 SCC 114

The following judgment of the Court was delivered:

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

This judgment shall dispose of both the petitions filed against the order passed by learned Appellate Authority (District Judge, Shimla) under the HP Municipal Corporation Act, hereinafter referred to as 'the Act' in short in an appeal under Section 253 (2) of the Act, whereby learned Commissioner, Municipal Corporation, Shimla has been directed to record the statement of Architect Planner on oath who has submitted the report qua unauthorized construction raised by the respondent herein and to afford the opportunity of cross-examination of the Architect Planner and thereafter to record the statement of the respondent as well as the witnesses to be produced by him on oath and allowing their cross-examination on behalf of the Municipal Corporation and to decide the case thereafter afresh. The case has, therefore, been remanded to learned Commissioner.

2. Mr. Hamender Chandel, learned Counsel representing the petitioner-Municipal Corporation has relied upon the judgment passed by a Coordinate Bench of this Court in ***CMPMO No.51 of 2014***, titled ***Municipal Corporation, Shimla through its Commissioner*** v. ***Savitri Devi***. In that case also, order passed by learned District Judge was under challenge and the issue brought to this Court by Municipal Corporation for adjudication was also similar. This Court after taking note of all pros and cons and also the scope and ambit of Section 253 of the Act as well as the case law touching the principle of natural justice, has arrived at a conclusion that the proceedings under Section 253 of the Act are quasi judicial in nature and it is only the bare minimum requirement of observance of the principle of natural justice should be adhered. The ratio of this judgment reads as follows:

> "82. While exercising his powers, under Section 253 of the Act, Commissioner is not performing ministerial act. Though Commissioner is not a Court, yet the very nature of functions he is discharging are quasi judicial. In view of the non-applicability of provisions of the Evidence Act, Commissioner is to be guided by the settled principles of natural justice. Admissibility of the report of the J.E. was never an issue and it is not that under all circumstances, Commissioner is bound to adduce evidence by first giving oath and have the witness examined or cross examined. Considering the nature of proceedings, on objective assessment, he has to form his opinion, based on the material placed on record by the parties. The report of the J.E. was a document relied upon by the parties and its non admissibility not a relevant issue in the proceedings before him.
>
> 83. Thus, for all the aforesaid reasons, order passed by the Appellate Authority cannot be said to be based on settled principles of law. It exceeded its authority and jurisdiction in directing the Commissioner to examine the Officer(s), on oath, and also afford opportunity of cross-examination to the respondent.
>
> 84. No doubt, right to property being a constitutional right needs to be protected and zealously safeguarded and any act which is arbitrary, irrational or

illegal, infringing such rights has to be struck down, but then it has to be within the settled and permissible legal sanctions. Ratio laid in A.S. Motors Pvt. Ltd. (supra) is squarely applicable to the given facts.

3. Similar order passed by learned Appellate Authority, Shimla, was also brought to this Court in ***CMPMO No.64 of 2014***, titled ***Municipal Corporation, Shimla*** v. ***Rattan Sharma***. This Court on having taken note of the given facts and circumstances and also the ratio of the judgment of the Hon'ble Apex Court in ***A.S. Motors Private Limited*** v. ***Union of India and others (2013) 10 SCC 114***, has held as follows:

> "8. The Commissioner, a quasi judicial authority is not required to sit over the matter and to conduct proceedings like in a case before the Civil Court as the learned Appellate Authority has directed him to do. Therefore, that part of the order, which directs the Commissioner to follow the provisions contained under the Evidence Act in the matter of recording evidence, the examination and cross-examination of the witnesses being not legally sustainable is hereby quashed and set aside. The only direction to the learned Commissioner in the peculiar facts and circumstances of this case would be to afford one more opportunity to the respondent to place on record the reply and documents in support thereof, on a date to be fixed by the Commissioner. After taking on record the reply to the show cause notice and also rejoinder, if any, thereto, the Commissioner shall proceed to hear the matter and decide the same in accordance with law...."

4. The point in issue in this petition is, therefore, squarely covered in favour of the petitioner-Corporation by the ratio of the judgments supra. The petition is accordingly disposed of with a direction to remand the case to learned Appellate Authority under the Act (District Judge, Shimla) for fresh decision in accordance with law laid down by this Court in the judgments referred to hereinabove. The respondent herein shall have the right to raise all contentions including his rights, if any, protected under the retention policy launched recently by the State Government qua regularization of the unauthorized construction already raised and seek the benefit of the policy, if entitled to. In view of the matter is old one, there shall be a direction to learned Appellate Authority to decide the same expeditiously, however, not beyond 30th September, 2016. The connected petition also stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR

Sania Dhanwal ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Revision No. 74 of 2009
Judgment reserved on: 11.05.2016
Date of decision: 28.06.2016

Indian Penal Code, 1860- Section 287, 337 and 304- petitioner parked the truck on the left side of the road and got down - he was talking to owner of vehicle at a short distance- some children entered into the cabin of driver - truck started moving backward and fell into gorge- children were seriously injured and two children succumbed to the injuries- prosecution asserted that petitioner had failed to take precautions to lock the door and to apply gutka/stopper to the truck- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that death of children was a direct result of omission or commission on the part of the accused and not on account of interference of some other persons in the present case- death was caused due to meddling with gear and clutches by the children- an error of judgment

is not negligence- however, petitioner was negligent in parking the truck without Gutka/stopper and without locking- hence, revision partly allowed - sentence imposed under Sections 304-A and 337 of I.P.C. set aside and conviction under Section 287 of I.P.C. upheld- benefit of Probation of Offenders Act granted to the petitioner. (Para- 9 to 21)

Cases referred:

State of Punjab Versus Saurabh Bakshi (2015)(V) SCC 182

Ambalal D. Bhatt. Versus The State of Gujarat 1972 CRI L.J. 727, (AIR 1972 Supreme Court 1150)

Udham Singh versus the State of Himachal Pradesh, 1980 Sim. L.C. 246

State of Punjab Versus Amrit Lal Jain, 2006 (I) J.R. (Criminal) 279(Punjab and Haryana High Court) and in case 1994 Cr.L.J. 363(Kerla High Court)

Kurban Hussein Mohammadalli Ranawalla Versus State of Maharashtra AIR 1965 SC 1616

Sushil Ansal v. State Through Central Bureau of Investigation (2014) 6 Supreme Court Cases 173

For the appellant : Mr. B. R. Verma, Advocate.
For the respondent : Mr. Pankaj Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur,J.

Petitioner is aggrieved by judgment passed in Criminal Appeal No. 47-S/10 of 2007, dated 30.05.2009 by learned Additional District Judge(Fast Track), Shimla confirming judgment passed by learned Chief Judicial magistrate in Cr. Case No.44/2 of 2006/03, dated 17.11.2007, convicting and sentencing petitioner to imprisonment of six months each for offences punishable under Sections 287 and 337 IPC and further under Section 304-A of Indian Penal Code with imprisonment of one year with a fine of Rs.2500/- and in default of payment of fine to undergo further simple imprisonment for a period of one month.

2. Driver of the vehicle was prosecuted for rash and negligent conduct with respect to machinery endangering human life and causing injury and death of the children. Notice of accusation under Sections 287, 337 and 304-A IPC was put to petitioner.

3. After facing trial, aggrieved by his conviction and sentence by trial court, petitioner had filed an appeal in Sessions Court which has been dismissed by learned Additional Sessions Judge, Fast Track Court, Shimla. Hence present petition has been preferred.

4. On the fateful day, petitioner had parked truck on the left side of road facing ascending gradient near G.S. Trading Company at Bhatakuffar near Churrat Nallah bifurcation in Shimla. The petitioner had alighted from truck and was talking with owner of vehicle at a short distance. In the meanwhile, children including son of petitioner playing on the spot had entered driver's cabin of the truck. Suddenly, children started crying on moving of truck in backward direction. Within few seconds truck had fallen into 500 deep gorge and children were seriously injured. Injured children were taken to Hospital however two of them they succumbed to injury on the way to Hospital. Son of petitioner was also one of surviving injured children.

5. It is the case of the prosecution that petitioner has omitted to take due care and caution to lock the door of truck and to apply gutka-stopper to the truck enabling entry and meddling with gear box, clutch, steering etc. by children resulting falling of truck into deep gorge causing serious injury to and death of children.

6. Shri B.R. Verma, learned counsel for petitioner has pleaded that failure to lock the door of truck is simple error and at the most may be termed as negligence for the purpose of tort but not a gross negligence rendering petitioner criminally liable. For criminal liability gross

negligence on the part of accused is a necessary ingredient. It has been further pleaded that accident should be immediate and proximate to negligence and parking truck without locking the door is not an immediate and proximate cause of accident and particularly for injury and homicide of children. For convicting petitioner injury and death should be direct consequences of the act on his part. It has been further pleaded that no father will put his son in danger, therefore, omission and commission on the part of petitioner in present case are not rash and negligent inviting criminal liability but are of simple error and injury to and death of children are not direct consequence of that error.

7. Shri Pankaj Negi, learned Deputy Advocate General has argued that there was no cleaner in the truck, door was not locked and truck was parked without applying gutka-stopper to tyres of truck. There is nothing on record that door was defective and even if it was defective, it was to be brought in the notice of owner of the vehicle by driver of the truck. The omission and commission on the part of petitioner proved on record are sufficient to convict and sentence the petitioner under Sections 287, 337 and 304-A IPC.

8. Learned Deputy Advocate General in support of case has also relied upon in case reported in case ***State of Punjab Versus Saurabh Bakshi (2015)(V) SCC 182*** for justifying conviction of petitioner and sentence imposed upon him.

9. The petitioner has relied upon judgment passed in case ***Ambalal D. Bhatt. Versus The State of Gujarat reported in 1972 CRI L.J. 727, (AIR 1972 Supreme Court 1150), in which it has been held as under:-***

> "8. It appears to us that in a prosecution for an offence under Section 304A, the mere fact that an accused contravenes certain rules or regulations in the doing of an act which causes death of another, does not establish that the death was the result of a rash or negligent act or that any such act was the proximate and efficient cause of the death. If that were so, the acquittal of the appellant for contravention of the provisions of the Act and the Rules would itself have been an answer and we would have then examined to what extent additional evidence of his acquittal would have to be allowed, but since that is not the criteria, we have to determine whether the appellant's act in giving only one batch number to all the four lots manufactured on 12-11-62 in preparing batch No. 211105 was the cause of deaths and whether those deaths were a direct consequence of the appellants' act, that is, whether the appellant's act is the direct result of a rash and negligent act and that act was the proximate and efficient cause without the intervention of another's negligence. As observed by Sir Lawrence Jenkins in Emperor v. Omkar Rampratap (1902) 4 Bom LR 679 the act causing the deaths "must be the cause causans; It is not enough that it may have been the causa sine qua non". This view has been adopted by this Court in several decisions. In Kurban Hussein Moham-medali Rangwala v. State of Maharashtra, the accused who had manufactured wet paints without a licence was acquitted of the charge under Section 304A because it was held that the mere fact that he allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it would be a negligent act, would not be enough to make the accused responsible for the fire which broke out. The cause of the fire was not merely the presence of the burners within the room in which varnish and turpentine were stored though this circumstance was indirectly responsible for the fire which broke out, but was also due to the overflowing of froth out of the barrels. In Suieman Rahiman Mulani v. State of Maharashtra the accused who was driving a car only with a learner's licence without a trainer by his side, had injured a person. It was held that that by itself was not sufficient to warrant a conviction under Section 304A. It would be different if it can be established as in the case of Bhalchandra v. State of Maharashtra that deaths and injuries caused by the contravention of a prohibition in respect of the substances which are

highly dangerous as in the case of explosives in a cracker factory which are considered to be of a highly hazardous and dangerous nature having sensitive composition where even friction or percussion could cause an explosion, that contravention would be the causa causans".

10. The petitioner has also put on reliance on judgment of this Court reported in case ***Udham Singh versus the State of Himachal Pradesh, reported in 1980 Sim. L.C. 246*** *to the following effects:-*

"5. Now it is well settled that merely because a person contravenes some rules and regulations he does not make himself liable for rashness or negligence. To make a person liable for criminal negligence or rashness, it is necessary to show a nexus between the wrongful act of an accused and the injuries received by another. The injuries suffered must be the immediate result of the wrongful act and not a remote consequence".

11. The petitioner has also relied upon judgment in case State of Punjab Versus Amrit Lal Jain, reported in ***2006 (I) J.R. (Criminal) 279(Punjab and Haryana High Court) and in case reported in 1994 Cr.L.J. 363(Kerla High Court)*** in which by following Ambalal's Judgment of Apex Court the drivers were acquitted under Section 304-A IPC as death was not found to be direct result of the negligent act of the person concerned.

12. Referring judgment of Hon'ble Supreme Court passed in case ***Kurban Hussein Mohammadalli Ranawalla Versus State of Maharashtra AIR 1965 SC 1616*** it has been argued on behalf of petitioner that to impose criminal liability under Section 304-A of IPC it is necessary that act should have been the direct result of omission and negligent act of the accused and that act must be proximate and efficient cause of negligence of accused without interference of another's omission and commission. It must have been causa causans and it is not enough that it may have been the causa sine quo non.

13. In a recent judgment reported in case ***Sushil Ansal v. State Through Central Bureau of Investigation (2014) 6 Supreme Court Cases 173,*** the Apex Court has explained Doctrine of causa causans and had acquitted persons incharge of maintenance of transformers despite their omission in duty to ensure to inspect the building and ensure that it was safe place for public. They were convicted under Sections 337 and 338 read with Section 34 IPC but were acquitted under Section 304-A IPC. In this judgment the Apex Court has explained causa causan as under:-

(V) Doctrine of Causa Causans:

"80. We may now advert to the second and an equally, if not, more important dimension of the offence punishable under Section 304-A IPC, viz. that the act of the accused must be the proximate, immediate or efficient cause of the death of the victim without the intervention of any other person's negligence. This aspect of the legal requirement is also settled by a long line of decisions of Courts in this country. We may at the outset refer to a Division Bench decision of the High Court of Bombay in Emperor v. Omkar Rampratap (1902) 4 Bom LR 679 where Sir Lawrence Jenkins speaking for the Court summed up the legal position in the following words:

" ..... to impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the act should have been the direct result of a rash and negligent act of the accused and that act must be proximate and efficient cause without the intervention of another negligence. It must have been the causa causans; it is not enough that it may have been the causa sine qua non."

The above statement of law was accepted by this Court in Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra AIR 1965 SC 1616. We shall refer to the facts of this case a little later especially because Mr. Jethmalani,

learned Counsel for the appellant-Sushil Ansal, placed heavy reliance upon the view this Court has taken in the fact situation of that case".

"81. Suffice it to say that this Court has in Kurban Hussein's case (supra) accepted in unequivocal terms the correctness of the proposition that criminal liability under Section 304-A of the IPC shall arise only if the prosecution proves that the death of the victim was the result of a rash or negligent act of the accused and that such act was the proximate and efficient cause without the intervention of another person's negligence. A subsequent decision of this Court in Suleman Rahiman Mulani v. State of Maharashtra AIR 1968 SC 829 has once again approved the view taken in Omkar Rampratap's case (supra) that the act of the accused must be proved to be the causa causans and not simply a causa sine qua non for the death of the victim in a case under Section 304-A of the IPC.

To the same effect are the decisions of this Court in Rustom Sherior Irani v. State of Maharashtra 1969 ACJ 70; Balchandra @ Bapu and Anr. v. State of Maharashtra AIR 1968 SC 1319; Kishan Chand v. State of Haryana (1970) 3 SCC 904; S.N Hussain v. State of A.P. (1972) 3 SCC 18; Ambalal D. Bhatt v. State of Gujarat (1972) 3 SCC 525 and Jacob Mathew's case".

"82. To sum up: for an offence under Section 304-A to be proved it is not only necessary to establish that the accused was either rash or grossly negligent but also that such rashness or gross negligence was the causa causans that resulted in the death of the victim".

"83. As to what is meant by causa causans we may gainfully refer to Black's Law Dictionary (Fifth Edition) which defines that expression as under:

"The immediate cause; the last link in the chain of causation."

The Advance Law Lexicon edited by Justice Chandrachud, former Chief Justice of India defines Causa Causans as follows:

"Causa causans: The immediate cause as opposed to a remote cause; the 'last link in the chain of causation'; the real effective cause of damage".

"84. The expression "proximate cause" is defined in the 5th edition of Black's Law Dictionary as under:-

Proximate cause: "That which in a natural and continuous sequence unbroken by any efficient, intervening cause, produces injury and without which the result would not have occurred. Wisniewski vs. Great Atlantic & Pac. Tea Company 226 Pa. Super 574, 323 A2d, 744, 748. That which is nearest in the order of responsible causation. That which stands next in causation to the effect, not necessarily in time or space but in causal relation. The proximate cause of an injury is the primary or moving cause, or that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission."

14. In the present case, the prosecution has examined 8 witnesses to prove the guilt of petitioner and thereafter statement of petitioner-accused under Section 313 Cr.P.C. was recorded. No evidence in defence has been led. Accident causing injury to death of children is not disputed. Question for determination is that whether petitioner has conducted the machinery rashly and negligently endangering the human life or to be likely to cause hurt or injury to any other person or knowingly or negligently omitted to take such order with machinery in his

possession as is sufficient to guard against any probable danger to human life from such machinery and such rash and negligent act has caused grievous injury to and death of children.

15. For determining question in issue in present case statements of PW-1 Gurcharan Singh owner of the vehicle and PW-2 Tej Singh Clerk and PW-4 Surender (12 years old) son of the petitioner and PW-8 Dev Krishan Investigating Officer are relevant. PW-1 has resiled from his previous statement recorded under Section 161 Cr.P.C and was declared hostile witnesses, but his statement can be relied upon on corroboration by cogent and reliable evidence on record. He has admitted that petitioner had parked truck without locking the same but has explained that in his opinion parking of vehicle without locking is not a negligent act. He has stated that on the spot children may have removed gutka and meddled with steering, gear and clutches etc., which may have caused accident. PW-2 has stated that at the time of accident petitioner was standing outside truck and was talking to someone. He has further stated that the petitioner had parked the vehicle by putting stone. He has shown his ignorance regarding meddling by children. PW-4 son of petitioner has also supported the prosecution case but he has stated that his father was standing at a distance of 20-30 feet of the parked vehicle and was talking with persons working there and children had entered truck without knowledge of petitioner and small children were playing outside the truck and one child meddled with gear and clutches of the truck. He has shown ignorance about putting stone by his father as Gutka/stopper with rear tyre. He has stated that within five minutes of parking the truck they had entered the truck and within 1-2 minutes truck had moved backwards. PW-8 has admitted that it transpired during investigation that children of labourers were also playing outside the truck at the time of accident and some of them entered and meddled with truck. He has admitted that accident has occurred on account of meddling with truck by children. It has also come in evidence that the petitioner was standing near the vehicle and talking with owner of the vehicle and has not abandoned the vehicle without locking it. In the meanwhile, children had entered in the vehicle without knowledge of the petitioner or anybody else and the petitioner noticed the act of children only after hearing cries of children.

16. On the above discussion, it is difficult to hold that death of children was a direct result of omission or commission on the part of the petitioner. As per ratio laid down by the Apex Court, death must be direct result of omission or commission on the part of petitioner and not on account of interference of act of some one else. The omission and commission of petitioner in present case are not sufficient to cause death of children. It is meddling with gear and clutches by the children that too without permission or knowledge of petitioner which has caused accident resulting death of children. The learned Additional Sessions Judge has relied upon answer to question No. 7 put to petitioner under Section 313 Cr.P.C. to hold him guilty. Though, the learned Additional Sessions Judge has referred judgment passed by the Hon'ble Supreme Court, reported in 2003, Criminal Law Journal 11 titled as Mohan

Singh Versus Prem Singh and another but has not applied the same as per ratio laid down by the Apex Court in the said judgment. Statement under Section 313 Cr.P.C. of the petitioner can certainly be taken in aid of to lend credence to the evidence led by prosecution. Only a part of such statement under Section 313 Cr.P.C. cannot be made sole basis of his conviction. There is no evidence on record pin pointing of omission and commission of gross negligence on the part of petitioner causing injury to and death of children. Portion of statement under Section 313 Cr.P.C. cannot be used against petitioner to convict him under Section 304-A IPC, particularly, when in answer to question No. 9, petitioner had denied his failure to take sufficient guard against the probable danger of vehicle being handled by other person causing injury to and death of children.

17. An error of judgment, which comes to light only on post accident reflection but could not be foreseen by the accused in that fragmented moment before the accident, is not a sure index of negligence. The accident in the present case has happened due to an error and not on account of negligence on the part of petitioner. Parking and leaving vehicle without locking is not the direct cause of accident.

18. In normal circumstances, parking a truck without Gutka/stopper and without locking may not attract criminal liability. However, in present case, it has come in evidence that there was steep gradient and children were playing other spot. In these facts and circumstances, such omission on the part of driver amounts to negligence as the petitioner has failed to take due care and caution as was sufficient to guard against any probable danger to human life from the vehicle.

19. From evidence on record, it can be safely inferred that learned Courts below have failed to consider ratio laid down by the Apex Court before holding petitioner guilty for an offence under Section 337 and 304-A IPC. However, there is sufficient evidence on record to hold petitioner guilty under Section 287 IPC in given facts and circumstances of present case.

20. In view of the foregoing discussion, the judgment passed in Criminal Appeal No. 47-S/10 of 2007 dated 30.05.2009 by learned Additional District Judge(Fast Track), Shimla confirming judgment passed by learned Chief Judicial magistrate in Cr. Case No. 44/2 of 2006/03 dated 17.11.2007 convicting and sentencing the petitioner under Sections 304-A and 337 IPC is set aside and petitioner is acquitted from the charges under Section 337 and 304-A, however, conviction under Section 287 IPC is upheld.

21. It has been pleaded by learned counsel for the petitioner that he is sole bread-earner of family and accident had taken place more than a decade ago i.e. in the year 2003. Petitioner has been facing criminal proceedings since the year 2003 and was convicted in the year 2007 and since then he is under fear to undergo sentence of one year imposed upon him. At the time of accident, age of petitioner was 30 years and responsibility towards family has also increased by passage of time. He has his family to support and is not a previous convict. Therefore, benefit of probation be given to him. Keeping in view the age and also fact that the petitioner is not previous convict and having regard to the circumstances of case, character of petitioner and nature of offence, petitioner is accordingly admonished by giving him benefit of Section 3 of Probation of Offenders Act, 1958. The appeal is partly allowed and disposed. Records of the Court below be sent back immediately.

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

Shiv Kumar ...Petitioner

Versus

Union of India & ors ...Respondents

CWP No. 5670 of 2011
Reserved on 4.06.2016
Decided on: 28.6.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as GDSBPM- charge-sheet was served upon him- Regular inquiry was conducted- it was found that petitioner had absented himself on two days and had unauthorisedly allowed R to work in his place- petitioner was removed from the service- an appeal was preferred against this order, which was rejected by the Appellate Authority- an original application was filed before the Central Administrative Tribunal, which was dismissed- aggrieved from the order, present writ petition has been filed- held, that Appellate Authority had passed a detailed order, wherein, all the contentions had been dealt with – Court cannot re-appreciate the evidence led during the inquiry- Disciplinary and Appellate Authority had considered the statements of the witnesses and had passed the order thereafter- petition dismissed. (Para-9 to 16)

Cases referred:
State Bank of Patiala Vs. Mahendra Kumar Singhal 1994 Supp (2) SCC 463
Sher Singh Vs. Union of India, & ors, CWP No.9030/2011

For the Petitioner:	Mr.S.R. Chauhan, Advocate.
For the Respondents:	Mr. Ashok Sharma, ASGI, with Mr. Ajay Chauhan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This writ petition is directed against the order passed by learned Central Administrative Tribunal on 15.3.2011, whereby it dismissed the original application filed by the petitioner.

2. Petitioner was appointed as GDSBPM in the Branch Post Office at Taklech, Tehsil Rampur, District Shimla, where he worked for about seven years. A charge-sheet dated 28.8.2007 was served upon him containing therein the following charges:-

> *"Charge-1*
>
> *That though he received Rs.262/-(5 instalments of Rs.50 each plus fine for delayed deposits) from the depositor of RD Account No.85590 on 27.7.2006 and made entry thereof in the pass book but did not account for it in departmental accounts and misappropriated the same for personal use.*
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> *Charge-II*
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> *That on 13.9.2005, he received Rs. 1048/- from the depositor of RD Account No.85759 (5 instalments @ Rs.200/- each plus Rs.48/- as fine) and made entry in pass book but failed to account for it in departmental accounts and used it for personal purposes.*
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> *Charge-III*
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> *That during the period from 27.10.2006 to 5.3.2007, he received payments against telephone bills and RPLI (Insurance) but accounted for Rs. 146/- less in Govt. account and thereby vitiated departmental rules and exhibited lack of devotion to duty."*

3. Regular inquiry was conducted wherein it was concluded that all the charges against the petitioner stand proved and in addition thereto, it was observed that the petitioner had willfully absented himself on two days and had unauthorisedly allowed Roshan Lal GDSMD to work in his place. A copy of the inquiry report was supplied to the petitioner, against which he submitted representation on 24.10.2008. The Disciplinary Authority held all the charges to be proved against the petitioner and vide order dated 29.11.2008 imposed penalty of removal from service. Appeal preferred against this order was rejected by the Appellate Authority vide order dated 19.2.2008, constraining the petitioner to file Original application before the learned Central Administrative Tribunal, wherein he prayed for the following reliefs:

> *"i)That impugned orders dated 29.11.2008 (A-1)and 19.2.2009 (A-2) be quashed and set aside being illegal, arbitrary and violative of principles of natural justice.*
>
> *ii) That respondents be directed to reinstate the applicant in service with retrospective effect from 18.5.2007 with all consequential benefits like arrears of salary along with 12% interest for delayed payment and seniority etc."*

4. The respondents had contested the Original application by filing a reply, wherein it was averred that petitioner in his reply had denied Articles I and II, whereas he admitted charge

No.III. It was further averred that this plea taken by the petitioner that Roshan Lal GDSMD had made entries in the pass book was not tenable since it was the petitioner alone who was authorized to make such transactions and Roshan Lal, GDSMD performed the duties of the petitioner with his consent but the latter was not authorized by the competent authority to do so. Therefore, it was only the petitioner, who alone was responsible for misappropriation of government money since he delegated his powers without authority and competence to an unauthorized person and that the petitioner had illegally tried to transfer his responsibility upon Sh. Roshan Lal, GDSMD. Respondents have thereafter averred that all the charges were found to have been established and proved and in addition to the charges framed, it was also found by the Inquiry Officer that the petitioner was in the habit of absenting himself from duty and entrusting the job to Sh.Roshan Lal unauthorisedly. It was lastly averred that the punishment awarded to the petitioner was not based on any new charge but was based on the original articles of charge which have been proved and established during the inquiry.

5. Three contentions were raised by the petitioner before the learned Tribunal, firstly that as per orders of the Disciplinary Authority and Appellate Authority, charges I and II had not been proved against the petitioner and only the charge of absenting from duty had been established. This contention was rejected by the learned Tribunal by holding that the punishment order dated 29.11.2008 revealed that the Disciplinary Authority had clearly relied upon the report of the Inquiry Officer, wherein all the charges against the petitioner, had been proved.

6. Second contention raised by the petitioner was that only charge proved against him was short fall of Rs.146/- which had occurred due to wrong totaling over a period from 27.10.2006 to 5.3.2007, for which he had no intention and, therefore, the punishment of removal from service, in such circumstances, was highly disproportionate. This contention was rejected by the learned Tribunal by concluding that the punishment had not been imposed on the petitioner on this sole ground, whereas whole tenor of the punishment order reflected that the petitioner was in the habit of absenting himself from his job and had unauthorisedly been assigning the same to Sh. Roshan Lal.

7. The third contention raised by the petitioner was that he had not been afforded personal hearing by the Appellate authority, which plea was rejected by the learned Tribunal on the ground that the petitioner himself had not asked for personal hearing.

8. The order passed by the Disciplinary Authority/Appellate Authority and learned Central Administrative Tribunal has been challenged on various grounds as taken in the writ petition.

We have heard the learned counsel for the parties and have gone through the material placed on records.

9. The learned counsel for the petitioner has vehemently argued that the learned Tribunal below has gravely erred in concluding that the petitioner was not entitled for personal hearing before the appellate authority which finding, according to him, is against the principles of natural justice.

10. It is a trite that the rule of *audi alteram partem* is not an absolute right. The court, in such like cases, is required to see as to whether all the contentions of the employees have been considered. This has been so held by the Hon'ble Supreme Court in ***State Bank of Patiala*** *Vs.* ***Mahendra Kumar Singhal*** **1994 Supp (2) SCC 463.** It is apt to reproduce para 3 which reads as follows:

> *"3. No rule has been brought to our attention which requires the appellate authority to grant a personal hearing. The rule of natural justice does not necessarily in all cases confer a right of audience at the appellate stage. That is what this Court observed in F.N. Roy v. Collector of Customs, Calcutta, 1957 SCR 1151. We, therefore, think that the impugned order is not valid. Our attention was, however, drawn to the decision in Mohinder Singh Gill v. Chief Election Commissioner, New*

Delhi'. (1978) 1 SCC 405, wherein observation is made in regard to the right of hearing. But that was not a case of a departmental inquiry, it was one emanating from Article 324 of the Constitution. In our view, therefore, those observations are not pertinent to the facts of this case".

11. In this background, if one would peruse the order passed by the appellate authority on 19.2.2009, it would be seen that the same is a detailed one, wherein all the contentions as raised by the petitioner have been dealt with and only thereafter appeal has been rejected.

12. The learned counsel for the petitioner would then contend that the statements of witnesses had not been appreciated by the authorities and the learned Tribunal and they further failed to consider that the penalty imposed is totally disproportionate.

13. Insofar question of re-appreciation of evidence and disproportionality of punishment vis-à-vis scope of interference by this court in exercise of its writ jurisdiction are concerned, these issues have been recently considered by us in case titled ***Sher Singh*** *Vs.* ***Union of India, & ors, CWP No.9030/2011***, decided on 26.4.2016, wherein it has been held as under:

"6 That apart, it would also be noticed that the order of removal from service of the petitioner has been upheld by the first appellate authority, the revisional authority and thereafter by the learned Tribunal and there is nothing to suggest that the findings recorded by any of the authorities below are in any manner perverse.

7. Insofar as the reliability and adequacy of the evidence is concerned, this Court cannot venture into re-appreciation of the evidence and act as third appellate authority.

8. The scope of interference by the High Court in such matters has been succinctly summed up by the Hon'ble Supreme Court in its recent decision in ***Union of India and others*** *versus* ***P.Gunasekaran AIR 2015 SC 545*** *in the following terms:-*

"13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge No.I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

a. the enquiry is held by a competent authority;

b. the enquiry is held according to the procedure prescribed in that behalf;

c. there is violation of the principles of natural justice in conducting the proceedings;

d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence.

Under Article 226/227 of the Constitution of India, the High Court shall not:

(i). re-appreciate the evidence;

(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;

(iv). go into the reliability of the evidence;

(v). interfere, if there be some legal evidence on which findings can be based.

(vi). correct the error of fact however grave it may appear to be;

(vii). go into the proportionality of punishment unless it shocks its conscience."

9. Notably, the case of the petitioner does not fall within any of the exceptions enumerated above so as to call for any interference by this Court in exercise of its writ jurisdiction.

10. Now adverting to the second contention regarding the proportionality of punishment, it was held in ***P.Gunasekaran's case*** *(supra) that the High Court would go into the question of proportionality of punishment only in case it shocks its conscience, but then this Court would not reappreciate the evidence for reaching at such conclusion.*

11. As observed earlier, the indictment of the petitioner was mainly on the basis of the confession made by him. Once the petitioner confessed to the charge of impersonation and retained the salary for 10 days before handing to Jai Ram, no leniency could have been shown by the Department.

12. It is trite that punishment is the discretion of the disciplinary authority and the Court would not substitute its own judgment unless the punishment shocks the conscience. Even, in such case, it has been held that the Court should ordinarily remit the matter to the disciplinary authority for consideration of punishment.

13. The scope and power of judicial review of the Courts while dealing with the validity of quantum of punishment imposed by the disciplinary authority was subject matter of discussion before the Hon'ble Supreme Court in ***Life Insurance***

Corporation of India and others *versus* ***S.Vasanthi (2014) 9 SCC 315*** *wherein it was reiterated that the High Court in exercise of its powers of judicial review cannot assume the role of sitting as a departmental appellate authority as the same is not permissible under law. It shall be apt to reproduce paras 10 and 11 of the judgment which read thus:-*

> *"10.The scope and power of judicial review of the courts while dealing with the validity of quantum of punishment imposed by the disciplinary authority is now well settled. In Kendriya Vidyalaya Sangthan v. J. Hussain (2013) 10 SCC 106, the law on this subject, is recapitulated in the following manner: (SCC pp.110-12, paras 7-10)*
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> *"7. When the charge is proved, as happened in the instance case, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed. Of course, this discretion has to be examined objectively keeping in mind the nature and gravity of charge. The Disciplinary Authority is to decide a particular penalty specified in the relevant Rules. Host of factors go into the decision making while exercising such a discretion which include, apart from the nature and gravity of misconduct, past conduct, nature of duties assigned to the delinquent, responsibility of duties assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in department or establishment where he works, as well as extenuating circumstances, if any exist.*
>
> *8. The order of the Appellate Authority while having a re-look of the case would, obviously, examine as to whether the punishment imposed by the Disciplinary Authority is reasonable or not. If the Appellate Authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the Disciplinary Authority. Such a power which vests with the Appellate Authority departmentally is ordinarily not available to the Court or a Tribunal. The Court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts.(See: Union Territory of Dadra & Nagar Haveli vs. Gulabhia M.Lad (2010) 5 SCC 775.) In exercise of power of judicial review, however, the Court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the Court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.*
>
> *9. When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with doctrine of Wednesbury[4] Rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the Court and the Court is forced to believe that it is totally unreasonable and arbitrary. This principle of proportionality was propounded by Lord Diplock in Council of Civil Service Unions vs. Minister for Civil Service 1985 AC 374 : (1984) 3 WLR 1174, in the following words: (AC p. 410 D-E)*
>
> > *'….Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads of the grounds on which administrative action is*

> *subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality".'*

10. An Imprimatur to the aforesaid principle was accorded by this Court as well, in Ranjit Thakur vs. Union of India (1987) 4 SCC 611. Speaking for the Court, Justice Venkatachaliah (as he then was) emphasizing that "all powers have legal limits" invokes the aforesaid doctrine in the following words: (SCC p.620, para 25)

> *'25....The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review.' "*

11. We are of the opinion that the High Court transgressed its limits of judicial review by itself assuming the role of sitting as departmental appellate authority, which is not permissible in law. The principles discussed above have been summed up and summarised as follows in the case of Lucknow Kshetriya Gramin Bank . v. Rajendra Singh, (2013) 12 SCC 372 (SCC p.382, , para 19)

"19.1. When charge(s) of misconduct is proved in an enquiry, the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities.

19.2. The courts cannot assume the function of disciplinary/ departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority.

19.3 Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of the court.

19.4 Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The court by itself cannot mandate as to what should be the penalty in such a case.

19.5. The only exception to the principle stated in para 19.4 above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct were identical or the co-delinquent was foisted with more serious charges. This would be on the doctrine of equality when it is found that the employee concerned and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of

charge but subsequent conduct as well after the service of charge-sheet in the two cases. If the co-delinquent accepts the charges, indicating remorse with unqualified apology, lesser punishment to him would be justifiable."

14. The legal position has thereafter been reiterated by the Hon'ble Supreme Court in its recent decision in ***Diwan Singh*** *versus* ***Life Insurance Corporation of India and others (2015) 2 SCC 341*** *and it was held as under:-*

"8.As far as argument relating to quantum of punishment, as modified by the High Court, which results in consequential forfeiture of pensionary benefits in view of Rule 23, quoted above, is concerned, we do not find the punishment to be harsh or disproportionate to the guilt, in view of the nature of the charge of which the appellant is found guilty in the present case. Time and again, this Court has consistently held that in such matters no sympathy should be shown by the Courts.

9. In NEKRTC v. H. Amaresh (2006) 6 SCC 187, this Court, in para 18 of the judgment has expressed the views on this point as under: (SCC p.193)

"18. In the instant case, the misappropriation of the funds by the delinquent employee was only Rs 360.95. This Court has considered the punishment that may be awarded to the delinquent employees who misappropriated the funds of the Corporation and the factors to be considered. This Court in a catena of judgments held that the loss of confidence is the primary factor and not the amount of money misappropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of misappropriating the Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment."

10. In Karnataka SRTC v. A.T.Mane (2005) 3 SCC 254 in which unaccounted amount was only Rs.93/- this Court expressed its opinion in para 12 as under: (SCC p.259)

"12. Coming to the question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment; on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. In our opinion, when a person is found guilty of misappropriating the corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal".

11. In Niranjan Hemchandra Sashittal and another v. State of Maharashtra(2013) 4 SCC 642, this Court has made following observations in paragraph 25 of the judgment: (SCC p.654).

"25..... In the present day scenario, corruption has been treated to have the potentiality of corroding the marrows of the economy. There are cases where the amount is small, and in certain cases, it is extremely high. The gravity of the offence in such a case, in our considered opinion, is not to be adjudged on the bedrock of the quantum of bribe. An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenets of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law."

12. In Rajasthan State Road Transport Corporation and another v. Bajrang Lal (2014) 4 SCC 693, this Court, following Municipal Committee, Bahadurgarh v. Krishnan Behari and others (1996) 2 SCC 714, has opined that in cases involving corruption there cannot be any other punishment than dismissal. It has been further held that any sympathy shown in such cases is totally uncalled for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant. In said case (Rajasthan SRTC[6]), the respondent employee was awarded punishment of removal from service. In the present case it is compulsory retirement. Learned counsel for respondents submitted that on earlier occasion, appellant was awarded minor punishment, for his misconduct, regarding defalcation of stamps. And now he is found guilty for the second time."

14. From the material available on record, we find that not only the Disciplinary Authority, but even the appellate authority had considered threadbare the statement of witnesses and only thereafter passed the impugned orders. Moreover in such like cases, it is not the amount misappropriated but the loss of confidence, which is the primary factor to be considered, while awarding punishment.

15. It is then contended by the petitioner that the penalty as imposed is not account of charges I to III having been proved, but for allegations which did not even form the basis of the charges i.e. absence from duty.

16. Even this contention is equally without merit as the learned Tribunal has already dealt with this issue and has rightly concluded that punishment had not been imposed upon the petitioner on this sole ground, rather the whole tenor of the punishment order reflects that in addition to the charges already framed, petitioner in terms of charge No.III had exhibited lack of devotion to his duty as he was in the habit of absenting himself from his job and had unauthorisedly been assigning his work to Sh. Roshan Lal.

In view of the aforesaid discussion, we find no merit in the petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant
Versus
Tarun Chopra .....Respondent

Criminal Appeal No. 20 of 2007
Reserved on: 20.06.2016
Date of judgment: 28th June,2016

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Tata Sumo, which hit the scooter- scooterist and pillion rider suffered injuries- accused was tried and acquitted by the trial Court- held, in appeal that complainant had admitted that the name of the driver of Tata Sumo was not mentioned by him - pillion rider admitted that driver of Tata Sumo had run away from the spot- identity of the accused was not established- view taken by the trial Court was reasonable- appeal dismissed. (Para-14 to 17)

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 Kumar Verma, Addl. AG, with Mr. Pushpinder Singh Jaswal, Deputy Advocate Genera.

For the respondents: Mr. Chandranarayan Singh, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal is maintained by the State of Himachal Pradesh against the judgment of acquittal dated 09.10.2006, passed by learned Chief Judicial Magistrate, Una, District Una, H.P. in case No.30-II-2002, under Sections 279, 337 and 338 of Indian Penal Code.

2. Briefly stating the facts giving rise to the present appeal are that on 22.10.2001 at about 9.00 AM, complainant, Rajesh Kumar, alongwith his sister, Monika was coming to Jhalera on his Scooter No.HP-20A-1905 from his house and when they reached near Raisari bridge, a Tata Sumo bearing registration No.DL-ICE 4867 came with high speed from Una side and after coming to the wrong side, struck against their Scooter causing injuries to Rajesh and Monika. The injured were brought to the hospital where Rajesh Kumar gave statement under Section 154 Cr.P.C. The police visited the spot, took in possession Tata Sumo and Scooter and got those vehicles mechanically examined, took photographs of the spot and, after completion of investigations, filed challan against the accused under Sections 279, 337 and 338 IPC.

3. I have heard learned Additional Advocate General for the State-appellant and Shri Chandranarayan Singh, learned counsel for the respondent. Learned Additional Advocate General has vehemently argued that the Court below has arrived at the findings on surmises and conjectures and without appreciating the evidence in its true perspective.

4. Shri Chandranarayan Singh, learned counsel for the accused, on the other hand has argued that the prosecution has miserably failed to establish the case against respondent and none of the witnesses could identify the accused and otherwise also, the prosecution story is full of doubts and appeal be dismissed.

5. To appreciate the arguments of learned Additional Advocate General and learned counsel for the respondent, I have gone through the record in detail.

6. PW1 Dr. S. Rana, examined Monika, daughter of Jagdish Ram, and found injuries on her person and she was referred for X-Ray and after X-Ray, fracture was found and injuries No.1 & 2 were found to be grievous as per MLC Ex.PW1/A. On the same day, she had also examined Rajesh Kumar and found injuries on his person and after receiving report from the C.M.C., Chandigarh, she found fracture and injury No.1 was found to be grievous and others were simple and she had issued MLC Ex.PW1/B, which is on record.

7. PW2 Sanjeev Kumar, Radiographer conducted X-ray of Monika, which are Ex.P1 and Ex.P2 respectively and that of Rajesh Kumar is Ex.P3 and handed-over the same to the police. In the presence of PW6 Rajinder Kumar, the police took into possession Scooter and Tata Sumo alongwith documents on record vide memo Ex.PW6/A and Ex. PW6/B. It has further been alleged that in the presence of PW7 Bhupinder Singh, the accused had produced driving licence, which the police took into possession on 23.10.2001, which is Ex.PW7/A. PW8, HC Ved Parkash, registered FIR Ex.PW8/B, on the basis of statement of Rajesh Kumar Ex.PW8/A.

8. PW3, Rajesh Kumar, has stated that on 22.10.2001, he along with his sister were going on Scooter No.HP-20A-1905 towards Jhalera. He was driving the scooter. At about 9.00 AM, near Raisari Bridge, a Tata Sumo No.DL ICE-4867 came with very high speed and after coming to the wrong side, struck with his scooter. His sister fell down from the bridge. He also sustained grievous injuries on right leg. His sister also got fracture of her arm, hip and at that

time Tata Sumo was being driven by the accused. His father Jagdish and one Rakesh Kumar were coming on Scooter behind them and took them to the hospital and his statement Ex.PW3/A was recorded by police the in the hospital. He was also referred for X- Ray. He produced his driving licence to the police, which was taken into possession by the police vide memo Ex.PW2/B. In cross-examination, he has stated that his father reached at the spot after 5-10 minutes of the accident. It has also been admitted that he had not mentioned name of the accused in his statement. It is also admitted that accused was not known to him prior to the accident. The driver of Tata Sumo ran away from the spot. It has also been admitted that after the occurrence of the accident, he saw the accused for the first time in the Court.

9. PW4 Monika, who was the pillion rider of the Scooter of Rajesh Kumar had fully supported statement of PW3 stating that the Scooter was stopped by her brother and Tata Sumo struck against that Scooter and they sustained grievous injuries. In cross-examination, she has stated that she can recognize the accused on seeing his face. However, no identification parade was carried-out by the police. The accused ran away after the accident. She has also seen the accused for the first time in the Court after the accident.

10. PW5 Rakesh Kumar has admitted that they reached on the spot and brought the injured to the hospital, as the Scooter, which was being driven by Rajesh Kumar had been hit by Tata Sumo. The accused ran away from the spot. However, he admitted that the police had not recorded his statement. They reached on the spot after five minutes of the accident and when they reached the spot, the accident had taken place and nobody was present in the Tata Sumo.

11. PW10 Shakti Chand had mechanically examined the Scooter and Tata Sumo on 22.10.2001 and did not notice any defect,, as per the reports Ex.PW10/A and Ex.PW10/B on record.

12. PW11 Karnail Singh got the photographs of the spot clicked and positives of which are Ex.PW11/A to Ex.PW11/C and negative Ex.PW11/D to Ex.PW11/F.

13. PW12 HCSubhash Chand, had visited the spot and prepared the site map Ex.PW12/C, got clicked photographs of the spot clicked, took into possession the vehicles and got them mechanically examined.

14. From the entire prosecution evidence, it is quite clear that prosecution has, in fact, failed to establish the identity of the accused. It is also admitted by the complainant Rajesh that in his statement recorded under Section 154 Cr.P.C., he did not mention name of the driver of the Tata Sumo. It is also admitted by him and Monika, that after the accident, the accused ran away from the spot. The evidence discussed above is so shabby and vague because the identity of the accused could not be established as driver of Sumo at that time. The prosecution has, in fact, failed to prove identity of the accused by leading cogent and satisfactory evidence. Although the accused was not known to the complainant and the complainant was injured also, yet prosecution has not conducted identification parade for establishing identity of the accused.

15. 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.

16. 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.

17. So, when the identity of the accused is not established, the findings of the Court below cannot be said to be perverse and against the law, as the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

18. In these circumstances, I find that the trial Court had rightly dealt with the evidence and found the same to be not worthy of credence. Thus, I find no merit and substance to interfere with the well reasoned judgment, passed by learned Chief Judicial Magistrate, Una, and the appeal is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Ajay Kumar @ Aju ....Petitioner.
Versus
State of HP ... Respondent.

Cr.R. No. 144 of 2009.
Reserved on 1.6.2016.
Decided on: 29.06.2016.

Indian Penal Code, 1860- Section 452, 427, 325 and 506- Accused placed an order for chilly chicken and went inside the kitchen – query was made from the accused as to what he wanted- accused got infuriated and inflicted injuries to D and R- accused was tried and acquitted by the trial Court- an appeal was preferred, which was dismissed- held, in appeal that evidence of the prosecution witnesses remained unshattered- accused had entered inside the kitchen- he was customer and had no right to enter into the kitchen of the hotel- accused had given beatings to D and R- merely because of the fact that there was no medical evidence, it cannot be said that hurt was not caused- Courts below had taken a reasonable view- revision dismissed. (Para-10 to 22)

Code of Criminal Procedure, 1973- Section 360- Section 360 is not applicable in the State of Himachal Pradesh as provisions of Probation of Offenders Act have been brought into force. (Para-23 to 25)

Cases referred:
Janta Dal Vs. H.S. Chowdhury & others, 1992 (4) SCC 305
State of Himachal Pradesh Vs. Lat Singh and others, 1990 CRI.L.J. 723
Chhanni Vs. State of U.P. (2006) 5 Supreme Court Cases 396
Daljit Singh and others Vs. State of Punjab (2006)6 Supreme Court Cases 159
Gulzar Vs. State of M.P. (2007) 1 Supreme Court Cases 619

For the petitioner. : Mr. Anup Chitkara, Advocate.
For respondent. : Mr. V.S. Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present petition, the petitioner has challenged judgment dated 27.8.2009 passed by the Court of learned Additional Sessions Judge, Fast Track Court, Hamirpur, in Cr. Appeal No. 6 of 2008 vide which judgment, the learned Appellate Court has dismissed the appeal of the accused and upheld the judgment of conviction and sentence passed by the Court of learned CJM, Hamirpur in Cr. Case No. 8-1 of 2006/72-II of 2006 dated 22.2.2008 under Sections 452, 427, 325 and 506 IPC.

2. The case of the prosecution was that PW1-Rakesh Kumar was working as a receptionist in Hotel Hill Side. PW2-Durga Dass was working as cook. Subhash Mahanti was working as House Keeper. Ram Chand was working as Masalchi and Sanjeev Sharma was working as Waiter in the said Hotel. On 31.8.2005 at about 8:30 p.m., accused Aju placed an

order for chilli chicken with Sanjeev Sharma and thereafter went into the kitchen and enquired from Ram Chand as to who else was present in the kitchen. Onkar Chand went to bathroom. Ram Chand asked him as to whom did he want. This infuriated Aju and he picked up jug and splashed water in the jug on the face of Subhash and also slapped him. Durga Dass came out. Aju inflicted 2-3 blows on the head of Durga Dass by means of steel jug and entered inside the bar room. He threw and broke one bottle bearing mark Bagpiper on the floor. Efforts were made to pacify him (accused), however, he entered the kitchen and gave beatings to Ram Chand. When efforts were made to contact police, accused ran away. On the basis of telephonic intimation, entry was recorded in Daily Diary vide Ext. PW3/A. HC-Pardeep Kumar (PW5) visited the spot and recorded statement of Rakesh Kumar, Ext. PW5/A on the basis of which, FIR Ext.PW5/B was registered. After completion of the investigation, challan was prepared and presented before the Court. As a prima facie case was made out, accordingly, accused was charged for the offences punishable under Sections 451, 323, 427 and 506 IPC. The accused pleaded not guilty and claimed to be tried.

3. In order to substantiate its case, the prosecution, in all, examined five witnesses. One witness was examined by the defence.

4. On the basis of material placed on record by prosecution, the learned Trial Court came to the conclusion that prosecution had succeeded in proving its case beyond reasonable doubt against accused for offences punishable under Sections 451, 323, 427 and 506 IPC and accordingly it convicted the accused for the offences under said Sections. The accused was sentenced to undergo simple imprisonment for a period of one year and to pay fine of Rs. 3,000/- and in default to undergo simple imprisonment for a period of three months for the offence punishable under Section 451 IPC. He was further sentenced to undergo simple imprisonment for a period of six months and to pay fine of Rs. 1,000/- and in default to undergo simple imprisonment for a period of one month for the offence punishable under Section 323 IPC. He was also sentenced to undergo simple imprisonment for a period of one year and to pay fine of Rs. 2,000/- and in default to undergo simple imprisonment for a period of two months for offence punishable under Section 427 IPC, and to undergo simple imprisonment for a period of one year and to pay fine of Rs. 2,000/- and in default to undergo simple imprisonment for a period of two months for offence punishable under Section 506 IPC. All the substantive sentences of imprisonment were ordered to run concurrently.

5. Feeling aggrieved by the said judgment passed by the learned Trial Court accused preferred an appeal before the learned Appellate Court. The learned Appellate Court vide its judgment dated 27.8.2009 upheld the judgment of conviction passed by the learned Trial Court as well as the sentences passed by the learned Trial Court and dismissed the appeal filed by the accused. The leaned Appellate Court also refused the contention of the accused to give him benefit of Probation of Offenders Act.

6. Feeling aggrieved by the said judgments passed by learned courts below, the accused has filed the present revision petition.

7. Learned counsel for the petitioner argued that the judgments passed by both the learned Courts below were perverse and not sustainable in law. According to him, the conclusions which have been arrived at by the learned Trial Court and which were upheld by the learned Appellate Court were not borne out from the records of the case. According to him, both the learned Courts below erred in convicting the accused. He submitted that both the learned Courts below erred in not appreciating that the petitioner had not committed any offence punishable under Section 427 of the IPC, as there was no proof that the value of the bottle allegedly broken by accused was more than Rs. 50/-. He further argued that similarly no offence was made against the petitioner under Section 452 IPC because the place where the alleged incident took place was a public place. It was further submitted that there was no medical evidence placed on record by the prosecution to substantiate that the petitioner had committed offence under Section 323 IPC nor there was corroboration by the prosecution to the effect that the petitioner had

committed an offence under Section 506 IPC. The learned counsel for the petitioner also argued that the learned Trial Court had erred in not granting the benefit of Section 360 of the Cr.P.C. to the petitioner and the judgment passed by the learned Courts below were thus liable to be set aside on this ground alone. It was also contended that both the learned Courts below had erred in not appreciating the provisions of Section 95 of the IPC.

8. On the other hand, learned Addl. Advocate General argued that the prosecution had successfully proved on record beyond reasonable doubt that the petitioner was guilty of commission of offences for which he has been convicted. He also argued that the contention being raised on behalf of the petitioner with regard to provisions of Section 360 Cr. P.C. was totally misplaced and further the provisions of Section 95 of IPC had no applicability in the facts of the case.

9. I have heard learned counsel for the parties and also gone through the records of the case as wells as the judgments passed by the learned courts below.

10. In my considered view there is neither any infirmity nor any perversity with the judgments passed by the learned Courts below. The learned Trial Court has rightly convicted the accused for the commission of offences because all the charges leveled against him were duly substantiated by the prosecution on the basis of material placed on record.

11. It has come in the statement of PW4 that the value of bottle which was broken by the accused and which was only partly consumed was Rs. 276/-. The testimony of the said witness to this effect has not been impinged by the defence. Therefore, it cannot be said that the findings returned by the learned Courts below to the effect that the petitioner had committed an offence punishable under Section 427 IPC are perverse and are not borne out from the record.

12. It has come on record that the accused had entered the premises of the kitchen in Hotel Hill Side. The evidence placed on record in this regard by the prosecution has also remained unshattered. It is apparent that in his capacity as a customer the accused had no right to enter the kitchen of the Hotel and accordingly in my considered view he has been rightly convicted for an offence punishable under Section 451 IPC.

13. In the present case, it has been established on record by the prosecution that accused after trespassing hit Durga Dass with a jug and before that he picked up a jug filled with water and threw the same on the face of Subhash and also slapped him. He also gave beatings to Ram Chand. The prosecution witnesses have duly corroborated the same. Therefore, it cannot be said that the learned Courts below have erred in convicting the accused for commission of offence punishable under Section 323 IPC.

14. Section 319 IPC defines 'hurt' as under:

"319.Hurt.-Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

15. Section 321 IPC defines 'voluntarily causing hurt' as under:-

"321.Voluntarily causing hurt.-Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said 'voluntarily to cause hurt'.

16. Section 322 IPC provides as under:-

"322.Voluntarily causing grievous hurt.-Whoever voluntarily cause hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said 'voluntarily to cause grievous hurt.'.

Explanation.- A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind."

17. In my considered view, the argument of the learned counsel for the petitioner that in the absence of any medical evidence, there could not have been any conviction under Section 323 IPC deserves outright rejection because there is no mandate of law that there can't be any conviction under Section 323 IPC in the absence of medical evidence.

18. Similarly, testimony of PW1 clearly proves that the offence of criminal intimidation was committed by the petitioner. It has come in the statement of said witness that accused had given abuses and warnings. This deposition of PW1 has not been shattered by the defence. Therefore, in my view the learned Trial Court has rightly convicted the accused for commission of offence punishable under Section 506 IPC and the learned Appellate Court has rightly upheld the said conviction.

19. Learned counsel for the petitioner has not been able to draw the attention of this Court towards any major contradictions or improvements in the statements of prosecution witnesses from which it can be inferred that the findings returned by the learned Courts below are either perverse or not borne out from the material on record.

20. It has been held by the Hon'ble Supreme Court in **Janta Dal** Vs. H**.S. Chowdhury & others**, 1992 (4) SCC 305 that 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.

21. 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. I do not find any manifest illegality with the judgments passed by the learned Courts below in the present case.

22. As far as the applicability of provision of Section 95 IPC is concerned, in my considered view the provision of Section 95 of IPC do not have any applicability in the facts and circumstances of the present case because this is not a case where it can be said that no person of ordinary sense and temper would complain of such harm as has been inflicted by accused.

23. Now, I will deal with the contention of learned counsel for the petitioner with regard to applicability of Section 360 Cr.P.C. The argument of learned counsel for the petitioner that learned Courts below have failed to appreciate the provision of Section 360 Cr.P.C. also deserves outright rejection.

24. This is for the reason that it has been held by Full Bench of this Court in ***State of Himachal Pradesh*** Vs. **Lat Singh and others**, 1990 CRI.L.J. 723 that the provisions of Section 360 of the Criminal Procedure Code (Cr.P.C.) are inapplicable to the State of Himachal Pradesh, as the provisions of Probation of Offenders Act have been brought into force in the State.

25. In **Chhanni Vs. State of U.P**. (2006) 5 Supreme Court Cases 396 this view has been reiterated by Hon'ble Supreme Court in **Daljit Singh and others Vs. State of Punjab** (2006)6 Supreme Court Cases 159 which has been further reiterated by the Hon'ble Supreme Court of India in **Gulzar Vs. State of M.P**. (2007) 1 Supreme Court Cases 619 that when the provisions of Probation of Offenders Act are applicable, the employment of Section 360 of Cr.P.C. is not to be made.

26. Further as far as the grant of benefit of Probation of Offenders Act is concerned, the learned Appellate Court has held by recording reasons that the present petitioner does not deserves benefit of probation and leniency and further the sentences imposed against him by the learned Trial Court were appropriate. This court concurs with the findings so arrived at by the learned courts below.

Accordingly, in my considered view there is neither any perversity nor any infirmity with the judgments passed by the learned Courts below and the findings returned by the said Courts are duly substantiated from the records of the case. In this view of the matter, the present revision petition is dismissed being devoid of any merit.

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

Miss Anjana Mahindru D/o late Kundan Lal. ....Appellant/Defendant.

Vs.

Sh Suraj Parkash son of late Budhi Singh ....Respondent/Plaintiff.

RSA No.208 of 2006
Judgment reserved on:17.5.2016
Date of Judgment: June 29,2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit seeking injunction pleading that ground floor of the house of the plaintiff and other co-sharers is being used as entrance- wall of the houses of the plaintiff and defendant is joint- defendant intended to demolish her house to raise construction- it was agreed that in case of damage to joint wall, damaged portion will be reconstructed- wall fell down but was not reconstructed- defendant denied the claim of the plaintiff and filed a counter-claim pleading that plaintiff had demolished the portion of the joint wall- defendant was not permitted to carry out renovation due to which defendant suffered loss of Rs. 60,000/-- trial Court dismissed the suit and the counter claim- appeal and cross-objection were preferred, which were dismissed- held, in second appeal that written agreement was executed between the parties relating to re-construction of the joint wall- defendant had admitted the liability to reconstruct the wall- hence, she was not entitled for any amount- trial Court had rightly appreciated the evidence- appeal dismissed. (Para-11 to 13)

For the appellant: Mr.C.N.Singh, Advocate.
For respondent: Mr.G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Judgment: Present appeal is filed under section 100 of Code of Civil Procedure 1908 against the judgment and decree dated 17.1.2006 whereby learned Presiding Officer Fast Track Court Mandi HP dismissed the appeal as well as cross objections and affirmed the judgment and decree passed by learned Trial Court in civil suit No. 35/2000 title Suraj Parkash Vs. Miss Anjana Mahindru decided on 24.5.2003.

Brief facts of the case:

2. Plaintiff Suraj Parkash filed suit for permanent prohibitory and mandatory injunction pleaded therein that residential house of plaintiff and other co-sharers is situated upon land comprising khata No. 281 min/275 khatauni No. 504 min khasra No. 2213 measuring 9-90 Sq. meters situated in mohalla lower Samkhetar No. HB 366/3, Mandi Town as per jamabandi for the year 1994-95. It is pleaded that ground floor of the house of plaintiff and

other co-sharers is used as entrance by plaintiff and other co-sharers. It is further pleaded that a portion of the house of defendant is situated over khasra No.2214. It is further pleaded that wall of the house of plaintiff and defendant is joint wall which is two feet in width. It is further pleaded that defendant intends to demolish her house and intends to raise new construction. It is further pleaded that defendant entered into an agreement with plaintiff on 28.4.2000 that if during the process of demolition of portion of joint wall, entire wall would falls down then defendant would simultaneously construct entire fallen portion of joint wall at her own costs and expenses and would also pay damage to the plaintiff. It is further pleaded that defendant engaged labourers for the demolition of her house including joint wall. It is further pleaded that during the process of demolition of half portion of joint wall entire joint wall fallen. It is further pleaded that defendant be directed to construct entire joint wall at her own costs. Prayer for decree of suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendant pleaded therein that plaintiff persist defendant and her two sisters to sell their entire property which defendant and her sisters inherited from their father but defendant refused to do so. It is further pleaded that defendant qualified her law course and started practice in court and defendant intends to renovate her parental house which was not in good condition. It is further pleaded that when defendant started renovation work plaintiff resisted renovation work on the pretext of joint wall. It is further pleaded that plaintiff malafide demolished a portion of joint wall. It is further pleaded that plaintiff and his family members did not allow defendant to raise renovation work. It is further pleaded that although defendant sustained loss to the tune of Rs.60000/- (Sixty thousand) for construction of joint wall but defendant filed counter claim to the tune of Rs.30000/- (Thirty thousand) for reconstruction of joint wall as defendant is not in a position to pay court fee. Prayer for dismissal of suit sought.

4. As per pleadings of parties learned Trial Court framed following issues on dated 17.8.2001 in civil suit.

1. Whether plaintiff is entitled to relief of injunction as prayed? ...OPP

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

3. Whether defendant is entitled to damages by way of counter claim, if so to what extent?. ...OPD.

5. Relief.

5. Learned Trial Court decided issue Nos. 1 to 3 in negative. Learned Trial Court dismissed the suit of plaintiff. Learned Trial Court also dismissed counter claim filed by defendant.

6. Feeling aggrieved against the judgment and decree passed by learned Trial Court Ms.Anjana Mahindru filed Civil appeal No. 100/2003/114/2005 and Sh Suraj Parkash also filed cross objection No. 2/2003/4/2005. Learned First Appellate Court dismissed the appeal as well as cross objections.

7. Feeling aggrieved against the judgment and decree passed by learned First Appellate Court Ms. Anjana Mahindru filed present RSA. Following substantial question of law framed on 21.11.2006.

Whether finding of two courts below regarding plea of appellant-defendant for award of damages by way of counter claim is perverse and is not based upon correct appreciation of evidence?.

8. Court heard learned Advocate appearing on behalf of the parties at length and also perused entire record carefully.

9. Findings upon point No.1 of substantial question of law with reasons.

9.1 PW1 Suraj Parkash has stated that his house is adjoining to the house of defendant. He has stated that copy of jamabandi for the year 1994-95 is Ext PW1/A. He has stated that between the house of plaintiff and defendant there is common passage and all co-sharers are using the passage. He has stated that there is common wall inter se parties. He has stated that defendant demolished her old house and started construction of new house including common wall of parties. He has stated that when defendant started new construction work of common wall then defendant executed agreement Ext PW1/B with plaintiff. He has stated that defendant did not comply with the terms and conditions of agreement Ext PW1/B relating to reconstruction of common wall. He has stated that photographs of the house are mark-1 to mark-3. He has stated that he had sustained damages due to new construction of defendant. In cross examination he has stated that he does not know that defendant has filed criminal complaint against him and his family members. He has stated that police officials have visited the spot. He has denied suggestion that common wall was demolished by him by way of hammer. He has denied suggestion that he has filed present civil suit in order to pressurize defendant to alienate her share in the suit land. He has stated that defendant has no brother and she has two other sisters. He has stated that revenue department did not visit at the spot.

9.2 PW2 Sunil Kumar has stated that parties are familiar to him and he has also seen suit land. He has stated that defendant started new construction work of new house after demolition of old house and common joint wall. He has stated that compromise Ext PW1/B was executed inter se parties and he has signed the agreement as marginal witness. He has stated that defendant has constructed new house up to three stories. He has stated that defendant has raised new joint wall with bricks. He has stated that defendant Anjana Mahindru did not stop her new construction work.

9.3 DW1 Jiwa Nand has stated that parties are known to him. He has stated that he performed work of construction of new joint wall. He has stated that plaintiff insisted to raise new joint wall with bricks and cement. He has stated that thereafter defendant constructed new joint wall with bricks and cement. He has stated that five pillars were also constructed. He has stated that Bihari labourer was also employed with him. He has stated that defendant paid to him Rs.200/- per day and labourer was paid Rs. 180/- per day by defendant for construction of new joint wall.

9.4 DW2 Smt. Anjana Mahindru has stated that her father, mother and brother have died and she has two sisters. She has stated that plaintiff pressurized her to alienate suit land but she declined the request of plaintiff. She has stated that she started practice in law after leaving service. She has stated that when she started new construction work of her house and joint wall then plaintiff harassed her. She has stated that written agreement dated 28.4.2000 Ext PW1/B was executed inter se parties. She has stated that newly constructed joint wall was damaged by plaintiff. She has stated that she constructed new joint wall twice but plaintiff damaged newly constructed joint wall twice. She has stated that plaintiff requested her to reconstruct joint wall with bricks and cement. She has denied suggestion that wall is joint inter se parties. She has denied suggestion that area of 12 inches joint wall belongs to plaintiff and area of 12 inches joint wall belongs to defendant. She has denied suggestion that she has filed counter claim in order to pressurize plaintiff to withdraw civil suit.

10. Following documentaries evidence filed by parties. (1) Ext PW1/B is the agreement dated 28.4.2000 executed inter se parties relating to reconstruction of joint wall. (2) Ext PW1/A is the copy of jamabandi for the year 1994-95 relating to suit land. (3) Mark 1 to mark 3 are the photographs of house.

11. In the present case it is proved on record that written agreement Ext PW1/B placed on record was executed inter se parties on dated 28.4.2000 relating to reconstruction of joint wall. Court has carefully perused written agreement Ext PW1/B placed on record relating to reconstruction of joint wall. Following are the terms and conditions of written agreement Ext PW1/B placed on record. (1) That common wall is 24 inch in width and both parties are using

common wall. (2) That Anjana Mahindru has demolished common wall to the extent of 12 inches. (3) That if joint wall which is situated towards plaintiff Suraj Parkash side would demolish during the new construction process of joint wall then Anjana Mahindru would be responsible for re-construction of entire joint wall. (4) That if any damage would cause to the rooms or house of plaintiff during reconstruction process then Anjana Mahindru would be liable to pay damages to plaintiff. (4) That Suraj Parkash plaintiff would not use pillars and beams owned by Anjana Mahindru. (5) That if Suraj Parkash would cause any damage to the pillars and beams of defendant then Suraj Parkash would be liable to compensate Anjana Mahindru.

12. Ms. Anjana Mahindru has filed counter claim to the tune of Rs.30000/- (Thirty thousand) in the present case on the ground that Anjana Mahindru had re-constructed the joint wall after payment of Rs. 30,000/- (Thirty thousand) to Monarch Design and Construction Firm. In agreement Ext PW1/B dated 28.4.2000 Ms. Anjana Mahindru has herself admitted the liability that she would re-construct entire joint wall if demolished during the process of reconstruction of some portion of joint wall. It is proved on record that some portion of joint wall was demolished by Ms. Anjana Mahindru herself voluntarily at the first instance. It is well settled law that if some portion of joint wall would be demolished at the first instance then automatically it will create counter impact upon other portions of joint wall. There is no recital in agreement Ext PW1/B placed on record that what maximum amount would be spent by Anjana Mahindru in the re-construction of joint wall. In view of the fact that Anjana Mahindru herself took liability of re-construction of joint wall it is not expedient in the ends of justice to grant counter claim to appellant amounting to Rs.30000/- (Thirty thousand) for reconstruction of joint wall. It is well settled law that party cannot be allowed to approbate and reprobate at the same time. See AIR 1993 Apex Court 352 title R.N.Gosain Vs. Yashpal Dhir. No party can accept and reject the same document. A person cannot say at one time that a document is valid and thereby obtain some benefit and then turn round and say same is void. It is held that judgment and decree passed by learned Trial Court and affirmed by learned First Appellate Court are not perverse. It is held that judgment and decree passed by learned Trial Court are based upon oral as well as documentaries evidence adduced by parties. In view of above stated facts point No. 1 of substantial question of law is answered in negative.

Relief.

13. In view of findings on point No.1 above RSA is dismissed. Parties are left to bear their own costs. Agreement Ext PW1/B dated 28.4.2000 placed on record executed inter se parties will form part and parcel of decree sheet. File of learned Trial Court and file of learned First Appellate Court along with certified copy of judgment and decree sheet be sent back forthwith. Learned Registrar Judicial will prepare decree sheet in accordance with law forthwith. RSA No. 208 of 2006 is disposed of. Pending applications if any also stands disposed of.

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

Indira Mahindra .....Petitioner.

Versus

Sh. Ashok Pal Sen and others. .....Respondents.

CMPMO No. 251 of 2016
Date of decision: 29th June, 2016

Code of Civil Procedure, 1908- Order 26 Rule 1- Plaintiff filed an application seeking examination of her General Power of Attorney in her presence by a Local Commissioner- application was dismissed by the trial Court- held, that no such relief can be sought or granted- General Power of Attorney is son of the plaintiff and she must have faith in him, if plaintiff does not have faith on the General Power of Attorney then she should examine herself- petition dismissed. (Para-2)

For the petitioner: Ms. Seema K. Guleria, Advocate.
For the respondents: *Nemo*.

The following judgment of the Court was delivered:

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

Challenge herein is to an order passed in an application under Order 26 Rule 1 of the Code of Civil Procedure registered as CMA No. (C.S. No. 5-1 of 2016/13) 88-6 of 2016, whereby the prayer made by the applicant/plaintiff qua examination of her General Power of Attorney in her presence by a Local Commissioner has been declined and the application dismissed.

2. True it is that the other party has not objected to the prayer made by the applicant/plaintiff for appointment of Local Commissioner, however, it cannot be said that the Court below has dismissed the application illegally for the reason that the plaintiff is pursuing the suit through her son and General Power of Attorney Mr. Marthand Singh Mahindra. It is not her case that she wants to get her own statement recorded. The only claim, however, is that the statement of her son and attorney Mr. Marthand Singh Mahindra may be recorded by a Local Commissioner in her presence. No such relief either can be sought or granted, because in that event the concept of appointment of General Power of Attorney and pursuing the matters through them is likely to be adversely effected. The General Power of Attorney of the plaintiff is her own son, therefore, she must have faith in him. Learned counsel submits that her General Power of Attorney besides pursuing the suit is also authorized to do certain other acts and deeds on her behalf. In case there is loss of faith, she is at liberty to pursue the suit at her own and to appear herself in the witness box and make statement. The findings that the Court should not act on the desire of a party to a *lis* are absolutely justifiable, hence legally sustainable. Therefore, I find no merit in the present petition and with the above observations the same stands dismissed. Pending application(s), if any, shall also stand disposed of.

An authenticated copy of this judgment be sent to learned trial Judge for being taken on record.

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

Jay Pee Himachal Cement Project .....Revisionist.
Versus
Daya Ram s/o Sh. Najru and others ....Non-revisionists

Civil Revision No. 86/2008
Reserved on: 18th May, 2016
Date of order: 29th June, 2016

Code of Civil Procedure, 1908- Order 23 Rule 3- Reference petition was filed- it was pleaded that during the pendency of the Reference Petition, matter was amicably settled between the parties and reference petition be disposed of in accordance with the settlement- application was dismissed by the Court- aggrieved from the order, present revision was filed- held, that similar applications were dismissed in other cases - revisions were preferred in which orders were passed to decide the applications afresh and to record the satisfaction about the execution of the agreement after recording evidence – hence, similar order passed in the present petition.

(Para- 5 and 6)

For revisionist : Mr. S. M. Goel, Advocate
For non-revisionists No.1 to 3: Mr. Virender Thakur, Advocate
For non-revisionists No.4 & 5: Mr. M.L.Chauhan, Addl.A.G. with Mr. R. K. Sharma, Dy.A.G.

The following order of the Court was delivered:

P. S. Rana, J.

Order:

Present civil revision is filed against the order dated 21.02.2008 passed by learned Additional District Judge Solan (H.P.) in miscellaneous application No.53-S/6 of 2008 filed in reference petition No.11-S/4 of 2006 title Daya Ram and others vs. M/s. Jai Parkash Associates Ltd. and others.

Brief facts of the case:

2. Land Reference Petition No.11-S/4 of 2006 title Daya Ram and others vs. M/s. Jai Parkash Associates Ltd. and others is pending adjudication in the Court of learned Additional District Judge Solan (H.P.). Vide notification dated 11.04.2015 under Section 4 of Land Acquisition Act land was acquired for establishment of Jay Pee Himachal Cement Project. In pursuance to notification award No.5/2005 was passed on 28.01.2006 by Land Acquisition Collector-cum-Sub Divisional Officer (Civil) Arki Distt. Solan (H.P.). Learned Collector granted compensation amount at the rate of Rs.2,10,000/- (Rupee two lac ten thousand) per bigha for cultivated land. Learned Collector granted compensation amount at the rate of Rs.40,369/- (Rupee forty thousand three hundred sixty nine) per bigha for uncultivated land. Feeling aggrieved against award passed by learned Collector S/Sh. Daya Ram s/o Sh. Narju Ram, Ram Lal s/o Sh. Hiru and Roshni Devi w/o Sh. Hiru filed reference petition under Section 18 of the Act. It is pleaded that after filing of reference petition matter was amicably settled inter se parties with regard to compensation amount by way of out of Court settlement. It is further pleaded that by way of out of Court settlement Jay Pee Himachal Cement Project agreed to pay enhanced compensation amount at the rate of Rs.4,25,000/- (Rupee four lac twenty five thousand) per bigha qua cultivated land and at the rate of Rs.1,25,000/- (Rupee one lac twenty five thousand) per bigha qua uncultivated land. It is pleaded that thereafter application under Order XXIII Rule 3 CPC was filed before learned Additional District Judge Solan (H.P.) for disposal of reference petition as per terms and conditions of compromise but same was dismissed by learned Additional District Judge Solan (H.P.) on dated 21.02.2008. Feeling aggrieved against the order Jay Pee Himachal Cement Project filed present revision petition.

3. Court heard learned Advocate appearing on behalf of revisionist and learned Advocates appearing on behalf of non-revisionists. Court also perused the entire record carefully.

4. Following points arise for determination :

(1) Whether civil revision petition is liable to be accepted as mentioned in memorandum of grounds of revision petition?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. It is proved on record that applications of similar nature were also rejected and thereafter CMPMO No.511 of 2009, CMPMO No.512 of 2009, CMPMO No.515 of 2009, Civil Revision No.77 of2008 to Civil Revision No.79 of 2008, Civil Revision No.81 of 2008 to Civil Revision No.85 of 2008, Civil Revision No.87 of 2008, Civil Revision No.88 of 2008, Civil Revision No.91 of 2008 to Civil Revision No.100 of 2008, Civil Revision No.102 of 2008 to Civil Revision No.104 of 2008 were filed before Hon'ble High Court.

6. It is proved on record that thereafter Hon'ble High Court on 16.07.2014 passed order on similar applications and quash the order relating to dismissal of applications and passed the following directions: (1) That Court shall decide the applications afresh in accordance with law. (2) That Court shall decide the issue, record its satisfaction about the execution if any of the agreement/compromise having entered into between the parties and will also record its legality and validity. (3) That Court would afford adequate opportunity for leading evidence if so required

by the parties. (4) That Court would decide the applications and the main petition itself expeditiously. It is expedient in the ends of justice to pass similar order in present civil revision petition in order to avoid conflicting orders. Point No.1 is decided accordingly.

Point No.2 (Final Order)

7. In order to avoid conflicting orders it is held that order passed by Hon'ble High Court in petitions cited supra also *mutatis mutandis* would apply to present civil revision No.86 of 2008. In view of above stated facts order dated 21.02.2008 passed by Additional District Judge Solan (H.P.) is set-aside with following directions: (1) That Court shall decide the application under Order XXIII Rule 3 CPC afresh in accordance with law. (2) That Court shall decide the issue and would record its satisfaction about the execution if any of the compromise having entered into between the parties and will also record its legality and validity. (3) That Court would afford adequate opportunity for leading evidence if so required by the parties. (4) That Court would decide the application under Order XXIII Rule 3 CPC and main petition itself expeditiously within three months from today as reference petition is pending since 2006 and requires expeditious disposal. (5) Parties are directed to appear before learned Additional District Judge Solan (H.P.) on 27.07.2016. File of learned Additional District Judge Solan (H.P.) alongwith certified copy of order be sent back forthwith for compliance. Civil Revision Petition No. 86/2008 is disposed of. Pending application(s) if any also disposed of.

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

Neeraj Sharma .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 418 of 2006.
Reserved on: June 28, 2016.
Decided on: June 29, 2016.

Indian Penal Code, 1860- Section 489-B and 489-C read with Section 34- Accused purchased three handkerchiefs from the complainant and handed over a currency note of Rs. 500/-- note was found to be fake- matter was reported to police- it was found that accused had handed over one currency note to another shopkeeper- accused was apprehended- search of the accused was conducted during which three fake currency notes were recovered- accused were tried and convicted by the trial Court- held, in appeal that currency notes were sent to FSL and were found to be fake- accused were identified by shopkeepers- shopkeepers had specifically stated that accused had visited their shops and had handed over fake currency notes- statements of witnesses were corroborated by the statement of the Investigating Officer- non explanation of the source of the currency note is a circumstance against the accused- appeal dismissed.

(Para-16 to 25)

Cases referred:

Raghubir Singh vs. State of Delhi, 2013 Cri. L.J. 3032,
Re, Satyanarayana, AIR 1961 AP 213
Ponnuswamy vs. State, 1995 Cri. L.J. 2658
Vijayan alias Kochomon vs. State of Kerala, 2002 Cri. L.J. 187
K. Hasim vs. State of Tamil Nadu, 2005 Cri. L.J. 143,

For the appellant: Mr. S.D.Vasudeva, Advocate.
For the respondent: Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23.11.2006, rendered by the learned Sessions Judge, Kangra at Dharamshala, H.P., in Sessions Trial No. 36 of 2006, Sessions Case No. 21-G/VII-2005, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 489-B & 489-C IPC read with Section 34 IPC was convicted and sentenced to suffer rigorous imprisonment for a period of one year and to pay fine of Rs. 10,000/- under Section 489-B read with Section 34 IPC and further to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 10,000/- under Section 489-C read with Section 34 IPC. In default of payment of fine, the accused was ordered to undergo further simple imprisonment for a period of two months each on both counts. Both the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that PW-1 Kishori Lal made statement under Section 154 Cr.P.C. vide Ext. PW-1/A to the effect that on 10.9.2004 at 1:30 PM, two boys aged about 20-25 years came to his shop. They purchased three handkerchiefs from him and handed over a currency note of the denomination of Rs. 500/- to him. He deducted Rs. 30, the price of three handkerchiefs and returned Rs. 470/- as balance to them. Thereafter, they went away on their scooter No. PB-07B-1995. Later on, when he checked the currency note, it appeared to be fake. He also got the currency note checked from the local Bank. It was reported to be fake. At about 2/2:05 PM, he informed the Police Post, Chintpurni. Thereafter, he went in search of the accused persons in his maruti car. HC Balbir Singh etc. also accompanied him in maruti car and went towards Gagret in search of those boys. When they reached near Police barrier at Gagret at about 3:00 PM, both the boys were going on scooter No. PB-07B-1995 towards Hoshiarpur. The police personnel disclosed their identity. Later on, the informant came to know that both the accused had also given one currency note of Rs. 500/- to Sanjeev Sharma, another shopkeeper of Chintpurni. He along with Sanjeev Sharma produced both the currency notes to the police. Ext. P-1 and P-2, currency notes were sealed and taken into possession vide memo Ext. PW-1/B in the presence of Kewal Krishan and Sanjeev Sharma. FIR Ext. PW-6/A was registered. The personal search of accused Neeraj Sharma was also carried out. Three currency notes of denomination of Rs. 500/- each Ext. P-3 to P-5, were recovered from back side pocket of his jeans pants. These were sealed in a parcel and taken into possession in the presence of witnesses by the police. The currency notes were deposited with MHC Onkar Chand. The same were sent on 4.10.2004 to FSL, Junga through PW-8 Const. Gurjit Singh. Report of the FSL Ext. PW-9/A was obtained to the effect that the currency notes were not genuine but counterfeit. 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 was also examined under Section 313 Cr.P.C. He pleaded innocence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Sanjay Dutt Vasudeva, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Neeraj K. Sharma, Dy. Advocate General has supported the judgment of the learned trial Court dated 23.11.2006.

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 Kishori Lal testified that on 10.9.2004 at about 12:30/1:00 PM two boys came to his shop. They were in the age group of 30-32 years. One of the accused, namely, Gurdeep Kumar asked for purchase of three handkerchiefs. They had come to his shop on scooter No. PB-07B-1995. They gave him Rs. 500/- currency note, out of which, he charged Rs.

30/- and returned Rs. 470/- to them. After he handled the currency note of Rs. 500/- given to him by the accused persons, he suspected that it might not be a genuine currency note. Thereafter, he went to Kangra Co-operative Bank, Chintpurni, adjacent to his shop and showed the note to one Mr. Rana, an employee of the Bank. Mr. Rana told him that the note was fake. Then, he telephonically informed Police Post, Chintpurni and proceeded to the Police Post. His statement under Section 154 Cr.P.C. was recorded by the police, from where police officials accompanied him in search of the accused persons towards Hoshiarpur. The accused persons were apprehended. In the meantime, one more shopkeeper Sanjeev Sharma also came to the Police Post, Chintpurni as the accused had handed over some fake currency to him also. He also identified the accused persons there. He handed over the currency note of Rs. 500/- vide memo Ext. PW-1/B. Sh. Sanjeev Sharma also handed over another currency note of Rs. 500/- denomination to the police. Three other currency notes of denomination of Rs. 500/- were also taken into possession vide memo Ext. PW-1/C by the police. In his cross-examination by the learned defence counsel appearing on behalf of the appellant, he denied the suggestion that at that time, only servant was present in the shop. He denied that currency note Ext. P-1 was handed over to him by his servant. He did not know the accused persons personally at that time. He denied the suggestion that neither the accused persons have purchased anything from him nor currency note Ext. P-1 was handed over to him by them. He admitted that Chintpurni bazaar is a busy place. In his cross-examination by the learned defence counsel appearing on behalf of accused Gurdeep, he denied the suggestion that nothing was recovered from accused Gurdeep Kumar.

7. PW-2 Sandeep Rana stated that he was working as Clerk in Kangra Co-operative Bank, Chintpurni. He was dealing with cash. He deposed that PW-1 Kishori Lal came to his seat and showed him currency note Ext. P-1, which was found to be fake.

8. PW-3 Sanjeev Sharma testified that he was running gift shop at Chintpurni bazaar. On 10.9.2004, he was in his house attending some function. His servant Surjeet Kumar was in his shop. In the evening there was a talk in the town that persons having fake currency notes have been arrested by the police. So, he went to the Police Post, Chintpurni as he was Up-Pardhan of Gram Panchayat. At about 3-3:30 PM, he came to his shop and found one fake currency note of Rs. 500/- in his sale. He handed over the currency note to police vide memo Ext. PW-1/B. He could not identify the accused persons from whom currency notes Ext. P-3 to P-5 were recovered by the police as the occurrence was old one. In his cross-examination, he deposed that he has not gone through the contents of Ext. PW-1/B and PW-1/C when he signed the same. He was declared hostile and cross-examined by the learned Public Prosecutor. In his re-examination, he admitted that the police has taken into possession fake currency notes handed over to him and Kishori Lal. He admitted that three notes were recovered from accused Neeraj which were sealed in his presence.

9. PW-4 Kewal Krishan deposed that PW-1 Kishori Lal and Sanjeev Kumar had handed over Ext. P-1 and P-2 to the police. He identified signatures on Ext. PW-1/B.

10. PW-5 HC Balbir Singh deposed that he received telephonic message from Kishori Lal, shopkeeper informing that two boys had come to his shop on scooter and purchased three handkerchiefs for Rs. 30/-. The accused paid him a note of Rs. 500/-, which according to him appeared to be fake. This information was reduced in daily diary vide Ext. PW-5/A. They proceeded in the vehicle towards Hoshiarpur. When they reached just little ahead from Gagret barrier, they noticed accused riding the scooter. They were identified by PW-1 Kishori Lal and intercepted.

11. PW-7 HC Onkar Chand deposed that on 10.9.2004 SI Om Parkash handed over to him two parcels duly sealed with seals “H” and “C” along with specimen seal and other articles of *jamatalashi*. He entered the same in the malkhana register. On 4.10.2004, he sent these articles to FSL Junga through HHC Gurjeet Singh vide RC No. 108/21.

12. PW-8 Const. Gurjeet Singh has taken the case property on 4.10.2004 to FSL, Junga.

13. PW-9 Dr. Meenakshi Mahajan has proved report Ext. PW-9/A. According to her, these currency notes were processed in the laboratory by her to find out their genuineness. In her opinion, these were fake currency notes.

14. PW-10 Surjit Kumar deposed that in the month of September, 2004, he was working in the shop of PW-3 Sanjeev Sharma at Chintpurni. PW-3 Sanjeev Sharma was away to his house in connection with some work and he was attending to the shop. At about 1:30 PM, two boys came to his shop and purchased one garland and ear rings. They handed over to him a currency note of Rs. 500/- and he returned the balance amount of Rs. 450/- to them. He produced the sale proceeds before PW-3 Sanjeev Sharma at about 4:00 PM. In his cross-examination, he admitted that the accused persons were shown to him outside the Court so he identified them.

15. PW-11 SI Om Parkash, deposed that on 10.9.2004, he was on patrolling duty along with other police officials from Dehra to Chintpurni. When he reached near Bharwain, HC Balbir Singh of PP Chintpurni along with PW-1 Kishori Lal and accused persons met him. They went to Police Post, Chintpurni, where report Ext. PW-1/A was lodged. Kishori Lal and Sanjeev Sharma handed over one fake currency note of five hundred each which were taken into possession by the police. He conducted personal search of the accused. Three fake/forged currency notes of Rs. 500/- were recovered from the pocket of accused Neeraj Kumar. The same were also sealed.

16. What emerges from the analysis of the statements of the witnesses is that the accused persons had visited Chintpurni on 10.9.2004. They had purchased three handkerchiefs from the shop of PW-1 Kishori Lal and handed over to him one fake currency note of Rs. 500/-. PW-1 Kishori Lal got currency note verified from PW-2 Sandeep Rana. It was found to be fake. Thereafter, the police was informed and accused were apprehended. PW-3 Sanjeev Sharma also came to know that accused had handed over fake currency note to his servant in the shop. Currency notes, Ext. P-1 and P-2 were taken into possession by the police. The currency notes subsequently recovered from the search of the accused Neeraj were also taken into possession vide Ext. P-3 to P-5. The case property was deposited in the malkhana. The currency notes were sent to FSL, Junga through PW-8 Const. Gurjit Singh. PW-9 Dr. Meenakshi Mahajan found the currency notes to be fake. She duly proved her report Ext. PW-9/A.

17. Mr. Sanjay Dutt Vasudeva, Advocate, for the accused has vehemently argued that the accused have not been identified, however, the fact of the matter is that the accused were identified by PW-1 Kishori Lal, PW-3 Sanjeev Sharma as well as PW-10 Surjit Kumar. The accused were apprehended when they were trying to escape towards Hoshiarpur by the police.

18. The currency notes which were handed over to PW-1 Kishori Lal and PW-3 Sanjeev Sharma were bearing No. 5 CC 96125 and 5 CC 96126. The currency notes which were subsequently recovered from the personal search of accused Neeraj Kumar were bearing Nos. 961130, 961131 and 352923. PW-1 Kishori Lal has categorically stated that the accused had visited his shop and purchased the articles by handing over to him fake currency note. Similarly, PW-10 Surjit Kumar has also deposed that accused had visited the shop of PW-3 Sanjeev Sharma and handed over fake currency note. PW-3 Sanjeev Sharma has also deposed that he found one currency note fake in the sale proceeds which was handed over to him by PW-10 Surjit Kumar. PW-3 Sanjeev Sharma, though was declared hostile, but in his re-examination, he admitted that the police took into possession fake currency notes handed over to him and Kishori Lal. He also admitted that three notes were recovered from accused Neeraj which were sealed in his presence.

19. The statements of PW-1 Kishori Lal and PW-3 Sanjeev Sharma have been duly corroborated by the Investigating Officer, PW-5 HC Balbir Singh as well as PW-10 Surjit Kumar

and PW-11 SI Om Parkash. The accused were in possession of fake currency notes knowing them to be fake.

20. The decision of the Hon'ble Supreme Court cited by Mr. Sanjay Dutt Vasudeva, Advocate, in the case of ***Raghubir Singh vs. State of Delhi,*** reported in ***2013 Cri. L.J. 3032,*** is not applicable in the present facts and circumstances of the case, more particularly when the accused were found in possession of five fake currency notes and they have not given any explanation how they came into the possession of the same.

21. The accused had the knowledge or reason to believe about the currency notes being forged at the time when it was passed over to the shop keepers. The accused had the intention to use the forged notes as genuine.

22. The learned Single Judge of the Andhra Pradesh High Court in ***Re, Satyanarayana,*** reported in ***AIR 1961 AP 213,*** has held that in a prosecution under S. 489-C IPC, the ingredients of the offence viz., that the accused knew or had reason to believe the currency notes to be counterfeit and his intention to use the same as genuine or that it might be used as genuine, should be proved by the prosecution. It is however not necessary that such proof should be by direct evidence. It has been held as follows:

> "12. It is clear from the above decisions that the ingredients under Section 489-C I. P, C. namely that the accused knew or had reason to believe the currency notes to be counterfeit and his intention to use the same as genuine or that it might be used as genuine, should be proved by the prosecution but that such proof need not be necessary by direct evidence, such as the evidence of P. Ws. 2 and 3 in the present case."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Ponnuswamy vs. State,*** reported in ***1995 Cri. L.J. 2658,*** have held that the appellant had no explanation to offer as to wherefrom he had obtained those forged currency notes. Silence on the part of the appellant in such circumstances would by itself be a telling circumstance which would weigh against him. It has been held as follows:

> "The verdict of the three Courts below is similar in convicting and keeping maintained the convictions of the appellant under Sections 489-B and 420 of the Indian Penal Code. The case of the prosecution against the appellant is that he had purchased paddy from a peasant on payment of 130 forged currency notes of Rs. 100/- denomination. On the arrest of the appellant, further forged currency notes were alleged to have been found in his possession for which he had to face a trial separately. All the same, the appellant had no explanation to offer as to wherefrom had he obtained those forged currency notes. Silence on the part of the appellant in such circumstances would by itself be a telling consideration of the prosecution evidence led against him. In these circumstances, we are of the view that the convictions recorded deserve no alteration and equally there is no scope for reduction of sentence. Maintaining the convictions and sentences of the appellant, we dismiss this appeal."

24. The learned Single Judge of the Kerala High Court in the case of ***Vijayan alias Kochomon vs. State of Kerala,*** reported in ***2002 Cri. L.J. 187,*** has held that when the accused had the full knowledge that notes possessed by him and offered to prosecution witness were counterfeit, he was thus liable to be convicted for offence under Section 489-C IPC. It has been held as follows:

> "11. PW-3 stated before Court that when the currencies were taken out and shown to him even at the first blush, he was convinced that they were counterfeit notes because there was difference in colour. Thus, the accused also had every reason to know that the currency notes possessed by him and offered to PW-3 were counterfeit currencies."

25. Their lordships of the Hon'ble Supreme Court in the case of ***K. Hasim vs. State of Tamil Nadu,*** reported in ***2005 Cri. L.J. 143,*** have held that Section 489 B relates to using as genuine forged or counterfeited currency notes or bank notes. The object of Legislature in enacting this section is to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe the same to be forged do any act which could lead to their circulation. Their lordships have further held that possession and knowledge that currency notes were counterfeited notes are necessary. It has been held as follows:

> "42. Similarly Section 489 B relates to using as genuine forged or counterfeited currency notes or bank notes. The object of Legislature in enacting this section is to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe the same to be forged do any act which could lead to their circulation.
>
> 43. Section 489C deals with possession of forged or counterfeit currency notes or bank notes. It makes possession of forged and counterfeited currency notes or bank notes punishable. Possession and knowledge that the currency notes were counterfeited notes are necessary ingredients to constitute offence under Section 489 C and 489 D. As was observed by this Court in State of Kerala v. Mathai Verghese and Ors. (AIR 1987 SC 33) the expression 'currency notes' is large and wide enough in its amplitude to cover the currency notes of any country. Section 489C is not restricted to Indian currency note alone but it includes dollar also and it applies to American dollar bills."

26. Accordingly, there is no merit in this appeal, the same is dismissed. Bail bonds are canelled.

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

LPA No. 430 of 2012 along with LPA Nos. 141 of 2009, 434 of 2012, 450 of 2012 & 148 of 2014.
Reserved on:12th May, 2016.
Date of Decision: 29th June, 2016.

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1. LPA No. 430 of 2012.
Pankaj Sharma & others ....**Appellants.**
Versus
H.P. State Electricity Board & Others ...**Respondents.**
2. LPA No. 141 of 2009.
Ram Krishan & others ....**Appellants.**
Versus
H.P. State Electricity Board & Others ...**Respondents.**
3. LPA No. 434 of 2012.
Bisheshwar Sharma ....**Appellant.**
Versus
H.P. State Electricity Board & Others ...**Respondents.**
4. LPA No. 450 of 2012.
Madan Gopal Sharma ....**Appellants.**
Versus
Yashwant Singh & Others ...**Respondents.**

5. LPA No. 148 of 2014.

H.P. State Electricity Board **....Appellant.**

Versus

Yashwant Singh & others **...Respondents.**

Constitution of India, 1950- Article 226- Petitioners were appointed as Assistant Engineers (Electrical) by HPSEB- Recruitment and Promotion Rules provide 6% quota for AMIE holders, 34% quota for J.E. (Electrical) and equivalent quota for promotion to the posts of AEs (E) - 60 % vacancies stand reserved for direct recruitment – Promotee Officers in excess were rendering services on ad-hoc basis as AE or JE- they were promoted as AE against 104 vacancies meant to be filled by direct recruitment- Aggrieved from the orders, writ petitions were filed- Office Order No. 302 dated 31.12.1997 was assailed whereby one time relaxation was granted – amendment application was filed for challenging the order, which was allowed- held, that appointment of promotees on the posts, in excess of the quota, was fortuitous and will confer no right of seniority- persons appointed in excess have to be pushed out and will get seniority from the date of the vacancy - amendment will relate back to the date of filing of the petition- writ Court had passed contradictory orders in different writ petitions- orders set aside and a fresh direction issued to draw a comprehensive seniority list in accordance with the promotion and recruitment rules. (Para-4 to 18)

Cases referred:

Keshev Chandra Joshi and others vs. Union of India and others, 1992 Supp.(1) SCC 272

B.K. Narayana Pillai versus Parameswaran Pillai and another, (2000)1 SCC 712

Vasant Balu Patil and others versus Mohan Hirachand Shah and others, (2016)1 SCC 530

Sampath Kumar versus Ayyakannu and another, (2002)7 SCC 559

LPA No. 430 of 2012.

For the Appellants: Mr. R.K. Gautam, Senior Advocate with Ms. Archana Dutt, Advocate.

For Respondent No.1: Mr. Trilok Jamwal, Advocate.

Respondents No.2, 4 to 8 and 10 to 18 already ex-parte.

LPA No. 141 of 2009.

For the Appellants: Mr. N.K. Sood, Senior Advocate with Mr. Aman Sood, Advocate, for appellants No.1 to 3 and 5.

Mr. Suneet Goel, Advocate, for appellant No.4.

For Respondent No.1: Mr. Trilok Jamwal, Advocate.

For Respondents No.6 & 15: Mr. Mukul Sood, Advocate.

For Respondents No. 9, 10, 12, 16, 19, 22, 24, 25, 27, 38, 39 and 41 : Ms. Ranjana Parmar, Senior Advocate with Ms. Komal Kumari, Advocate.

For Respondents No. 40, 42, 43, 46, 47 and 48: Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.

Nemo of other respondents.

LPA No. 434 of 2012.

For the Appellant: Mr. K.S. Banyal, Senior Advocate with Mr. Vijender Katoch and Mr. Sudhir Thakur, Advocates.

For Respondent No.1: Mr. Trilok Jamwal, Advocate.

For respondents No.2, 3, 6, 7 &10: Mr. Sanjeev Sood, Adv.

For respondents No. 5, 8, 9, 13 & 14 : Mr. R.K.Gautam, Senior Advocate with Ms. Archana Dutt, Advocate.

Respondents No.4, 11 and 12 already ex-parte.

Names of respondents No. 15 to 177 stand deleted.

LPA No. 450 of 2012.

For the Appellant: Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.

For Respondents No.1, 2 & 9: Mr. Sanjeev Sood, Advocate.

For Respondents No. 4, 8, 11, 12 & 13: Mr. R.K.Gautam, Senior Advocate with Ms. Archana Dutt, Advocate.

For respondent No. 14: Mr. Trilok Jamwal, Advocate.

Respondents No. 3, 5, 6 and 10 already ex-parte.

Names of respondents No. 15 to 177 stand deleted.

LPA No. 148 of 2014.

For the Appellant: Mr. Tirlok Jamwal, Advocate.

For Respondents No.4, 7, 12 and 13: Mr. R.K.Gautam, Senior Advocate with Ms. Archana Dutt, Advocate.

For Respondents No. 57, 73, 84, 85, 89 and 95: Mr. Sanjeev Sood, Advocate.

Nemo for other respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

LPA Nos. 434 of 2012, 450 of 2012 and LPA No. 148 of 2014.

The aforesaid LPAs stand directed against the judgment dated 20.07.2012 passed by the learned Single Judge in CWP(T) No. 2736 of 2008 whereby the learned Single Judge allowed the Writ Petition aforesaid (for short "impugned judgment").

2. The facts necessary for recording a decision qua the instant LPAs are of January, 1997 there occurring 125 vacant posts for theirs standing filled up from the direct quota. However, from amongst the aforesaid 125 posts only 21 vacancies stood advertised by the H.P. Public Service Commission (for short 'Commission') in consonance with the apposite requisition sent by the H.P. State Electricity Board (for short 'Board') to the Commission. The posts aforesaid were to be filled up by direct recruits. The writ petitioners applied for the aforesaid posts advertised by the Commission. On the writ petitioners standing selected by the Commission, the latter forwarded in March, 1998, the list of selected candidates to the Multi Purpose Project and Power Department, State of H.P. (for short 'MPP and Power Deptt.). The writ petitioners and others were appointed as Assistant Engineers (Electrical) {for short 'AEs (E)} with the Board. The Himachal Pradesh State Electricity Board Recruitment and Promotion Regulations as enacted for recruitment and promotion to the posts of AEs (E) stipulate a 6% quota for AMIE holders, 34% quota for J.E. (Electrical) and equivalent for promotion to the posts of AEs (E) and 60 % vacancies stand reserved for direct recruits.

3. The writ petitioners on standing awakened qua the factum of the Board in digression of or in excess of the quota stipulated for promotees under the apposite regulations, coming to issue the contentious promotion orders on 31.12.1997 and 27.3.1998 whereupon the private respondents in the aforesaid CWP(T) No. 2736 of 2008, who were rendering service under the Board on adhoc basis in the capacity of Assistant Engineers or Junior Engineers with AMIE degree and diploma holders besides, also non diploma holders, stood hence promoted as AEs(E) against the residue of 104 vacancies meant for being filled up by direct recruits. Also the Board had made some promotions on 12.6.2000 after the joining of the petitioners as AEs (E). Consequently, on 12.6.2000, the Board in supersession of all the previously circulated final seniority lists, issued a final seniority list of AEs(E) displaying therein, all AE(s)(E) who stood promoted by the Board on 31.12.1997, 27.3.1998 and 12.6.1998 against vacancies solitarily meant to be filled up by direct recruitment standing placed higher in seniority vis-a-vis the writ petitioners/direct recruits in CWP(T) No. 2736 of 2008. The said action of the Board was contended before the learned Single Judge of this Court to be unwarranted as there existed no

provision in the Rules for diluting or relaxing the quota meant to be filled up by direct recruits whereupon as a natural corollary the act of the Board in filling 104 vacancies in the category of AEs, though meant to be filled up by direct recruits, by its rather promoting the private respondents/promotees thereto, who hitherto either were working on adhoc basis as Assistant Engineers or as Junior Engineers with AMIE degree and Diploma holders and also non diploma holders, stood canvassed therebefore to stand grossly vitiated with a vice of illegality.

4. The legal onslaught constituted by the writ petitioners to the promotions made by the Board of the private respondents/promotees against posts/vacancies reserved for theirs standing filled up from the source/channel of direct recruits stands hinged upon its office order No.302 of 31.12.1997 whereunder a one time decision stood recorded by the Board to bring in the manner hereinafter extracted a one time relaxation to the hitherto apposite regulations. With the Board in compliance therewith effectuating promotions of the private respondents/promotees against the quota meant to be filled up by direct recruits concerned it hence concerts to validate the promotions of private respondents/promotees. The apt portion of Order No.302 of 31.12.1997 aforesaid reads as under:-

> ""As a one time relaxation to the R&P Regulations 50% AMIE/Graduate Junior Engineers (E) and 27 AMIE/G Graduate JE(C/M) who are working as Assistant Engineers on Adhoc or Acting basis shall be considered for regular promotion as Assistant Engineers if otherwise found fit against vacant posts falling to the share of Graduate meant for direct recruitment. Similarly another 56 Junior Engineers (Elect.) and 22 (C/M) who obtained AMIE/Degree qualification after the above Adhoc/Acting A.Es but became senior to them, AMIE Holders, as a result of Supreme Court decision/Board's order shall be considered for regular promotion as A.E. (E) against vacancies meant for the direct recruitment category."
>
> The Board is further pleased to order that:-
>
> "25 posts of Junior Engineers (Elect.) and 5 posts A.Es(C/M) upgraded as Assistant Engineers shall be filled up by promotion on regular basis from amongst Diploma holders only as one time relaxation to the R&P Regulations."

5. During the pendency of the aforesaid writ petition before the Hon'ble Division Bench of this Court, an order stood recorded on 27.11.2009 on an application moved thereat by the writ petitioners for securing an amendment in the writ petition whereby the apposite application of the writ petitioners for effectuating an amendment to the writ petition by incorporating a challenge therein to office order No.302 of 31.12.1997 issued by the Board for hence facilitating them to assail it, stood allowed by the Hon'ble Division Bench of this Court. The order of the Hon'ble Division Bench of this Court recorded on 27.11.2009 wherein the apposite permission stood granted by it to the writ petitioners to incorporate in the writ petition a challenge to the office order aforesaid was hedged with a fetter of the apposite permission being subject to all just exceptions. The learned counsel for the appellant contends with immense fervor of the order of the Division Bench of this Court recorded on 27.11.2009, whereunder it permitted the writ petitioners to incorporate a challenge to the office order No. 302 of 31.12.1997 yet with the apposite permission thereunder to the writ petitioners to effectuate an amendment qua the facet aforesaid in the writ petition standing trammeled by a rider of its standing afforded to the writ petitioners subject to all just exceptions, hence, foisting in the promotees/private respondents/appellants herein a latitude to hereat contend of the granting of the amendment by the Hon'ble Division Bench of this Court under its order recorded on 27.11.2009 being hereat assailable on all fronts at the instance of the promotees/appellants herein whereupon one Madan Lal respondent No.109 in CWP(T) No.2736 of 2008 had opposed the endeavour of the writ petitioners to effectuate an amendment in the aforesaid writ petition qua the facet aforesaid.

6. Be that as it may, even if, assuming of the aforesaid espousal of the learned counsel for the appellants of theirs also holding leverage to assail the order of the Hon'ble Division Bench of this Court recorded on 27.11.2009 in CMP No. 6465 of 2009, whereunder it

permitted the writ petitioners to incorporate by way of an amendment to the writ petition the aforesaid challenge to the apposite office order No.302 of 31.12.1997 issued by the Board, may hold tenacity yet the aforesaid submission is liable to be discountenanced by this Court for the reasons hereinafter afforded. (a) With a decision recorded by this Court on 9.10.2009 in ***LPA No.45 of 2009 along with other connected matters, titled as Anokhi Ram Verma versus Arun Kumar and others,*** whereunder this Court while standing seized of the office order No.302 of 31.12.1997, the apt portion whereof stands extracted hereinabove, holding the appointments of the promotees therein being fortuitous whereupon the contention raised therebefore by the writ petitioners therein of their hitherto period of appointment on adhoc basis against posts enjoined to be filled up by direct recruits being reckonable for fixing or determining their seniority vis-a-vis the direct recruits also hence suffered effacement. The relevant portion of the pronouncement of this Court in LPA No. 45 of 2009 reads as under:

> "Before us it has also been urged on behalf of the writ petitioners that they were appointed on ad hoc basis against the regular vacancies since their services have been regularized the period of ad hoc service rendered by them must also be counted for determining their seniority. No such plea was taken in the writ petition nor before the learned Single Judge. We also find that their appoints were fortuitous since no direct recruitment was being done during that period. They cannot be given benefit of the ad hoc service rendered by them."

7. The afore referred pronouncement by this Court in LPA No.45 of 2009 assumes immense significance, given the appellants therein as apparent on a reading of the hereinafter extracted portion of the verdict aforesaid occurring below the extraction by this Court in its apposite decision of the office order of 31.12.1997 on anchorage whereof the Board though hitherto enjoined to fill up the apposite vacancies by direct recruits, yet filled them by making promotions thereto of promotees, further when the Board placed the latter higher in seniority vis-a-vis the direct recruits, when loudly echoes of the appellants therein holding a status congruous to the private respondents/promotees in CWP(T) No.2736 of 2008 hence with alikeness in status intra se promotees/private respondents in CWP(T) No. 2736 of 2008 and appellants/promotees in LPA No. 45 of 2009, the effect of the verdict of this Court recorded in LPA No. 45 of 2009 whereby this Court held the appointments of the promotees/appellants against posts/vacancies meant to be filled up by direct recruits being fortuitous also holding sway qua the appellants/promotees herein standing disentitled to avail the benefit of their hitherto ad hoc service rendered against posts which they held fortuitously. A further effect whereof is of the decision recorded by this Court in the aforesaid LPA No.45 of 2009 negating the purveying by the Board to the appellants/promotees therein, who held an analogous position in service vis-a-vis private respondents/promotees in CWP(T) No.2736 of 2008, the benefit of office order of 31.12.1997 as extracted hereinabove embodying therein the decision of the Board to grant a one time relaxation in the apposite Recruitment and Promotion Regulations. Concomitantly also with this Court in LPA No.45 of 2009 negating the purveying of the benefit of office order No.302 of 31.12.1997 by the Board to the appellants/promotees therein who held/hold a position in service akin to the promotees/private respondents in CWP(T) No. 2736 of 2008, is of the office order aforesaid whereunder the Board took a decision to grant a one time relaxation in the Recruitment & Promotion Regulations qua promotees, standing nullified. In aftermath, the decision recorded by the learned Single Judge of this Court while allowing the claim of the direct recruits for theirs standing entitled to seniority above the promotees especially when the latter had occupied posts meant to be filled up by direct recruits is undislodgeable, it being in concurrence with the verdict of this Court recorded in LPA No. 45 of 2009. The apt portion of the decision of this Court recorded in LPA No.45, referred to hereinabove reads as under:-

> "As a result of this decision the Board decided to grant one time relaxation for granting regular promotion as Assistant Engineers to 50 AMIE/Graduate Junior Engineers in Electrical Division and 27AMIE/Graduate Junior Engineers in Mechanical who were already working as Assistant Engineers on ad hoc/acting basis. At the same time it was also decided to grant regular promotion to those AMIE

Junior Engineers who had become senior to the ad hoc Junior Engineers on the basis of M.B. Joshi's judgment (supra). Thereafter, regular promotion of the petitioners and private respondents were made on 31.12.1997 and the senior ity list was issued wherein the petitioners were shown junior the private respondents. Hence, the petition."

8. Further more, on the anvil of the judgment of Hon'ble Apex Court reported in ***Keshev Chandra Joshi and others vs. Union of India and others, 1992 Supp.(1) SCC 272,*** the relevant paragraph whereof stands extracted hereinafter, wherein the Hon'ble Apex Court with immense formidability has held that when promotion made outside the quota, the apposite seniority being reckonable from the date of accruing of vacancy(ies) within the quota rendering the previous service to be fortuitous also its handing down a verdict qua the rule of quota being statutory, it is enjoined to be strictly implemented, unamenable to any deviation therefrom owing to administrative exigencies or expediency besides its rigor being not open for dilution even if it works hardship in fixing seniority qua the occupants of posts, who hold/held it beyond or in excess of the quota meant for them, in coagulation thereof when the verdict of this Court recorded in LPA No.45 of 2009 also gives a firm impetus for reasons aforestated, to an irrefragable inference of hence nullification infecting the office order of 31.12.1997 on anchorage whereof an akin benefit to the appellants/promotees therein vis-a-vis the private respondents/promotees in CWP(T) No.2736 of 2008 stood respectively to them purveyed by the Board. As a corollary with a vice of nullification percolating the office order of 31.12.1997, the purveying by the Board to the private respondents/promotees, its benefit is squarely off the legal tangent. The relevant portion of the decision of the Hon'ble Apex Court referred to hereinabove reads as under:-

".....When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would ot be proper to do injustice to the direct recruits. The rule of quota being a statutory one it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Articles 14 and 16(1)....."

9. Be that as it may, the pronouncement of this Court recorded in LPA No. 45 of 2009 with conclusivity rests the legal proposition of the appellants herein, when had secured appointments by promotion against posts to be filled up by direct recruits, their apposite appointments, when stood prodded by an inefficacious office order recorded on 31.12.1997 by the Board wherein it by making a one time relaxation to the hitherto apposite Recruitment and Promotion Regulations, besides whereupon exhaustion of the quota preserved for direct recruits stood sequeled also hence the appointment thereto of Junior Engineers (Electrical) and AMIE/Graduate JE(C/M) stood legalized besides regularization of their hitherto rendition of service on adhoc basis as Assistant Engineers stood begotten, also the communication occurring therein of other 56 Junior Engineers (Electrical) and 22 (C/M) who had obtained AMIE/Degree qualification after the above ad hoc/acting A.Es who became senior to them being also eligible for being considered for promotion to the post of AEs(E) against posts/vacancies meant for direct recruits, omnibusly holding no validation. (b) With the decision of this Court recorded in LPA No.45 of 2008 benumbing the effect of office order No.31.12.1997, with the sequeling effect of promotions of the appellants/promotees therein alike the private respondents/promotees in CWP(T) No. 2736 of 2008 against posts meant to be filled up by direct recruits suffering impairment, yet besets this Court with an onerous task of gauging the effect of the rider incorporated in the order of the Division Bench of this Court recorded on 27.11.2009 whereby

liberty as afforded to the writ petitioners in CWP(T) No. 2736 of 2008 to incorporate a challenge to the office order No.302 of 31.12.1997 being subject to all just exceptions, whereupon the learned counsel appearing for the appellants/promotees make a vociferous espousal of the parlance "just exceptions" occurring therein holding the import of the appellants/promotees holding a capacity to extantly assail it on all grounds as embodied in the apposite reply meted by the promotees/private respondents to the apposite application, qua apposite application whereof the apposite order stood recorded on 27.11.2009 by the Hon'ble Division Bench of this Court, yet any acceptance by this Court of the aforesaid submission would subvert the conclusive decision of this Court recorded in LPA No.45 of 2009 whereunder this Court had frowned upon the meteing of appointments by the Board to promotees against posts meant to be filled up by direct recruits besides had construed their appointments thereto to be fortuitous. Since, the conclusive decision of this Court recorded in LPA No. 45 of 2009 is qua an invalid office order of 31.12.1997 hence obviously holds sway for resting a secure conclusion thereupon of the office order of 31.12.1997 on foundation whereof the validity of appointments of promotees against posts meant for direct recruits became thereafter amenable to impeachment, of even the apposite permission to the writ petitioners/direct recruits in CWP(T) No. 2736 of 2008, for its incorporation therein as stood accorded by the Hon'ble Division Bench of this Court, though standing trammeled with a rider of it being subject to all just exceptions, nonetheless, when any acceptance of the concert of the counsel on anvil thereto score off the amendment qua the facet aforesaid would beget derogation of the findings of this Court recorded in LPA No.45 of 2009 whereunder untenability stood foisted qua the office order of 31.12.1997. As a corollary when the countenancing of the submission of the learned for the appellants/promotees, an inefficacious order would yet hold clout, it would be in-sagacious for this Court to score off the apposite amendment permitted to be incorporated in the writ petition under an order recorded on 27.11.2009 by the Hon'ble Division Bench of this Court dehors its standing granted to the writ petitioners/direct recruits therein with all just exceptions. (c) With the necessity of inclusion in the pleadings, of the office order aforesaid besides the imperativeness of its being prayed to be set aside for ensuring concurrence with the verdict of this Court recorded in LPA No.45 of 2009 both judicial ethos as well as judicial discipline enjoins this Court to revere the verdict of this Court recorded in LPA No.45 of 2009 whereupon it illegalized any reliance by the Board upon office order No.302 of 31.12.1997. An apt sequitur thereto is of the concert of the learned counsel for the appellants to score off the apposite amendment permitted to be incorporated by the Division Bench of this Court being unacceptable as any acceptance thereof would give vigour and strength to the office order of 31.12.1997 even when its validity stands frowned upon by the earlier decision of this Court recorded in LPA No.45 of 2009. In aftermath, to avoid conflicting decisions qua the validity of the office order No.302 of 31.12.1997 it would be apt to revere the hallowed decision of this Court recorded in LPA No. 45 of 2009.

10. Since, the appointments of the private respondents in CWP (T) No. 2736 of 2008 stood harboured upon an office order No.302 of 31.12.1997, permission for incorporation therein stood afforded to the writ petitioners by the Division Bench of this Court under its order recorded on 27.11.2009 preeminently when an apposite liberty to the writ petitioners/direct recruits for its incorporation in their petition by the Hon'ble Division Bench of this Court stood afforded to them on 27.11.2009 whereas with the judgment of this Court recorded in LPA No.45 of 2009 standing recorded prior thereto also peremptorily warranted its incorporation in CWP (T) No. 2736 of 2008 for obviously facilitating its being prayed to be quashed and set aside, in absence whereof the learned Single Judge may have been constrained to render a decision in conflict therewith. Moreover, with the apposite amendment permitting the writ petitioners/direct recruits in CWP(T) No. 2736 of 2008 to challenge the apposite office order hence thereupon a right in favour of the writ petitioners/direct recruits/respondents herein of theirs holding a right to hold seniority above the appellants herein/promotees stood secured by the direct recruits/writ petitioners therein besides when on anvil thereof the appellants/promotees acquired seniority vis-a-vis the writ petitioners/direct recruits hence also upstaged the legitimate seniority of the writ petitioners/direct recruits in CWP (T) No. 2736 of 2008, office order whereof for reasons stated

hereianbove, holding no validity, as a corollary when the writ petitioners herein stand under a decision of this Court recorded in LPA No.45 of 2009 invested with a legal right to impeach the office order of 31.12.1997, predominantly, for obviating conflicting decision qua it besides to baulk the employer from proceeding to prepare a comprehensive seniority list vis-a-vis promotees and direct recruits bereft of any avoidable piece meal exercise with all the ensuing hazardous consequences, in case the decision recorded by this Court in LPA No. 45 of 2009 qua its invalidity is permitted to suffer dilution by irreverence standing meted to it. In sequel, the mere factum of delay, if any, occurring in the institution of the apposite application by the writ petitioners before the Hon'ble Division Bench of this Court for seeking an apposite communication in their pleadings qua quashing of office order No.302 of 31.12.1997 cannot be amenable to a construction, of the apposite permission accorded to the writ petitioners/direct recruits for its incorporation in their pleadings standing discountenanced by this Court dehors the factum of a rider, if any, standing reserved in favour of the appellants/private respondents/promotees to contest the order of the Hon'ble Division Bench of this Court whereby it permitted the writ petitioners to incorporate a challenge to the office order No.302 of 31.12.1997, office order whereof when already stands, for reasons aforesaid, to hold invalidity when, hence, gives no leverage to the learned counsel for the appellants herein/promotees to yet preclude its standing assailed by the writ petitioners/direct recruits in CWP(T) No. 2736 of 2008. Consequently, with a vested right accruing in favour of the writ petitioners/ direct recruits/respondents herein to under an apposite permission accorded by the Hon'ble Division Bench of this Court for its incorporation by them in their pleadings as a ground of challenge to the promotions of the promotees/appellants herein made in consonance therewith by the Board to, hence, assail the office order of 31.12.1997. In aftermath, with a vested right accruing in favour of the writ petitioners/direct recruits qua the aforesaid facet, the apposite permission for its incorporation in their apposite pleadings by the writ petitioners/direct recruits for theirs constituting a challenge qua it, remains unvitiated. This Court in coming to the aforesaid inference derives succor from a decision of the Hon'ble Apex Court in ***B.K. Narayana Pillai versus Parameswaran Pillai and another, (2000)1 SCC 712,*** the relevant paragraph No.4 whereof reads as under:-

> "[4] This Court in A. K. Gupta and Sons v. Damodar Valley Corporation, (1966) 1 SCR 796 : (AIR 1967 SC 96 at pp. 97-98) held :
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> (21) "The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit or new case or cause of action is barred : Weldon v. Neale, (1887) 19 QBD 394. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation : See Charan Das v. Amit Khan, AIR 1921 PC 50 and L. J. Leach and Company Limited v. Jardine Skinner and Company, 1957 SCR 438 : (AIR 1957 SC 357).
>
> The principal reasons that have led to the rule last mentioned are, first, that the object of Courts and rules or procedure is to decide the lights of parties and not to punish them for their mistakes (Cropper v. Smith, (1884) 26 Ch D 700) and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended in Kishandas Rupchand v. Rachappa Vithoba, (1909) ILR 33 Bom 644 approved in Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil, 1957 SCR 595 : (AIR 1957 SC 363).
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> The expression 'cause of action' in the present context does not mean 'every fact which it is material to be proved to entitle the plaintiff to succeed' as was said in Cooke v. Gill, (1873) 8 CP 107, in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That

expression for the present purpose only means, a new claim made on new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corporation Limited, 1962 (2) All ER 24, and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas'. Doman v. J.W. Ellis and Company Limited, 1962 (1) All ER 303. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

Again in Smt. Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393 : (AIR 1974 SC 1126) this Court held (Para 22 of AIR) :

"The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court".

In M/s. Ganesh Trading Company v. Moji Ram, (1978) 2 SCC 91 : (AIR 1978 SC 484) it was held (Para 4 of AIR) :

"It is clear from the foregoing summary of the main rules of pleadings and provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its Counsel is inefficient in setting out its case initially the short coming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued."

The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The Courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite part on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement."

11. Moreover with the Hon'ble Apex Court in a decision reported in ***Vasant Balu Patil and others versus Mohan Hirachand Shah and others, (2016)1 SCC 530,*** the relevant paragraph No.16 whereof stands extracted hereinafter, propounding the proposition of the

apposite amendment incorporated in the apposite relief clause relating back to the date of the suit besides when the amendment remains unchallenged hence foreclosing the right of the aggrieved to on the score of delay to assail the amendment constrains this Court to conclude of the apposite amendment permitted to be incorporated by the writ petitioners in the apposite pleadings under an order recorded on 27.11.2009 by the Hon'ble Division Bench of this Court relating back to the date of institution of the writ petition also given its imperativeness qua its occurrence/inclusion in the writ petition dehors the apposite rider engrafted in the order of the Hon'ble Division Bench of this Court, whereby the permission accorded therein to the writ petitioners to incorporate the apposite amendment in the writ petition was made subject to all just exceptions , hence, not yet affording any leverage to the appellants herein to on the score of the amendment as proposed to be incorporated by the petitioners qua which apposite liberty stood afforded to them, to contend hereat of given its standing concerted to be belatedly incorporated, its holding no tenacity. The relevant paragraph No.16 of the aforereferred judgment reads as under:-

> "16. So far as the plea of limitation is concerned there can be no manner of doubt that the amend of the plaint(s) to incorporate the relief of declaration of title has necessarily to relate back to the date of filing of the suit. Once, the said amendments were allowed and were not challenged by the defendants, the issue with regard to limitation has to be decided in favour of the plaintiffs."

12. Furthermore, the incorporation of the amendment was both just and essential, besides facilitative of clinching the entire controversy engaging the parties embedded upon the office order qua whose incorporation by the petitioners in the writ petition, the Hon'ble Division Bench of this Court recorded the apposite order on 27.11.2009. Quintessentially when its incorporation in the writ petition was essential for obviating multiplicity of litigation which would spur in the event of the writ petitioners therein standing driven to institute a separate writ petition, institution whereof may have been baulked by the provisions of Order 2, Rule 2 of the Code of Civil Procedure (for short 'CPC') whereunder the omission of the writ petitioners/direct recruits to embody the entire cause of action in the extant writ petition would forestall them to in the subsequently instituted writ petition incorporate therein the apposite relief of office order No.302 of 31.12.1997 being quashed and set aside. Consequently, to avoid multiplicity of litigation besides to oust the invocation of Order 2, Rule 2 of the CPC against the direct recruits, the apposite orders of this Court recorded on 27.11.2009 permitting the writ petitioners/direct recruits to incorporate the apposite amendment in their pleadings is expedient as well as just. In coming to the aforesaid conclusion, this Court derives support from a decision of the Hon'ble Apex Court reported in **Sampath Kumar versus Ayyakannu and another, (2002)7 SCC 559,** the relevant paragraphs No.6, 7 and 11 whereof read as under:-

> "6. It is true that the on the averments made in the application for amendment proposes to introduce a cause of action which has arisen to the plaintiff during th pendency of the suit. According to the defendant, the averments made in the application for amendment are factually incorrect and the defendant was not in possession of the property since before the institution of the suit itself.
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> 7. In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought by the plaintiff. In the opinion of the trial court, it was open to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the trial court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiff's revision. We failed to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.
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> 8. .....

9. .....

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11. In the present case the amendment is being sought for almost 11 years after the date of institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, be excluding a period of 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the relief of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed."

13. The Board concerts to validate its action, whereby it against the quota reserved for direct recruits made promotions thereto of promotees, on the anvil of the apposite office order No. 302 of 31.12.1997, concert whereof emanates from it standing empowered by apposite powers of relaxation vested in its by the provisions of Section 79(c) of The Electricity (Supply) Act, 1948, to beget amendments in the apposite Recruitment and Promotion Regulations, in exercise of the empowerment whereof, in-dilution of the hitherto apposite Recruitment and Promotion Regulations of accruing posts/vacancies being mandated to be filled up by direct recruits, a valid amendment thereto stood enacted by the Board by its making apposite office order, yet the aforesaid submission of the learned counsel for the Board of, hence, appointments on the anvil of the apposite office order of promotees against the posts/vacancies earmarked for being filled up by direct recruits being valid is unworthy of acceptance, as this Court in its decision recorded in LPA No. 45 of 2009 has undermined the appointments of the promotees against vacancies meant to be filled up by direct recruits. In sequel, when preeminently this Court in LPA No.45 of 2009 has construed the appointments of the promotees against vacancies/posts earmarked for being filled up by direct recruits being fortuitous also the computation of the hitherto service of the promotees/respondents in CWP(T) Nos. 1358 of 2008, CWP(T) No. 53 of 2008 and CWP(T) No. 2158 of 2008 on adhoc basis being unamenable for theirs computation as a qualifying period of service in the feeder category for hence eligiblizing them for promotion to the promotional post, whereas when on the anchorage of the office order of 31.12.1997, the Board purveyed qua them its benefits, benefits whereof when stood snatched by a decision recorded in LPA No. 45 of 2009. As a corollary, the private respondents/ promotees in CWP(T)s when hold an alike position vis-a-vis writ petitioners/direct recruits in civil writ petition aforesaid renders them too being amenable to face a similar fate as has befallen upon alike promotees/respondents in CWP(T)s No. 1358, 53, 2158 of 2008, whereupon in the LPAs preferred therefrom before this Hon'ble Division Bench of this Court, sequeled a decision thereon of its holding no efficacy besides any reliance thereupon by the learned counsel for the appellants/promotees suffering impairment dehors the factum of the Board standing vested with powers to mete relaxation in the apposite R&P Regulations by enacting office order No.302 of 31.12.1997. Consequently, the submission made by the learned counsel for the Board wanes.

LPA No. 430 of 2009.

14. Predominantly, the reasons which prevailed upon the learned Single Judge to decline relief to the direct recruits/ writ petitioners though they therebefore ventilated alike grievance vis-a-vis the writ petitioners/direct recruits in CWP(T) No.2736 of 2008 qua theirs standing untenably relegated behind the promotees in the seniority list, on the score of the Board purveying to promotees the benefit of office order No.302, dated 31.12.1997, was of the apposite office order standing therein prayed not its being quashed and set aside. However the aforesaid reason which prevailed upon the learned Single Judge, for declining the relief to the writ petitioners/direct recruits is legally unsound, as given the imminent portrayal of office order aforesaid when stood permitted under the order of the Hon'ble Division Bench of this Court recorded on 27.11.2009, to be incorporated in the apposite pleadings constituted in CWP(T) No. 2736 of 2008 for its being quashed and set aside yet with the writ petitioners/ appellants herein not alike the writ petitioners in CWP(T) No. 2736 of 2008 rearing a challenge qua the validity of office order of 31.12.1997 recorded by Board, though their grievance was alike the one ventilated by the writ petitioners/direct recruits in CWP(T) No. 2736 of 2008, was insufficient to constrain the learned Single Judge to disallow CWP No. 819 of 2009. His disallowing the claim of the writ petitioners/direct recruits in CWP No. 819 of 2009 is off the legal tangent inasmuch as (a) the learned Single Judge holding judicial notice of the writ petitioners/direct recruits in CWP(T) No.2736 of 2008 holding leverage to carry an apposite valid amendment to the writ petition whereunder they set a challenge to the recording of the order of 31.12.1997 by the Board, the learned Single Judge when proceeded to decide CWP(T) No. 2736 of 2008 along with CWP (T) No. 1470 of 2008 and CWP No. 819 of 2009 ought to have taken into consideration the impact of the tenable amendment effectuated by the petitioners in CWP(T) No. 2736 of 2008 besides ought to have thereupon, when the petitioners in all the writ petitions aforesaid more or less projected an alike grievance qua the untenable affording by the Board of seniority to promotees/respondents therein against vacancies initially open for being filled up by direct recruits alike the petitioners in the writ petition aforesaid, revered the aforesaid amendment incorporated by the writ petitioners/direct recruits in CWP(T) No. 2736 of 2008, reverence whereof by him would have obviated a dichotomous decision intra se writ petitions aforesaid. In aftermath, the learned Single Judge ought have recorded an alike decision in all the writ petitions, especially when he proceeded to decide them under a common judgment. The stark dichotomy besides disparity in verdicts recorded in the writ petitions aforesaid has obviously emerged in the learned Single Judge recording a decision in favour of the direct recruits/writ petitioners in CWP(T) No. 2736 of 2008, leanings whereof in favour of the writ petitioners/direct recruits therein emerges solitarily on the anvil of the petitioners therein impeaching the order of 31.12.1997 recorded by the Board yet the said onslaught qua it by the petitioners therein entailed its being hence implanted by him also qua CWP No. 819 of 2009 even when it stood unimpeached by the writ petitioners/directs recruits in CWP No. 819 of 2009, non impeachment whereof by the latter constitutes the untenable solitary ground for the learned Single Judge dismissing the writ petition of the writ petitioners/direct recruits, whereas writ petition No. 819 of 2009 when standing connected with CWP (T) No. 2736 of 2008 besides when both stood decided by him under a common judgment whereunder too a grievance alike the grievance of the writ petitioners/direct recruits in CWP(T) No. 2736 of 2008, stood projected, enjoined the learned Single Judge for obviating palpable conflicting decisions qua alike petitioners or petitioners holding parity besides canvassing alike reliefs to afford an akin relief to the similarly situate direct recruits/writ petitioners in CWP No.819 of 2009.

15. Be that as it may, if the Board embarks upon the exercise of drawing a seniority list inter se the promotees and direct recruits in consonance with the verdict of this Court, the upholding by this Court of the dichotomus verdicts rendered by the learned Single Judge of this Court would make the aforesaid exercise onerously cumbersome whereas this Court reversing the findings recorded by the learned Single Judge would facilitate the Board to draw up a comprehensive fresh seniority list vis-a-vis direct recruits and promotees in concurrence with the verdict of this Court. For promoting the aforesaid exercise by the Board with facility and ease, the decision recorded by the learned Single Judge in CWP No.819 is quahsed and set aside.

16. Further more, the dismissal of CWP No. 819 of 2009 by the learned Single Judge is also per incuriaum vis-a-vis the recording of a decision by the Hon'ble Division Bench of this Court in LPA No.45 of 2009, dictum whereof prohibits judicial pronouncements rendered in ignorance of conclusive verdicts to hold no binding effect. Consequently, with a conclusive finding stands recorded by the Hon'ble Division Bench of this Court in LPA No. 45 of 2009 of promotees/appellants therein, who hold parity with the promotees/private respondents in CWP(T) No. 2736 of 2008 spurring from theirs respectively holding leverage on the anvil of office order of 31.12.1997 to vindicate their appointment/promotion qua posts enjoined to be filled up by direct recruits,whereas with the apposite office order aforesaid, for reasons aforestated, holding no efficacy, warranted the learned Single Judge of this Court to revere the earlier verdict of this Court recorded in LPA No. 45 of 2009, dehors the direct recruits/appellants herein not assailing the apposite office order No.302 of 31.12.1997. Also the direct recruits /appellants herein stood not debarred from receiving the benefit of the decision of this Court recorded in LPA No.45 of 2009, especially when the verdict of the learned Single Judge of this Court would hence beget the stain of its being per incuriaum vis-a-vis the decision recorded by this Court in LPA No.45 of 2009. Also this Court holding in LPA No. 45 of 2009 of the appointments/promotions of the appellants/promotees therein against posts meant for direct recruits being fortuitous, this Court likewise to obviate irreverence to the conclusive verdict of this Court recorded in LPA No. 45 of 2009 besides to obviate the decision recorded by the learned Single Judge in CWP No. 819 of 2009 being per incuriaum vis-a-vis the previously recorded decision of this Court in LPA No. 45 of 2009, hence, proceeds to set it aside. Consequently, the instant LPA is allowed and the judgment of the learned Single Judge rendered in CWP No. 819 of 2009 is set aside.

LPA No. 141 of 2009.

17. The appellants herein stand aggrieved by the judgment of learned Single Judge of this Court recorded on 7.8.2009 in CWP (T) No.5087 of 2008. Under his impugned judgment, the learned Single Judge while partly allowing the petition directed the Board to reframe the seniority list of the direct recruits/writ petitioners/appellants herein and the private respondents/promotees by showing the writ petitioners/direct recruits senior to promotees/respondents No.51, 52, 55 and 56 therein. However, the other claims of the writ petitioners stood denied to them on the ground of the petitioners not constituting a challenge to the office order No.302 of 31.12.1997 wherein the promotees stood promoted/appointed against the posts/vacancies to be filled up by direct recruits. In sequel, whereof the promotees stood placed higher in seniority list vis-a-vis the direct recruits/writ petitioners. The decision of the learned Single Judge stood recorded on 6.8.2009. Since, in LPA No.434 of 2012 arising out of CWP(T) No. 2736 of 2008 this Court has while revering the verdict of the Hon'ble Division Bench of this Court recorded in the LPA No.45 of 2009 wherein a conclusive verdict stands recorded of the appellants/promotees therein alike the promotees/respondents herein not holding any tenacity to on the anvil of the decision recorded by the Board on 31.12.1997 claim any benefit thereof. Consequently, when the appellants/direct recruits in LPA No.141 of 2009 hold position alike the direct recruits/respondents in LPA No.434 of 2009, imperatively they in equivalence stand entitled to the benefit of the decision of this Court recorded in LPA No.45 of 2009 dehors the factum of only in CWP(T) No. 2736 of 2008, the writ petitioners therein assailing the order recorded by the Board on 31.12.1997. In sequel, to afford parity of treatment qua alike situated direct recruits, above whom in derogation qua their legitimate rights of theirs standing placed higher in seniority list vis-a-vis the promotees, rather the promotees stand placed higher in seniority list vis-a-vsis the direct recruits, also to obviate conflicting decision qua alike factual matrix embedded upon an order recorded on 31.12.1997 by the Board, validity whereof stands scored off by a judgment recorded by the Hon'ble Division Bench of this Court in LPA No. 45 of 2009, constrains this Court to afford qua the direct recruits in LPA No. 141 of 2009 an alike relief as stand afforded to the writ petitioners/direct recruits in CWP(T) No.2736 of 2008. Furthermore, unless the aforesaid parity of treatment stands afforded by this Court qua alike employees/direct recruits, the decision recorded by this Court in LPA No.141 of 2009 would be per incuriaum vis-a-vis the verdict recorded by this Court in LPA No. 45 of 2009. To obviate the aforesaid

upsurgings, the writ petitioners/appellants/direct recruits herein are held to be entitled to a similar relief as afforded to the writ petitioners/direct recruits in CWP(T) No.2736 of 2008.

18. In view of the above discussion, LPA No. 434 of 2012, LPA No.450 of 2012 and LPA No. 148 of 2014 are dismissed and the impugned judgment dated 20.7.2012 rendered by the learned Single Judge in CWP(T) No. 2736 of 2008 is affirmed and maintained. However, LPA No. 430 of 2012 and LPA No. 141 of 2009 are allowed and the impugned judgment dated 6.8.2009 rendered by the learned Single Judge in CWP(T) No. 5087 of 2008 and judgment dated 20.7.2012 rendered in CWP No. 819 of 2009 are set aside. The respondent-Board is directed to draw a comprehensive seniority list in consonance with the apposite Recruitment and Promotion Regulations prevailing hitherto to its recording the office order No. 302 of 31.12.1997. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sh. Sita Ram .....Appellant/plaintiff.

Vs.

Sh. Nand Lal and others .....Respondents/defendants.

RSA No. 671 of 2005
Reserved on : 16.06.2016
Date of Decision: 29.06.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking injunction for restraining the defendants from creating a passage over the land owned by him- defendant No.1 pleaded that defendants have been using maind (beer) of the land as per prevailing custom- suit was dismissed by the trial Court- appeal was preferred, which was also dismissed- held, in second appeal that plaintiff had admitted the existence of the custom of use of the beer for going to the fields in the village- PW-2 also admitted this fact- defendant stated that he was using the maind of the field of the plaintiff as per custom- right of using edges of the field by agriculturists has been recognized by the Courts- Courts had rightly dismissed the suit- appeal dismissed.

(Para-15 to 37)

Cases referred:

Amar Singh and others Vs. Kehar Singh and others, AIR 1995 Himachal Pradesh 82
Virendra Singh others Vs. Kashiram, AIR 2004 Rajasthan 196
Atluri Brahmanandam Vs. Anne Sai Bapuji, AIR 2011 Supreme Court 545
Rup Chand Vs. Sh. Daulatu and others 1991(2) Sim. L.C. 94
Vidya Sagar and another Vs. Ram Das and another, AIR 1976 Allahabad 415
Satya Bala and another Vs. Onkar Chand, 2014(2) Him. L.R. 1043
Rup Chand Vs. Sh. Daulatu and others 1991(2) Sim. L.C. 94
Ass Kaur Vs. Kartar Singh and others (2007) 5 Supreme Court cases 561
Bhagwati Prasad Vs. Chandramaul, AIR 1966 Supreme Court 735

For the appellant: Mr. G.D. Verma,Senior Advocate, with Mr. B.C. Verma, Advocate.
For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Mukul Sood, Advocate, for respondent No. 1.
Respondents No. 2 to 10 are *ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of present appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Bilaspur in Civil Appeal No. 108 of 2003 dated 19.09.2005, vide which the learned appellate Court has upheld the judgment and decree passed by the Court of learned Sub Judge 1st Class, Bilaspur in Civil Suit No. 76/1 of 2001 dated 26.09.2003 with the prayer that the judgments and decrees so passed by both the learned Courts below be set aside and the suit of the plaintiff/appellant be decreed as prayed for.

2. This appeal was admitted on 06.12.2007 on the following substantial question of law:

> *"Whether the alleged customs of use of maind i.e. boundary land of the respective plots of the parties having not been specifically pleaded nor proved on record therefore the respondent has no right to interfere with the ownership and possession of the appellant."*

3. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for permanent prohibitory injunction in the Court of learned Sub Judge 1st Class, Bilaspur on the grounds that he was a resident of Village Panjgain, Pr. and Tehsil Sadar, District Bilaspur, H.P. and was owner in possession of suit land comprised in Khata/Khatauni No. 198 min/982 min, Khasra No.1182, measuring 0-9 bighas, situated in Village Panjgain. Defendants were also residents of Village Panjgain and had no right, title and interest over the suit land and they were forceful and sourceful persons and were forcibly trying to create a new path through the suit land. The plaintiff requested the defendants not to interfere in the suit land in any manner, but the said requests of the plaintiff were turned down, hence the suit.

4. According to the plaintiff, the cause of action arose on 20.08.2001 when the defendants forcibly tried to create new path through the suit land. Accordingly, he prayed that a decree for permanent injunction be passed restraining the defendants not to interfere and create new path through the suit land in any manner themselves or through their agents etc. In the alternative, it was prayed that in case the defendants succeed in dispossessing the plaintiff during the pendency of the suit, then the same be ordered to be restored to the plaintiff.

5. The suit was contested by the defendant No. 1 by way of filing of written statement. In preliminary objections, it was stated that the defendants have been using the maind (beer) of the lands in order to reach the house and cowshed from the road which is a custom prevailing in the area since time immemorial. In the alternative, the defendant No. 1 also pleaded that there is easement of necessity to the defendants to use the path as there is no alternative path on the spot. On merits, the case put forth by defendant No. 1 was that the said defendant do not object the ownership and possession of the plaintiff on the suit land except the use of maind to reach the house from the main road. Defendant No. 1 further submitted that he has no concern with the suit land except the use of maind which was the boundary of land of the parties. It was further contended on behalf of defendant No. 1 that he was not creating any new path over the suit land as alleged.

6. On the basis of pleadings on record, learned trial Court framed the following issues on 11.07.2002:

> *"1. Whether the plaintiff is entitled for the permanent prohibitory injunction as prayed for? OPP*
>
> *2. Whether the plaintiff is entitled for mandatory injunction as prayed for? OPP*
>
> *3. Whether the suit was not maintainable as alleged? OPD*

4. Whether the plaintiff has not come with clean hand as alleged? OPP

5. Whether the defendant has a right by customs to use main (Beer) on the suit land as alleged? OPD

6. Whether the defendant has easement of necessity as alleged? OPD

7. Relief."

7. These issues were answered by the learned trial Court as under:

"Issue No. 1: No.

Issue No. 2: No.

Issue No. 3: No.

Issue No. 4: No.

Issue No. 5: Yes.

Issue No. 6: No.

Relief: The suit of the plaintiff is hereby dismissed as per operative part of the judgment.

8. Thus, the learned trial Court held that admittedly the plaintiff and defendants had lands adjacent to each other and have a common edge, i.e. maind in between. It further held that it stood admitted in his evidence by the plaintiff that in plain areas the maind in between the lands of two persons is used by them jointly and grass is also cut jointly. It further held that therefore the defendants have also same right on the edge as plaintiff and hence, the plaintiff and defendants have equal rights over the edge/maind in question in the case. The learned trial Court also held that if the plaintiff has right to use the maind, the defendants have equal right to use the maind in question and the use of the maind by the defendants does not prove any interference by the defendants. Learned trial Court also held that it has further come in evidence that it was the custom in the area to use the maind/edge in between two fields of the persons for ingress and egress by the parties having adjoining lands. This fact was corroborated by the witnesses of the plaintiff and oral evidence of defendants. Learned trial Court also held that in view of the fact that it had come in evidence of plaintiff that Shimla-Beri road abuts the land of the defendants, he could not claim any easement. Thus, the learned trial Court dismissed the suit of the plaintiff and held that the plaintiff was not entitled for permanent prohibitory injunction.

9. Feeling aggrieved, the plaintiff filed the appeal before the Court of learned District Judge, Bilaspur, H.P.

10. The learned Appellate Court vide its judgment dated 19.09.2005 upheld the judgment passed by the learned trial Court and dismissed the appeal by holding that the plaintiff had failed to prove that defendant was interfering with his possession over the suit land and was bent upon to open a new path over the suit land. The learned appellate Court also held that the use of maind by the defendants does not prove any interference by the defendants, more so, there was a custom prevailing in the area that maind was being used as a path for coming and going by the parties to their own lands. It also held that the plaintiff has miserably failed to prove any kind of interference except use of maind for which the defendants had the right to use as per the admission of the plaintiff as a witness.

11. It is against the findings so returned by the learned Courts below that the present appeal has been filed by the appellant/plaintiff.

12. Mr. G.D. Verma, learned Senior Counsel appearing for the appellant has strenuously argued that the judgments and decrees passed by both the Courts below were not sustainable in the eyes of law and were liable to be set aside because both the Courts below have failed to appreciate that the defendants had neither pleaded nor proved customary right of use of maind in the area as is required in law. According to Mr. Verma, a feeble reference in the written

statement by defendant No. 1 therein to the effect that the defendants were using the maind (beer) of the land in order to reach the house and cowshed from the road, which is a custom prevailing in the area since times immemorial, does not amount to pleading of custom as is required in law. Mr. Verma further argued that the defendant in fact had become owner of the said land only in the year 1972, therefore, it is not understood as to how he could say that he was using the maind to have access to his house from time immemorial. Mr. Verma further argued that it was clear from the evidence on record that there was an alternative road leading both to the shop as well as to the house of defendant No. 1. According to him, this very important aspect of the matter had been ignored by both the learned Courts below which had erred in not appreciating that when defendant No. 1 himself admitted that there was a road leading to his shop and house, then the very contention being put forth by the defendant No. 1 that there was no access to his house and land except the use of the maind was a totally wrong stand taken by him. On the basis of this, Mr. Verma strenuously argued that the findings returned by both the Courts below were liable to set aside and the suit filed by the plaintiff be decreed as prayed for. In order to substantiate his arguments, Mr. Verma has relied upon the following judgments:

1. AIR 1995 HP 1982
2. AIR 2004 Rajasthan 196
3. AIR 2011 SC 545

13. Mr. K.D. Sood, learned Senior Counsel appearing for respondent No. 1 has argued that there is no merit in the contentions which have been raised by learned Senior Counsel for the appellant. According to Mr. Sood, custom was not only pleaded by defendant No. 1 in the written statement as is required in law, but it was also proved by defendant No. 1. Mr. Sood further argued that both the Courts below have come to the conclusion and rightly so that the defendants were not causing any interference in the ownership and possession of the plaintiff over the suit land and that the usage of the maind could not be termed to be an interference. According to Mr. Sood, there being concurrent findings in favour of the defendants in this regard, the same did not warrant any interference in the second appeal. He further submitted that the maind was being used to have access to the land of the defendants which was at the back of the house to which there was no other approach except the maind. Accordingly, he argued that as there was no merit in the present appeal and the same should be dismissed with cost. Mr. K.D. Sood, in support of his case, has relied upon the following judgments:

"1. 1991(2) Sim. L.C. 94
2. AIR 1976 Allahabad 415
3. 2014(2) Him. L.R. 1043

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

15. Mulla in his Principles of Hindu Law observed as follows:

> *"A custom derives its force from the fact that it has, from long usage, obtained the force of law. Mulla further observed:*
>
> *All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality."*

16. Section 13 of the Indian Evidence Act, 1872 envisages as under:

> *"13. Facts relevant when right or custom is in question.-Where the question is as to the existence of any right or custom, the following facts are relevant:-*

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from."

17. Out of the 7 issues which were framed by the learned trial Court, issue No. 5 was:

"Whether the defendant has a right by custom to use Maind (Beer) on the suit land as alleged? OPD

This issue has been answered in favour of the defendants by the learned trial Court.

18. A perusal of the statement of PW-1 Sita Ram, i.e. the plaintiff demonstrates that he has admitted the custom of use of *maind* (beer) for the purpose of going from one field to the other in the village. His deposition is quoted hereinbelow:

"Thik hai ki gaon mai ek khait se dusere khait ko jana ho to beer par se jate hai thetha rasta aadi kaagjat mai darz na hote hai"

19. PW-2 Bohra Ram has also admitted it to be correct that Nand Lal and Sita Ram etc. use the *maind* (beer) for the purpose of going to their lands.

20. Hariman, Field Kanungo Sadar, District Bilaspur has entered into the witness box as DW-1. He has proved on record Tatima Ex. DW-1/A. He has also deposed that when he investigated the matter, he found that defendants have not encroached upon any land of the plaintiff. He further deposed that red line reflected in the Tatima is the *maind* between the two numbers. In his cross-examination by the plaintiff, he has clearly stated that in between the boundaries of the plaintiff and the defendants, there is a *maind* which is used by the defendants.

21. Similarly, defendant Nand Lal has entered into the witness box a DW-2 and he has stated that he uses the maind between his land and the land of the plaintiff for excessing his cowshed and field. He has also stated that in their village, all the villagers use the *maind* between their lands to access their fields and this custom is prevailing from centauries. He has also deposed that the grass on the 'Beer' is cut proportionately *(aadha aadha)* by him and the plaintiff. He has also deposed that he has not caused any interference in the land of the plaintiff. He has also deposed that the *Tatima* which has been produced on record clearly reflects the said 'Beer'. He has clarified in his cross-examination that 'Beer' is used to access his land which is behind his house. He has stated that first there is a road, then there is his shop, behind his shop is the house and behind house is vacant land which is accessed through the 'Beer'.

22. Incidentally, there is no cross-examination of the defendant to the effect that save and except using the *maind (beer),* the defendant is also interfering in other portion of the suit land. There is no suggestion to the defendant that he has no right to use the *maind (beer)* as a matter of custom. Similarly, there is no suggestion to the defendant that there does not exist any custom to the effect as alleged by the defendant.

23. In his written statement, the defendant has mentioned in preliminary objections as under:

"3. That the defendant has been using the Maind (Beer) of the lands in order to reach the house and cowshed from the road which is a custom prevailing in the area since time immemorial."

He has further mentioned in paragraph No. 2 of his written statement as under:

> *"2. In reply to para No. 2, it is submitted that the defendant No. 1 has no concern with the suit land except the use of the Maind which is the boundary of land of the parties."*

24. What this Court has to examine is whether custom has been sufficiently pleaded and proved by the defendants or not. In fact, this is the substantial question of law which has to be decided by this Court because if this Court comes to the conclusion that defendant No. 1 has both pleaded and proved custom, as is required in law, then there is no occasion for entering into any other issue because both the Courts have concurrently held against the plaintiff and in favour of the defendants that the plaintiff is not entitled for the relief of permanent prohibitory injunction and that the defendant has a right by custom to use the 'Maind' (Beer).

25. This Court in **Amar Singh and others** Vs. **Kehar Singh and others,** AIR 1995 Himachal Pradesh 82 has held that the pre-requisites of a valid custom are to be concluded by the Courts on the basis of the evidence adduced by the parties and not only with reference to the allegations and counter allegations made by them. This Court has also held that it is well established that when plaintiff bases his case on custom, he must actually plead custom in his plaint and prove it by leading cogent evidence.

26. The High Court of Rajasthan in **Virendra Singh others** Vs. **Kashiram,** AIR 2004 Rajasthan 196 has held on the facts and circumstances of that case in paragraphs No. 20 as under:

> "*Learned counsel for the defendants contended that he was taken in adoption according to the custom applicable to the parties but this argument is devoid of merit as there is no pleading and evidence with regard to any custom or usage applicable to the parties permitting persons to be adopted above the age of 15 years. Hence, the defendant No. 1 was not capable of being taken in adoption by the plaintiff."*

27. The Hon'ble Supreme Court in **Atluri Brahmanandam** Vs. **Anne Sai Bapuji**, AIR 2011 Supreme Court 545 has held in paragraphs No. 12 and 13 as under:

> *"12. We are concerned for the purpose of this case with clause (iv) of Section 10 which provides that a person to be adopted should not have completed the age of 15 years. But there is also an exception provided therein to the aforesaid required qualification which provides that if there is a custom or usage applicable to the parties permitting persons who have completed the age of 15 years being taken in adoption, such a person could also be validly adopted. On the other hand, the effect and the implication of Section 16 of the Act is that if there is any document purporting to record an adoption made and is signed by the person giving as well the person taking the child in adoption is registered under any law for the time being in force and if it is produced in any Court, the Court would presume that the adoption hasbeenmadeincompliance of the provisions of the Act unless and until it is disproved.*
>
> *13. There is no denial of the fact in the present case that the respondent was more than 15 years of age at the time of his adoption. But the respondent has relied upon the exception provided insection 10 (iv) and has proved by leading cogent and reliable evidence like Ex. A-8 that there is a custom in the "Kamma" community of Andhra Pradesh for adoption of a boy even above the age of 15 years. Therefore, the aforesaid exception which is engrafted in the same part of the provision of Section 10 of the Act was satisfied. Since the aforesaid custom and aforesaid adoption was also recorded in a registered deed of adoption, the Court has to presume that the adoption has been made in compliance with the provisions of the Act, since the respondent has utterly failed to challenge the said evidence and also to disprove the aforesaid adoption.*

28. This Court in **Rup Chand** Vs. **Sh. Daulatu and others** 1991(2) Sim. L.C. 94 has held that the right of using edges of each others fields for going to their respective fields by agriculturists is a customary right of easement and not a right of easement to be acquired either by prescription or by necessity.

29. The High Court of Allahabad in **Vidya Sagar and another** Vs. **Ram Das and another**, AIR 1976 Allahabad 415 has held in paragraph No. 4 as under:

> *"4. India is predominantly an agrarian, country where, speaking generally, the relation between cultivators is cordial and rests on mutual regard for the convenience of others. It is, therefore, too common for one cultivator to pass over the Mend of another cultivator as a means of access to his own field and such user of the Mend of one's field by another for purposes of agricultural operations and allied activities is, generally speaking, never objected to and is, therefore, nothing but permissive. No easementary right, therefore, can be acquired in this country by use of a Mend as a way unless there is clear evidence of such user as a matter of right. I am, therefore, of the Opinion that the finding of the lower appellate Court that a right of way was acquired by respondent Ram Das over the Mend existing between plots Nos. 340 and 354 cannot be sustained in law in view of the requirements of Section 15 of the Indian Easements Act. The claim was rightly rejected by the trial court on the ground of necessity in the face of evidence of an alternative route being available to the respondent. In the result the appeal must succeed.*

30. This Court has further held in **Satya Bala and another** Vs. **Onkar Chand,** 2014(2) Him. L.R. 1043 that it cannot be disputed that it is a common feature of the villages in Himachal Pradesh that people generally pass over the 'MAIND' of the land. Such like customary usage is existing in other parts of India also. Paragraph-19 of the said judgment reads as under:

> *"19. It cannot be disputed that it is a common feature of the villages in Himachal Pradesh that people generally pass over the 'MAIND' of the land. Such like customary usage is existing in other parts of India also and has been noticed in Smt. Balley and another vs. Rama Shanker Lal and others AIR 1975 Allahabad 461 in the following manner:-*
>
> > *"5. The main question that falls for determination in this appeal is whether the plaintiff can be said to have acquired a prescriptive right of way under Section 15 of the Easements Act on the 'Danda' running over the ridge 'between the two fields Nos. 30 and 31. Learned counsel for the plaintiff-respondent contended that the learned Judge of the lower appellate Court rightly applied the law in holding that the plaintiff having proved that he has been passing over the disputed passage for over 25 years after purchasing plots Nos. 9 and 10 for enjoyment thereof without any let or hindrance, it would be presumed that he did it as of right. Reliance was placed in this connection on the cases of Hari v. Mahadeo (AIR 1921 Nag 127), Phoolchand v. Murari Lal (AIR 1951 Madh Bha 89) and Tukaram Rajaram Suple v. Sonba Chindu Mali (AIR 1959 Bom 63). In my judgment, the learned Judge of the court below seems to 'be of the view that once a person establishes his passing over a piece of land for more than 20 years without any evidence of interruption or hindrance, then he would be deemed to be so doing as of right and he would acquire a prescriptive right of way under Sec. 15 of the Easements Act. Even the cases cited by the learned counsel for the plaintiff-respondent do not lay down any such rule of law. It would be seen that in all those cases on the facts and circumstances it was either found that the user was as of right or the user was not as of right but was by way of leave or licence. Here in the instant case the plaintiff came with a case that there was passage one Lattha wide on which bullock carts and Ikkas could pass and he had been using it for over 25 years as of right for access from the main road to his Gher in plots Nos. 9 and 10.*

This affirmative case pleaded by him has not been found to be established. What has been found established is that on the ridge between the boundaries of the two cultivated fields there was a passage 1 to 2 feet wide which could be used as an access from the public road to the agricultural plots in the village lying to the south of that public road. It is the common feature in our agricultural villages that on the Mend 'boundary between two cultivated agricultural fields public generally pass and hardly by habit any agriculturist objects to it. I have no hesitation in holding that such passing over the ridges of the field to and fro by the villagers would always the permissive user. Thus an uninterrupted user by any person of a ridge between the two agricultural fields for passing over it could be presumed to be permissive and not as of right. Moreover, it would not be in public interest if this court countenances recognizing acquisition of prescriptive right of way over the boundaries of the agricultural fields as that would lead to complications in the agricultural areas having a baneful effect end completely preventing the re-arrangements of agricultural fields or their divisions. In the circumstances of the instant case in the consolidation proceedings, on the own admission of the plaintiff, Rama Shanker Lal, who appeared in the witness box, he did not ask for a chak road over the disputed land. The view of the court below that such an objection could not have been raised under Section 9 or 20 of the Consolidation of Holdings Act may be a correct view but there was nothing to prevent the plaintiff when the chaks were being carved to ask the Consolidation to leave a passage. The attempt of the plaintiff that the consolidation had put stone pillars demarcating the passage has miserably failed as there is a finding recorded that no such stone pillars were found at the spot which were put as demarcation by the Consolidator. I, therefore, hold that the lower appellate Court has misdirected itself in holding that as of right the plaintiff had 'been using the 'Danda' for access to the plots 9 and 10 from the public road. It would be 'presumed that the user was permissive. The plaintiff could not succeed therefore merely on the evidence as adduced by him that any prescriptive right of way has accrued to him under Section 15 of the Easement Act."

31. It is clear from the judgments of this Court in **Rup Chand** Vs. **Sh. Daulatu and others** 1991(2) Sim. L.C. 94 and **Satya Bala and another** Vs. **Onkar Chand**, 2014(2) Him. L.R. 1043 (supra) that the right of using edges of each others fields for going to their respective fields by agriculturists is a customary right.

32. The Hon'ble Supreme Court in **Ass Kaur** Vs. **Kartar Singh and others** (2007) 5 Supreme Court cases 561 has held as under:

"*18. In R.B.S.S. Munnalal and Others v. S.S. Rajkumar and Others [AIR 1962 SC 1493], this Court was considering the question as to whether a Jain widow could adopt a son to her husband without his express authority, being governed by the custom which had by long acceptance become part of the law applicable to them. Therein, it was observed :*

"It is well-settled that where a custom is repeatedly brought to the notice of the Courts of a country, the courts may hold that custom introduced into the law without the necessity of proof in each individual case"

19. The court can also take judicial notice of such customs in terms of Section 57 of the Evidence Act, 1872. As and when custom has repeatedly been recognized by the courts, the same need not be proved. Reference in regard to the Punjab 'general custom' may be made to Ujagar Singh (supra), and Bawa v. Taro [AIR 1951 Punjab 239."

33. In my considered view, in the present case, custom to this effect has been sufficiently pleaded by defendant No. 1 in the written statement. Not only the custom of use of

maind in the village by the villagers to have access to each others agricultural lands has been pleaded, it has also been proved as per the requirement of law. Incidentally, the custom of using the maind by villagers for the purpose of approaching the agricultural land has been admitted even by the plaintiff himself when he has entered into the witness box as PW-1. PW-2 has deposed that the maind in issue was used both by the plaintiff and the defendants. DW-1 has duly proved that there exists such maind between the boundaries of the plaintiff and the defendants, which was duly reflected in the Tatima which is on record.

34. Therefore, in my considered view, the contention of the learned counsel for the appellant that in the present case the custom of usage of 'maind' has neither been pleaded nor proved is totally unsustainable. It has been clearly pleaded in the written statement that use of 'maind' is a custom and the said custom is prevailing in the area since time immemorial.

35. It has been held by the Hon'ble Supreme Court in **Bhagwati Prasad** Vs. **Chandramaul,** AIR 1966 Supreme Court 735 that if a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

36. Learned counsel for the appellant has not been able to convince this Court that the averments made qua the custom in the written statement do not amount to sufficient pleading of custom. I have already held above that as far as the use of 'maind' (beer) for access to one's agricultural land is concerned, it has been duly proved as a matter of custom not only by the contesting defendant, but existence of the same as a custom in the village has also been admitted by the plaintiff. The substantial question of law is thus answered accordingly.

37. Thus, I do not find any merit in the present appeal and there is neither any perversity nor any infirmity with the judgments and decrees passed by both the learned Courts below. Accordingly, the present appeal is dismissed with cost.

CMP No. 4974 of 2015

38. During the pendency of the appeal, an application was filed under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, i.e. CMP No. 4974 of 2015 for restraining the respondents from interfering in any manner over Khasra No. 1182, situated in Mauja Panjgain, Tehsil and District Bilaspur, H.P. and also for restraining the respondents from raising any construction and encroaching upon any portion of the said land.

39. This Court on 06.10.2015 appointed Tehsildar Sadar, District Bilaspur as Local Commissioner to demarcate the land on the spot and find out encroachment, if any, made by respondent/defendant No. 3 and any other respondent/defendant over the suit land bearing Khasra No. 1182. The report of the Local Commissioner is available on record. There is no finding returned by the Local Commissioner that the contesting respondent has encroached upon the suit land, subject matter of the application. All that is mentioned in the report of the Local Commissioner is that within the Eastern and Northern *'maind',* respondent No. 3 and others had made encroachment by way of shrub like fencing, which was got removed at the spot and proper identification points of the land were fixed. In view of the said report, the grievance of the appellant, if any, was met at the spot and the application has thus become infructuous. Accordingly, the application stands disposed of as infructuous, so other applications, 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
Shayam Lal and others ..... Respondents

Cr. Appeal No. 353 of 2010
Reserved on: 20.06.2016
Date of decision: 29.06.2016

Indian Penal Code, 1860- Section 320 and 201- Dead body of the deceased was found in the field- burn injuries were found on his person - accused confessed that he had connected the wire for protection of fields and for hunting wild animals- accused was tried and acquitted by the trial Court- held in appeal that accused was implicated on the basis of confession made before the police that he had connected service wire with electricity line 15 meters away from the place where dead body was recovered – no confession made to a police officer can be proved before a Court of law - PW-1 had not supported the prosecution version that any recovery was made from the place mentioned by the accused- no witness was examined to prove that accused had put wire in the field for hunting animal and had connected wire with electricity line- it was a case of no evidence- Court had rightly acquitted the accused- appeal dismissed. (Para-8 to 31)

Cases referred:
Mehboob Ali & Another Vs. State of Rajasthan, (2015) 9 J.T. 512
Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609

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. H.S. Rana, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, the appellant/State has challenged judgment passed by the Court of learned Sessions Judge, Solan, dated 16.02.2010, in Sessions Trial No. 21-NL/7 of 2008, vide which, learned trial Court has acquitted the accused therein for offences punishable under Sections 302, 364, 404, 201 read with Section 34 I.P.C.

2. The case of the prosecution was that Nisha wife of Dila Ram was found missing during the intervening night of 19/20.03.2007 from her residence in village Khil-Khokhla falling in jurisdiction Police Station, Ram Shahar, Tehsil Nalagarh, District Solan. She was putting up in her house alongwith her three children, as her husband Dila Ram was working as a labourer in Calcutta. She was not having good relations with the accused and their family members. On account of holidays in school, deceased had sent her children to her parental house one day prior to her disappearance. When her parents came to know about her disappearance, they informed the husband of deceased telephonically. As instructed by Dila Ram, the house was opened and the cattle was freed, which was unattended in the cattle shed. This was followed by search of the deceased by her father and other relatives but she could not be traced. Missing report was lodged with the police. Dila Ram arrived from Calcutta and on the basis of a report made by him, FIR No. 30/2007 was registered under Section 365 at Police Station. On suspicion, A-1 Shayam Lal and other accused were arrested on the premise that Shayam Lal was having illicit relation with the deceased and he kept on visiting her despite

objections of family members. As per prosecution, matter was taken note of by the residents of the area. They informed the police regarding the said conduct of the deceased that she was of loose character and lot of people used to visit her and residents apprehended that some untoward incident may take place. Shayam Lal was directed not to visit her. Deceased had also been provided a mobile phone by A-1 on which she used to converse with him. There was also land line telephone at her residence. Police discovered that accused after hatching a conspiracy to eliminate the deceased took her to jungle during night time. This was done on the pretext that they will apprehend Kamal as well as Narain accused, who used to fell Kher trees in order to revenge the excise case which had been planted against her and on the basis of which, a complaint was also lodged. During night time, when the deceased was accompanying Shayam Lal, he throttled her to death. Thereafter, he called Mohinder and Narain who accompanied him to jungle to dispose of the body. The dead body was thrown in a well known as "Jharni Moorh Kuan" near Jogon. After 20 days, the dead body was found floating in the well by accused. The dead body was cut into pieces and was dumped in the well in two gunny bags by A-1 accompanied by other accused. After about six months, husband of deceased heard the accused discussing while consuming liquor that they had succeeded in eliminating the deceased and by now her bones must have decomposed. The husband of the deceased thereafter went to the well alongwith other people and gunny bag was found floating. The matter was reported to the police and on the next day, the gunny bag was taken out, in which there were body parts. Later on after getting the well dried up, the remaining parts of the body were taken out which were all putrefied. The parts of the body were sent for chemical analyses to IGMC Shimla, where forensic expert and doctor conducted postmortem and a part of the body recovered was sent for DNA profiling. On the basis of DNA profiling, the dead body was found to be that of deceased Nisha. Accused Shayam Lal was arrested alongwith his brother Kamal Chand. On the discovery of body, FIR No. 238 of 2007 was registered on 13.09.2007 at Police Station Nalagarh. Investigation revealed that Shayam Lal accused was unmarried and he was having illicit relation with deceased Nisha. After his engagement, Nisha insisted that she never wanted Shayam Lal to marry someone else, she used to threaten accused Shayam Lal with dire consequences and that she will involve him in a rape case. Accused Shayam Lal continued his relations with her. Investigation also revealed that Mohinder Singh and Narain Dass did not accompany Shayam Lal to jungle to dispose of the dead body. Surender was taken to the spot for disposing of the dead body, which was thereafter thrown in the well. Shayam Lal and Kamal Kumar were alleged to have went to the spot and noticed the dead body floating, which was thereafter chopped and the pieces of the dead body were put in gunny bag and they were put dumped back in the same well. Her hairs, shoes, bangles, watch and sim card etc. were kept hidden under concrete. The hairs, shoes bangles etc. were subsequently burnt by the accused. Accused Shayam Lal made a disclosure statement on the basis of which axe and sickle with which the dead body was cut into pieces were recovered. It was concluded on the basis of investigation that murder had been committed on the basis of a conspiracy hatched in this regard between accused Shayam Lal, Kamal Chand and Narain Dass.

3. After the completion of investigation, challan was presented in the Court. The accused were charged for commission of offences under Sections 302, 364, 404, 201 read with Section 34 I.P.C., to which, they pleaded not guilty and claimed trial.

4. On the basis of material on record, the learned trial Court came to the conclusion that no doubt dead body of Nisha was found in pieces in two gunny bags in a well at Jharni which was fished out, however, it had not been found beyond shadow of doubt that she was murdered by the accused after hatching conspiracy in this regard and her dead body was dumped by them in the well as per the allegations. Thus, the learned trial Court gave the accused persons benefit of doubt and acquitted them of the charged levelled against them.

5. We have heard Mr. V.S. Chauhan, learned Additional Advocate General as well as Mr. H.S. Rana, Advocate, learned counsel for the respondents. We have also gone through the records of the case and the judgment passed by the learned trial Court.

6. Mr. V.S. Chauhan, learned Additional Advocate General, argued that the finding of acquittal which has been returned by the learned trial Court was not sustainable in law because the prosecution was able to prove beyond any reasonable doubt on the basis of material on record that a conspiracy was hatched by accused Shayam Lal alongwith Narain Dass and Mohinder to do away with the deceased and the deceased was murdered as a result of the said conspiracy and her body was thrown into the well. According to him, it further stood established on record that after the commission of the murder evidence was also destroyed by the accused as a part of the conspiracy.

7. On the other hand, learned counsel for the respondents has argued that there was neither any perversity nor any infirmity with the judgment passed by the learned trial Court because the accused were not guilty of the offences alleged against them nor the prosecution was able to prove its case against the accused beyond reasonable doubt. According to him, neither any conspiracy was hatched by the accused as alleged by the prosecution nor the deceased was murdered as a result of the conspiracy.

8. In our considered view, what has to be scrutinized on the basis of the material on record is whether the prosecution has been able to prove beyond any reasonable doubt that a conspiracy was indeed hatched by Shayam Lal with Narain Dass and Mohinder Singh to do away with the deceased and whether the deceased was killed as part of that conspiracy and whether thereafter, the accused destroyed the evidence after committing the murder of the deceased.

9. In the present case, there is no direct evidence to suggest that on the intervening night of 19/20.03.2007, the deceased was led to jungle by accused Shayam Lal. This factum has come on record in the course of investigation on the basis of the alleged disclosure statement made by accused Shayam Lal while in police custody which is on record as Ext.PW6/A. This disclosure statement has been allegedly made in the presence of two witnesses, namely, Bagga Ram and Ram Lok.

10. It is settled principle of law that no confession made to a police officer shall be proved as against a person accused of any offence. This is provided in Section 25 of the Evidence Act. Section 26 of the said Act further provides that no confession made by any person while he is in the custody of a police officer, shall be proved as against such person unless it be made in the immediate presence of a Magistrate. Section 27 of the said Act provides how much of an information received from accused may be proved.

11. The Hon'ble Supreme Court in ***Mehboob Ali & Another Vs. State of Rajasthan***, ***(2015) 9 J.T. 512***, has held as under:-

> "**[13]** For application of section 27 of Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the Police before disclosure statement of the accused is recorded, is admissible in the evidence.
>
> **[14]** Section 27 of Evidence Act refers when any "fact" is deposed. Fact has been defined in section 3 of the Act. Same is quoted below :
>
> "Fact" means and includes'
>
> (1) any thing, state of things, or relation of things, capable of being by the senses;
>
> (2) any mental condition of which any person is conscious. Illustrations:
>
> (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
>
> (b) That a man heard or saw something, is a fact.
>
> (c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact. "Relevant". "One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."

[16] This Court in State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru, 2005 11 SCC 600 has considered the question of discovery of a fact referred to in section 27. This Court has considered plethora of decisions and explained the decision in Pulukuri Kottaya & Ors. V. Emperor, 1947 AIR(PC) 67 and held thus :

"125. We are of the view that Kottaya case, 1947 AIR(PC) 67 is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of Kottaya case. The ratio of the decision in Kottaya case reflected in the underlined passage extractedwas highlighted in several decisions of this Court.

127. The crux of the ratio in Kottaya case was explained by this Court in State of Maharashtra v. Damu. Thomas J. observed that: (SCC p. 283, para 35)

"The decision of the Privy Council in Pulukuri Kottaya v. Emperor is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In Mohd. Inayatullah v. State of Maharashtra, 1976 1 SCC 828, Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in Pulukuri Kottaya case . The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)

"Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kottaya v. Emperor ; Udai Bhan v. State of U. P., 1962 Supp2 SCR 830)."

12. Now in this legal background, we will be scrutinizing the disclosure statement made by the accused under Section 27 of the Evidence Act. According to the prosecution, accused Shayam Lal disclosed that on 19.03.2007 he took Nisha Devi in the jungle on the pretext of cutting Kher trees as was earlier conspired alongwith Narain Dass and Mohinder Singh. Said two persons were already at the disclosed place. At a short distance from the house he strangulated Nisha Devi. Thereafter, he called Mohinder Singh and Narain Dass. Narain Dass did not come. Mohinder Singh came to the spot. Thereafter, they both left to their respective house. After sometime, he alongwith his brother Kewal and his nephew came back with a gunny bag and all three of them after concealing the body of Nisha Devi in the said gunny bag, threw the same during night time inside the well near the "Jharni Moorh". Next day, he told about this fact to his brother Kamal who had come from Patiala. After 20-25 days, he and Kamal had gone to pay their obeisance to Haripur Baba Ji. On their way when he looked inside the well he found the said gunny bag floating. Next day, when they came back from Haripur Baba Ji, his brother purchased a rope from Panejehra Bus Stand and on the same night, he alongwith Mohinder Singh, Kamal and Surender went to the well. He took two gunny bags and axe and sickle from the house. They took out the body of Nisha from the well. At that time, her

hair alongwith skin came out. They concealed shoes, bangles and clip etc. in a black cloth and put it back in the same bag. Neck, arms and legs of the dead body were cut into pieces and put into two separate gunny bags in which stones were put and gunny bags were again thrown in the well. The cloth containing shoes, bangles, hair sim card etc. was hidden behind sand and rodi near the Nala. Other articles were thrown in the Nala. He had kept axe and Darat in his house. He had later on burnt the clothes, shoes, hair, bangles, clip etc. in the jungle. He stated that he can demarcate that place where he had strangulated Nisha Devi and also from where the clothes were hidden and thereafter burnt, and the place where he has concealed axe without handle and sickle.

13. Bagga Ram has entered the witness box as PW-5 and Ram Lok has entered the witness box as PW-6. A perusal of the testimony of the PW-5 demonstrates that he has not stated either in his examination-in-chief or in his cross-examination that any disclosure statement was made in his presence by accused Shayam Lal.

14. Ram Lok, who has entered the witness box as PW-6, has deposed to the effect that on 13.07.2008 he alongwith Bagga Ram had visited the Police Station and police conducted interrogation of accused Shayam Lal in his presence. Accused told that a sickle and axe (Safajang) had been kept by him at his home and stated that he can get the same recovered. This disclosure statement is alleged to have been made on 13.07.2008. In this disclosure statement, as per the prosecution, the accused amongst other things had disclosed that on the evening of the fateful day, he allured deceased to the jungle and there he strangulated her. Accused has also mentioned in his disclosure statement that as to how the body of the deceased was subsequently disposed of. However, none of these facts have been stated by PW-6. As far as PW-5 is concerned, we have already taken note of this fact that he has no where stated in his statement that any disclosure statement was made in his presence. He has only deposed with regard to the alleged recoveries effected in his presence.

15. This in our considered view, makes the factum of any disclosure statement having been made by the accused voluntarily in the manner as has been stated by the prosecution highly doubtful and suspicious.

16. Now, we come to the statement of husband of deceased PW-1. According to PW-1 Dila Ram, he used to work as a labourer in Calcutta. On 19.03.2007, he talked with his wife on mobile for about 20-25 minutes and he was told that his children on completion of their examination had gone to the house of their maternal grand father and his wife was alone at home. According to him, thereafter, for the next 2-3 days he could not talk with his wife. Thereafter, he received a telephone from his in-laws informing him that the deceased was not at home and the house was locked and animals were unattended. On this, he asked his in-laws to release the animals and to break open the locks of the house. He reached back on 24.03.2007 and proceeded to Police Station Ram Shahar and asked the police to conduct search of his wife. Thereafter, according to him, he met SDPO, Nalagarh and moved an application Ext. PW1/A. CIA staff Solan arrested the accused. However, the whereabouts of is wife could not be ascertained. Now comes the most important part of his testimony, which is quoted herein below:-

> **"After some time the date and month I do not remember I was returning home from the house of my sister at village Kasana. When at about 10-12 PM I had reached near my house on hearing some talks inside of the home of Bhagat Ram. I had stopped there. Some people were consuming liquor. Kamal Chand, Shyam Lal, Chaman Lal, Hari Krishan and Bhagat Ram were those people who were talking inside whom I could identity from their voice. All being from my village. One of them Shyam Lal, Kamal Chand are present today in the Court today. In their conversation they were saying that by now the bone of Nisha may have got dissolved in the well. and now they have succeeded in their mission."**

17. He further deposed that thereafter he went to his house and asked his younger brother Chuni Lal to prepare food for him in the early morning. At about 7.00 A.M., his brother Nikka reached home. After having meals, he accompanied Nikka and his elder brother Ganju and, went to Jogon to search the well about which he had heard over night. They reached near the place known as Jharni where the well is situated. Thereafter, he has deposed as under:-

> **"We saw a gunny bag flouting in the well. On suspecting that dead body may be in the well I informed my in laws telephonically. 2-3½ hours my father in law, mother in law accompanied by Achharu the uncle of my wife. My father in law had telephonic call with District Inspector of Police CIA Solan who had asked us to approach Police Post Joghon. Police people at Joghon had asked me to keep watch for the night at the well on our moving application at PP Joghon. Next day police people with the help of villagers had fished out the gunny bag which was found containing dead body without head and some other organs which was taken by the police."**

18. In his cross-examination, he has stated that he did not give any complaint in writing to the police about what he had heard. In fact, he says that he had not informed any one about what he had heard. He has also admitted that there was dispute between him and accused Kamal with regard to irrigation of their respective lands and a settlement had been arrived at on the intervention of Panchayat. He has also deposed that before lodging report against accused Shyam Lal, he and his family members were not entertaining any suspicion on any of the accused.

19. In our considered view, the version which has been putforth by the said witness, requires a very close scrutiny. This is for the reason that besides him being an interested witness, as he is the husband of the deceased, the story putforth by him does not seem to be believable. The way and manner in which according to him, he came to know about his wife having been killed by the accused seems more like a concocted version than a fact which will come into the knowledge of a person in normal circumstances. The alleged body of the deceased in a gunny bag has been first noticed by PW-1. He allegedly visited the well after hearing the version of the accused. He has also stated that before visiting the spot where the well was situated he had returned to his house where he disclosed what he had heard to his brother and asked him to prepare meal. He had his meal in the morning and thereafter visited the spot. According to us, this conduct of a person who has gained knowledge about the circumstances in which his wife was killed is unnatural. Any normal person on gaining knowledge as to how his wife was killed would rush to the nearest Police Station/Police Post to disclose what he has heard. However, PW-1 rather than doing this, went to his house, stayed there over night and also had meal and then he visited the spot. This conduct of PW-1 besides being unnatural also shrouds the story of the prosecution with suspicion.

20. According to the prosecution, thereafter, next day police people with the help of villagers had fished out the gunny bag which was found containing body parts. The dead body was taken into possession and photographs were also taken. The parts of the body were sent for analysis. The analysis were conducted by Dr. Piyush Kapila, who has stated has PW-21 that the body parts were of a human being. He has also stated that sex of the individual was female aged about 17-40 years. It was also stated that for absolute identification whole jaw and one femure bone was sent for DNA analysis. As per the record, blood samples of the parts of the deceased were taken by the police in the presence of Judicial Magistrate, Nalagarh, for the purpose of DNA analysis. DNA profiling has been conducted by PW-18 Dr. D.S. Negi. On the basis of DNA profiling coupled with the statements of medical expert, it stood established on record that the body so discovered was of deceased Nisha.

21. According to the prosecution, accused Shayam Lal was also having motive to do away with the deceased. Accused Shayam Lal and the deceased were having illicit relations and

after accused Shayam Lal was engaged, he was threatened by the deceased that she will not allow him to marry any one and if he does, she will implicate him in a rape case. At this stage, we can also refer to the so called disclosure statement made by accused Shayam Lal as well as Kamal Chand (whose disclosure statement is Ext.PW9/A), which led to the recovery of axe, sickle, torch and the rope, which has been purchased from a shop at Jogon. The factum of the purchase of rope from a shop at Jogon has come in the disclosure statement of accused Kamal, which disclosure statement has been exhibited as Ext. PW9/A. This rope according to the prosecution was used for taking out the gunny bag from the well when it was found to be floating at the first instance by accused Shayam Lal.

22. PW-24 Ajay Kumar, seller of the rope, has deposed that he runs a hardware shop at Panejehra and police had come with two persons and stated that they had purchased a rope from his shop. However, he did not remember whether they purchased any rope. According to him, he saw those two persons only on that day. He was declared as a hostile witness. Incidentally, the rope in issue was never discovered by the police.

23. In our considered view, this disclosure statement which has been recorded under Section 27 of the Evidence Act is of no relevance at all because where as on one hand any disclosure statement made by an accused in police custody is not admissible in law, On the other hand, on the basis of the said disclosure statement, as far as the present case is concerned, no recovery has been effected by the police. This statement looses its relevance and significance.

24. A perusal of the testimony of the witnesses in whose presence recoveries have been effected on the basis of the disclosure statement made by accused Shayam Lal demonstrates that these witnesses have not supported the case of the prosecution. There are contradictions in the statements of these witnesses, which shroud the case of the prosecution with suspicion. According to PW-47 Inspector Om Prakash, one axe Ext. P-3, sickle Ext. P-4 and torch Ext. P-5 were recovered from the house of the accused vide Ext. PW5/C on the basis of disclosure statement made by accused Shayam Lal. As per PW-47 Inspector Om Prakash, these recoveries were made at the instance of Shayam Lal and Ext.PW5/C was prepared in the presence of witnesses Hem Lata, Bagga Ram and Ram Lok. Hem Lata has deposed as PW-7 and according to her the objects which were recovered at the instance of accused Shayam Lal were concealed in a separate parcel and taken into possession. According to her, she did not remember impression of seal. She was also declared as a hostile witness.

25. Incidentally, as per the report of the chemical analysis, the sickle and the axe were not found to be carrying any particles of tissue of the dead body. If the said weapons had been used to cut the body of the deceased then some particles of the tissue of the dead body ought to have been found from the sickle or the axe. This also creates a serious doubt as to whether these articles actually were the alleged weapons of offences or not. Therefore, in our considered view, the prosecution has miserably failed to connect the accused with the alleged disclosure statement made by accused Shayam Lal and the alleged recoveries effected on the basis of the said statement.

26. From what we have discussed above, it is evident that the prosecution has not been able to establish on record beyond any reasonable doubt that Nisha was murdered by the accused after hatching conspiracy in this regard and thereafter, the dead body of the deceased was dumped in the well as is the case of the prosecution. We may reiterate here that in the present case there are no eye witnesses, who have seen the alleged commission of offences.

27. It is settled law that in the case of circumstantial evidence, the salient features which have been carved out by the Honble Supreme Court in **Vijay Thakur** Vs. **State of Himachal Pradesh**, (2014) 14 Supreme Court Cases 609, 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

(ix) 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.

28. From what we have discussed above, it cannot be said that there are circumstances which have been placed on record by the prosecution on the basis of which it can be said that there is a definite conclusion of guilt, which has been fully established by the prosecution against the accused. This is evident from the following:-

(a) The prosecution has not been able to place any material on record from where it can be gathered that the deceased was allured to the jungle by accused Shayam Lal, as a result of conspiracy hatched by him with other co-accused to do away with her.

(b) The prosecution has not been able to place any material on record to substantiate that the deceased was strangulated by Shayam Lal and thereafter her body was packed in a gunny bag and thrown in a well.

(c) The prosecution has not been able to substantiate by placing any material on record that after few days Shayam Lal with the help of other co-accused fished out gunny bag from the well and after chopping the dead body dumped the same again into two gunny bags with stones and threw it in the well.

(d) The prosecution has not been able to establish that Shayam Lal and other co-accused destroyed the other evidence by burning the clothes, hairs, bangles, sim card and other belongings found on the dead of the deceased.

(e) The prosecution has not established on record that PW-1 actually over heard the accused the accused confessing about having murdered the deceased and thereafter disposing her body in the manner as has been putforth by the prosecution.

29. Therefore, the chain of circumstances in the present case from the time the deceased went missing and till the time her body was found from the well in the gunny bags does not link the accused conclusively with the commission of the offences.

30. According to us, the material on record placed by the prosecution may be pointer that the accused might have committed the offence which has been alleged against them but we reiterate that this "may be" cannot be made basis to convict a person.

31. On the basis of material on record, it cannot be said that the prosecution was able to bring home the guilt of the accused beyond reasonable doubt.

32. Further, a perusal of the judgment passed by the learned trial Court demonstrates that all these aspects of the matter have been taken into consideration by the learned trial Court and dealt with in detail. According to us, the conclusions arrived at by the learned trial Court can neither be said to be perverse nor it can be said that the conclusions are not borne out from the records of the case.

33. Therefore, we uphold the judgment passed by the learned trial Court and dismiss the appeal being without any merit. Bail bonds, if any, furnished by the accused are discharged.

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

Chhaju Ram. ...Petitioner

Versus

Smt. Asha Devi. ...Respondent

Cr.MMO No. 207 of 2014
Date of decision: 30.6.2016

Protection of Women from Domestic Violence Act, 2005 - Section 12- Marriage between petitioner and respondent was solemnized and two children were born- relations between the parties were not good and the respondent was compelled to leave her matrimonial home- respondent filed an application under Section 12, in which maintenance of Rs. 3,000/- per month was granted- an appeal was preferred, which was dismissed- held, that it is moral and legal duty of the husband to provide basic amenities of life like food, clothes and shelter and to maintain children – Section 12 has been enacted for amelioration of the financial, mental agony and anguish that woman suffers on leaving her matrimonial home – she is entitled to lead a life as she would have lived in the house of her husband- once the husband is an able-bodied man capable of earning sufficient money, he is under legal obligation to support his wife as well- maintenance @ Rs. 3,000/- per month had been awarded to wife and two children, which cannot be said to be excessive- husband has not paid maintenance awarded to the wife and has not complied with the undertakings- direction issued to comply with undertaking failing which contempt proceedings will be initiated. (Para-5 to 24)

Cases referred:

Shamima Farooqui vs. Shahid Khan JT 2015 (3) SC 576,
Dinesh Mohan Vs. Kavita @ Kamlesh, I L R 2015 (V) HP 670

For the Petitioner: Mr. Vijay Bir Singh, Advocate.
For the Respondent: Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (oral).

This petition under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India is directed against judgment dated 27.3.2014 passed by learned Additional Sessions Judge-I, Kangra at Dharamshala, whereby he affirmed the order of grant of interim maintenance of Rs.3,000/- to the respondent and two of her dependents.

2. Though this petition could have been conveniently dismissed only on the score that the petitioner till date has failed to comply with the orders passed by this Court from time to time, whereby he was directed to pay the arrears of maintenance. However, instead of dealing with the matter in a hyper technical manner, this Court would proceed to adjudicate upon the controversy by looking into the relative merits of the case.

3. The undisputed facts are that the marriage between the petitioner and respondent was solemnized in accordance with Hindu rites and customs and out of this wedlock two children, namely, Sanjna and Divyansh were born. Initially the relations between the parties remained cordial. However, after some time, there was a rift between them and the matter deteriorated to such an extent that the respondent was compelled to leave her matrimonial home along with the children.

4. Respondent filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short the 'Act') and the learned Magistrate after considering the same granted an interim maintenance of Rs.3,000/- per month. This order came to be assailed before the learned Additional Sessions Judge, Kangra, who vide judgment dated 27.3.2014 dismissed the appeal. Both these orders have been assailed by the petitioner on the ground that the orders are contrary to the provisions of law and the maintenance awarded is otherwise excessive. In addition to that, it is claimed that the petitioner is always ready and willing to take back the respondent to the matrimonial home, as such there is no question of awarding maintenance.

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

5. It is more than settled that it is not only a moral obligation, but a legal duty cast upon the petitioner to provide basic amenities of life, like food, clothes and shelter to the respondent, who is none, than his wife and also to maintain his two children living with her.

6. The obligation for Hindu male to maintain his wife is not a modern day concept but it existed even under the Shastric Hindu Law. According to the old Shastric Hindu Law, marriage between two Hindus is a sacrament a religious ceremony which results in a sacred and a holy union of man and wife by virtue of which the wife becomes a part and parcel of the body of the husband. She is, therefore, called '*Ardhangani*'. It is on account of this status of a Hindu wife, under the Shastric Hindu law, that a husband was held to be under a personal obligation to maintain his wife and when he dies, possessed of properties, then his widow was entitled, as of right, to be maintained out of those properties.

Mulla in his classic work on "Hindu Law," 14the Edn., dealing with the characteristic of the right of maintenance of a Hindu wife observes:

> *"A wife is entitled to be maintained by her husband, whether he possesses property or not. When a man with his eyes open marries a girl accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style. The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship, and quite independent of the possession by the husband of any property, ancestral or self-acquired."*

Mayne in his Treatise on "Hindu Law and Usage" 11th Edn., while trancing the history and origin of the right of maintenance of a Hindu wife says:-

> *"The maintenance of a wife by her husband is, of course, a matter of personal obligation, which attaches from the moment of marriage."*

7. The law on the subject has been elaborately dealt with by the Hon'ble Andhra Pradesh High Court in ***Kota Varaprasada Rao and another vs. Kota China Venkaiah and others AIR 1992 AP 1***, wherein it has been held as follows:

> *"8. The oldest case decided on the subject is one in Khetramani Dasi v. Kashinath Das, (1868) 2 Bengal LR 15. There, the father-in-law was sued by a Hindu widow for maintenance. Deciding the right of the widow for maintenance, the Calcutta High Court referred to the Shastric law as under:*
>
> *"The duty of maintaining one's family is, however, clearly laid down in the Dayabhaga, Chapter II, Section XXIII, in these words:*
>
> *'The maintenance of the family is an indispensable obligation, as Manu positively declares.' Sir Thomas Strange in his work on Hindu Law Vol. I page 67, says:*
>
> *'Maintenance by a man of his dependants is, with the Hindus, a primary duty. They hold that he must be just, before he is generous, his charity beginning at home; and that even sacrifice is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects,*

co-extensive as it is with the family whatever be its composition, as consisting of other relations and connexions, including (it may be) illegitimate offspring. It extends according to Manu and Yajnavalkya to the outcast, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune; all being entitled to be maintained with food and raiment."

At page 21, the learned Judges have also referred to a situation where there is nothing absolutely for the Hindu widow to maintain herself from the parents-in-law's branch by referring to the following texts from NARADA:

"In Book IV, Chapter I Section I, Art. XIII of Celebrooke's Digest, are the following texts from NARADA:

'After the death of her husband, the nearest kinsman on his side has authority over a woman who has no son; in regard to the expenditurte of wealth, the government of herself, and her maintenance, he has full dominion. If the husband's family be extinct, or the kinsman be unmanly, or destitute of means to support her, or if there is no Sapindas, a kinsman on the father's side shall have authority over the woman; and the comment on this passage is: "'Kinsman on the husband's side; of his father's or mother's race in the order of proximity. 'Maintenance' means subsistence. Thus, without his consent, she may not give away anything to any person, nor indulge herself in matters of shape, taste, small, or the like, and if the means of subsistence be wanting he must provide her maintenance. But if the kinsman be unmanly (defecient in manly capacity to discriminate right from wrong) or destitute of means to support her, if there be no such person able to provide the means of subsistence, or if there be no SAPINDAS, then anyhow, determining from her own judgment on the means of preserving life and duty, let her announce her affinity in this mode : 'I am the wife of such a man's uncle; 'and if that be ineffectual, let her revert to her father's kindred; or in failure of this, recourse may be had even to her mother's kindered" (Emphasis supplied.)

In Book III, Chapter II, Section II, Art. CXXII, of Colebrooke's Digest, we have the following texts and comments:

"She who is deprived of her husband should not reside apart from her father, mother, son, or brother, from her husband's father or mother, or from her maternal uncle; else she becomes infamous."

As per the above texts and comments, a Hindu widow if the parents-in-law's branch is unmanly or destitute of means to support her is entitled to be with the father or the kinsman on the father's side.

9. In Janki v. Nand Ram, (1889) ILR 11 All 194 (FB), a Hindu widow after the death of her father-in-law sued her brother-in-law and her father-in-law's widow. The Full Bench of the Allahabad High Court held that the father-in-law was under a moral, though not legal, obligation not only to maintain his widowed daughter-in-law during his life time, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by a suit against the son and against the property in question. While so deciding, the learned Judges at page 210 made a reference to a passage from Dr. Gurudas Banerjee's Tagore Law Lectures, thus:

"We have hitherto been considering the claim of a widow for maintenance against the person inheriting her husband's estate. The question next arises how far she is entitled to be maintained by the heir when her husband leaves no property and how far she can claim maintenance from other relatives. The Hindu sages emphatically enjoin upon every person the duty of maintaining the

dependant members of his family. The following are a few of the many texts on the subject:--

MANU: 'The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care.'

NARADA: 'Even they who are born, or yet unborn and they who exist in the womb, require funds for subsistence; deprivation of the means of subsistence is reprehended.'

BRIHASPATI: 'A man may give what remains after the food and clothing of his family, the giver of more who leaves his family naked and unfed, may taste honey at first, but still afterwards find it poison.' "

The text of MANU as added reads:

> *"He who bestows gifts on strangers, with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison; such virtue is counterfeit: even what he does for the sake of his future spiritual body, to the injury of those whom he is found to maintain, shall bring him ultimate misery both in this life and in the next."*

Having so quoted the texts, the Full Bench based its judgment on the proposition:

> *".....under the Hindu law purely moral obligations imposed by religious precepts upon the father ripen into legally enforceable obligations as against the son who inherits his father's property."*

10. In Kamini Dassee v. Chandra Pode Handle, (1890) ILR 17 Cal 373, it is held by the Calcutta High Court that the principle that an heir succeeding to the property takes it for the spiritual benefit of the late proprietor, and is, therefore, under a legal obligation to maintain persons whom the late proprietor was morally bound to support, has ample basis in the Hindu law of the Bengal School and accordingly decreed the suit for maintenance laid by a widowed brother against her husband's brothers.

11. In Devi Prasad v. Gunvati Koer, (1894) ILR 22 Cal 410, deciding an action brought for maintenance by a Hindu widow against the brothers and nephew of her deceased husband after the death of her father-in-law, the Calcutta High Court held that the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's life time, enforced partition of that property, and as the Hindu law provides that the surviving coparceners should maintain the widow of a deceased coparcener, the plaintiff was entitled to maintenance.

12. In Bai Mangal v. Bai Rukmini, (1899) ILR 23 Bom 291, the statement of law of MAYNE that

> *"After marriage, her (meaning the daughter's) maintenance is a charge upon her husband's family, but if they are unable to support her, she must be provided for by the., family of her father."*

was understood to have been one of monetary character than laying down any general legal obligation. The learned Judge, Ranede, J., after examining all the authorities has broadly laid down the law, as he understood, thus:

> *"In fact, all the text writers appear to be in agreement on this point, namely, that it is only the unmarried daughters who have a legal claim for maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which*

her maintenance can be claimed as a charge on her father's estate in the hands of his heirs." (page 295).

13. However, the same learned Judge, Ranede, J., in a later case in Yamuna Bai v. Manubai, (1899) ILR 23 Bom 608, expressed his absolute concurrence with the law laid down by the Allahabad High Court in Janaki's case, (1889 ILR 11 All 194) (supra), as regards the right of the widow of a predeceased son to maintenance against the estate of the deceased father-in-law in the hands of his heirs.

14. The view of Ranede, J., in Bai Man-gal's case, (1899 ILR 23 Bom 291) (supra), was further conditioned by Ammer Ali, J., in Mokhoda Dassee v. Nundo Lall Haldar, (1900) ILR 27 Cal 555, by holding that the right of maintenance is again subject to the satisfaction of the fact that the widowed sonless daughter must have been at the time of her father's death maintained by him as a dependant member of the family.

15. But, both the views of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra), and Ameer Ali, J., in Mokhode Dassee's case, (1900 ILR 27 Cal 555) (supra), did not find acceptance of A. K. Sinha, J., of the Calcutta High Court in Khanta Moni v. Shyam Chand, . The learned Judge held that a widowed daughter to sustain her claim for maintenance need not be a destitute nor need be actually maintained by the father during his life time... All that she is required to prove to get such maintenance, the learned Judge held, is that at the material time she is a destitute and she could not get any maintenance from her husband's family."

"19. In Appavu Udayan v. Nallamrnal, AIR 1949 Madras 24, the Madras High Court has to deal with the rights of daughterin-law against her father-in-law and his estate in the hands of his heirs. There it is held that the father-in-law is under a moral obligation to maintain his widowed daughter-in-law out of his self-acquired property and that on his death if his selfacquired property descends by inheritance to his heirs, the moral liability of the father-in-law ripens into a legal one against his heirs.

20. A Full Bench of this High Court in T. A. Lakshmi Narasamba v. T. Sundaramma, AIR 1981 Andh Pra 88 held:

> *"The moral obligation of a father-in-law possessed of separate or self-acquired property to maintain the widowed daughter-in-law ripens into a legal obligation in the hands of persons to whom he has either bequeathed or made a gift of his property.*
>
> *Under the Hindu law there is a moral obligation on the father-in-law to maintain the daughter-in-law and the heirs who inherit the property are liable to maintain the dependants. It is the duty of the Hindu heirs to provide for the bodily and mental or spiritual needs of their immediate and nearer ancestors to relieve them from bodily and mental discomfort and to protect their souls from the consequences of sin. They should maintain the dependants of the persons of property they succeeded. Merely because the property is transferred by gift or by will in favour of the heirs the obligation is not extinct. When there is property in the hands of the heirs belonging to the deceased who had a moral duty to provide maintenance, it becomes a legal duty on the heirs. It makes no difference whether the property is received either by way of succession or by way of gift or will, the principle being common in either case."*

21. It is rather pertinent to notice here that the view of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra) has been dissented from specifically by the Full Bench of this High Court."

8. It can never be forgotten that inherent and fundamental principle behind section 12 of the Act 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 that there has to be some acceptable arrangements so that she can sustain herself. Sustenance does not mean and can never allow to mean a mere survival.

9. A woman, who is constrained to leave the matrimonial 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. She cannot be compelled to become a destitute or a beggar.

10. It is next contended by the petitioner that he is only working as labourer and cannot, therefore, afford to maintain his wife. Similar issue came up before the Hon'ble Supreme Court in ***Shamima Farooqui*** *vs.* ***Shahid Khan JT 2015 (3) SC 576,*** wherein it has been held as follows:-

> ***"****15. .....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. While determining the quantum of maintenance, this Court in Jabsir Kaur Sehgal v. District Judge Dehradun & Ors. [JT 1997 (7) SC 531: 1997 (7) SCC 7] has held as follows:-*
>
> > *"The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."*
>
> *16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai JT 2008 (1) SC 78 : 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 JT 2005 (3) SC 164".*
>
> *16.1. 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. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in Chander Prakash Bodhraj v. Shila Rani Chander Prakash AIR 1968 Delhi 174 wherein it has been opined thus:-*

> *"An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."*

11. From the aforesaid enunciation of law, it is absolutely clear that once the husband is an able-bodied young man capable of earning sufficient money, he cannot simply deny his legal obligation of maintaining his wife.

12. It has to be remembered that 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 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 which she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance. (Ref: *Shamima Farooqui vs. Shahid Khan supra).*

13. Now adverting to the quantum of maintenance, it would be noticed that the court below has awarded an interim maintenance of Rs.3000/-, but that is not for the respondent alone but has been awarded to three persons, i.e. respondent and her two children i.e. a maintenance of Rs.33/- per person per day. This court cannot be oblivious to the fact that apart from sustenance, respondent and her children would be incurring some expenses for their upkeep, purchase of clothes, shoes, utensils etc. etc.

14. Similar issue came up for consideration before this Court in ***Civil Revision No.75 of 2015*** titled as ***Dinesh Mohan Vs. Kavita @ Kamlesh,*** decided on 28th September, 2015, wherein it was observed as under:

> *"8. In the matter of making an order of interim maintenance, the Court is to be guided by the criteria provided in the Section itself namely the means of the parties and also after taking into account incidental and other relevant factors like social status, the background from which the parties come from and the economical dependence of the wife/child upon the husband/father. Since an order for interim maintenance by its very nature is temporary, a detailed and elaborate exercise by the Court may not be necessary. But, at the same time, the Court has got to take all the relevant factors into account and arrive at a proper amount having regard to the factors which are mentioned in the statute.*
>
> *9. A duty is fastened upon the Court to award maintenance pendente lite in such a manner so that spouse and the child can live with dignity according to their social status. Factors which can be culled out as required to be kept in mind while awarding interim maintenance are as under:-*
>
> *(i) Status of the parties;*
>
> *(ii) Reasonable wants of the claimant;*
>
> *(iii) The income and property of the claimant;*
>
> *(iv) Number of persons to be maintained by the husband;*
>
> *(v) Liabilities, if any, of the husband;*
>
> *(vi) The amount required by the wife to live a similar life-style as she enjoyed in the matrimonial home keeping in view food, clothing, shelter,*

educational and medical needs of the wife and the children, if any, residing with the wife.

10. The learned Court below accorded the following reasons for awarding the maintenance and litigation expenses.

> *"5. Respondent-wife has stated that she has no independent source of income. However, she has stated that she is employed in MNREGA and getting less than* Rs.*1,500/- per month. She has school going minor child with her, who is studying in 4th standard. She is unable to support herself and her child due to this meagre income, which she is earning being employed under MNREGA. Petitioner-husband is stated to have shop at Main Bazar, Chandi and having goods carrying vehicles. This means apparently that husband has sufficient income.*
>
> *6. Thus, having regard to the facts and circumstances of the case, coupled with the discussion aforesaid, it is deemed just and fit to award maintenance pendente lite to respondent-wife @* Rs.*7,000/- per month along with litigation expenses i.e.* Rs.*10,000/-. Accordingly, the petition stands disposed of. Any observations made hereinabove are without prejudice to the merits of the case. The file, after due completion, be tagged with the main file."*

11. No doubt, the findings recorded by the learned Court below are not happily worded, but, this Court cannot ignore the fact that the award of maintenance is not solely for the benefit of the respondent herein, but is also for the benefit of the minor child, who admittedly is studying in a Public School. Even if, the maintenance of Rs.*100/- per day is considered as sufficient for the purpose of sustenance alone, even then the maintenance for two persons would work out to* Rs.*6,000/- per month.*

12. That apart, the Court cannot also be oblivious to the fact that apart from sustenance, the respondent and her child would be incurring some other expenses for their upkeep, purchase clothes, shoes, utensils etc. etc. Once the minor child is school going, then there would be additional expenses to be incurred towards admission fees, tuition fees, school uniform etc. and, therefore, the additional amount of Rs.*1,000/- per month i.e. roughly* Rs.*33/- per day for two persons can by no stretch of imagination in the present day cost of living, growing inflation and purchasing power of rupee, be termed to be a luxury. The interim maintenance not only includes educational expenses of the child, but it is also required to ensure that the child is brought up keeping in view the status and life-style of the parents.*

15. It has to be remembered that the object of providing maintenance is to prevent vagrancy by compelling the husband to support his wife and children, who are unable to support themselves. Most of these provisions are not penal in nature, but are only intended for enforcement of the duty, a default, which may lead to vagrancy. The further object underlying maintenance is that neither party may suffer by his/her inability to conduct the proceedings for want of money or expenses.

16. Having failed on all scores, the petitioner would lastly contend that he is ready and willing to take the respondent back to the matrimonial home.

17. Even this submission is equally without force for the simple reason that this Court has been watching very carefully and patiently the conduct of the petitioner, who till date, as observed earlier, has not even cared to deposit a single penny towards the arrears of maintenance. This offer is made only to get rid of the order of maintenance.

18. The petitioner is a liar and his intention is to deceive the court. This observation is made on the basis of undertaking given by him to this court on 31.10.2014, whereby he undertook to open bank account in the name of his two minor children and further undertook to open bank account of Rs.15,000/- each in the name of his two minor children and had also undertaken to make regular deposits in these accounts. Not only this, he had further undertaken to take back the respondent to the matrimonial home on 9.11.2014 and assured the court that he will not give rise to any occasion which may call for interference by this court. This would be evident from the order passed on 31.10.2014, which reads thus:

> *"The parties have compromised the matter. The petitioner undertakes to open bank accounts in the name of his two minor children and would remit a sum of* Rs.*15,000/- in these accounts within a fortnight from today and keep on depositing in future. He also undertakes to take the respondent back to her matrimonial home on Sunday i.e. 9.11.2014 and assures this Court that he will not give rise to any occasion, which may call for interference by this Court. However, the Court like to observe the conduct of the parties, therefore, is not disposing the case. In view of statements of the parties, further proceedings in the Court of learned Judicial Magistrate, Ist Class, (2), Nurpur, District Kangra in Cr. Case No. 17-III/2011 are stayed."*

19. As observed earlier, petitioner did not comply with any of the aforesaid undertakings and thus has taken this court for a ride. More importantly, the petitioner after giving aforesaid undertaking, even managed to get further proceedings in the court below stayed, which proceedings unfortunately continue to be stayed till date.

20. The conduct of the petitioner and the dubious method adopted by him in getting the proceedings stayed, is highly reprehensible and his action, in fact, amounts to contempt of court. However, taking into consideration the fact that this case is one relating to delicate human relationship, this court at this stage, refrains from initiating such proceedings, but needless to say that in case the petitioner fails to comply with the undertaking as given to this court on 31.10.2014, on or before 15.8.2016, the trial Magistrate shall inform this court so that proceedings under the contempt of court can be initiated against the petitioner.

21. It is instances like this, which undermine the faith of the people in the justice delivery system. After all people have faith in the justice delivery system. The hallmark whereof is that justice should not only be done, but must also appears to be done. If a trial does not appear to have done justice to either of the parties, the people would lose faith in the judicial process. Judiciary is the bed rock and handmaid of democracy. If people lose faith in justice parted by a Court of law, the entire democratic set up would crumble down.

22. Unfortunately it is the respondent and her children who are at the receiving end and, therefore, their faith in the laws and legal system has to be re-assured and re-strengthened. The petitioner after giving undertaking to this court cannot get away so as to give an impression to the respondent or the general public that he is either above the law or there is no rule of law. Any act, which undermines the faith of the people in the judicial system, harms the rule of law. Therefore, before the petitioner can be heard in the matter, he will have to comply with the undertaking given by him on 310.2014 within the aforesaid stipulated time.

23. For the reasons stated above, there is no merit in this petition and the same is accordingly dismissed.

24. However, before parting, it is made clear that before the petitioner is heard in the matter, he will have to comply with the undertaking with respect to the opening of accounts of his minor children and pay the entire arrears of maintenance on or before 15th August, 2016, failing which trial court will make a reference to this court so as to enable it to initiate contempt proceedings against the petitioner. This would be in addition to the other coercive steps which

may be required to be taken by the learned trial court to enforce the order of interim maintenance.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

HPSEB through its Secretary, Shimla & others ...Appellants

Versus

Sh. Shamsher Singh & others ... Respondents

RFA No. 284 of 2013.
Date of Decision : June 30 , 2016

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for the construction of Hydro Electric Project- Collector determined the market value @ Rs. 1,65,400/- per hectare- a Reference Petition was filed, which was allowed- compensation was enhanced to Rs. 64.31 per centare- solatium was awarded on the additional compensation- aggrieved from the award, present Reference Petition has been filed- held, that claimants are entitled to additional amount @ 12% per annum on the market value of the acquired land from the date of publication of notification- claimants are also entitled for additional amount @ 30% on the enhanced amount- however, no solatium is payable on additional amount @ 12%- appeal allowed and it is held that amount of solatium shall not be payable on the additional amount. (Para-3 to 7)

For the appellant : Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate, for the appellants.

For the respondent : Mr. H. C. Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Challenge to the impugned Award dated 26.12.2012, passed by learned District Judge, Kinnaur Civil Division at Rampur Bushahr, in Land Reference Petition No. 68 of 2006, titled as *Shamsher Singh & others vs. H.P.S.E.B. through its Secretary, Shimla & others,* is led on the ground that the Court Below could not have awarded solatium @ 30% on the additional compensation so awarded under Section 23 (1A) of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act').

2. Undisputedly claimants' land situate in village Ganvi, Tehsil Rampur, Distt. Shimla, H.P. came to be acquired for public purpose namely construction of Ganvi Hydro Electric Project (Stage-II). Acquisition proceedings commenced with the publication of notification issued under Section 4 of the Act on 19.4.2003. The Collector Land acquisition passed his award on 12.9.2005. It is a matter of record that market value of the acquired land came to be determined @ Rs.1,65,400/- per hectare. Finding the compensation to be inadequate the land owners filed petitions under Section 18 of the Act. Based on the previous awards passed by the Collector, with regard to the land acquired in the very same village for the very same public purpose, the Court below re-determined the market value of the acquired land by enhancing the amount to Rs.64.31 per centare.

3. It is not in dispute that the claimants have accepted such findings. The grievance made by the beneficiary, to a limited extent, is only qua the grant of solatium @ 30% on the additional compensation as referred to supra.

4. Section 23 of the Act reads as under:

"23. Matters to be considered in determining compensation. – (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration –

first, the market value of the land at the date of the publication of the notification under section 4, sub-section (1);

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any), sustained by the person interested, at the time of the Collector's taking possession of the land by reason of severing such land from his other land;

fourthly, the damage (if any), sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings;

fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) *bona fide* resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.

(1A) In addition to the market value of the land, as above provided, the Court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

Explanation. – In computing the period referred to in this sub-section, any period or periods during which the proceedings for the acquisition of the land were held up on account of any stay or injunction by the order of any Court shall be excluded.

(2) In addition to the market-value of the land as above provided, the Court shall in every case award a sum of thirty per centum on such market-value, in consideration of the compulsory nature of the acquisition."

5. Sub-section (1A) of Section 23 of the Act entitles the claimants for additional amount calculated @ 12% per annum on the market value of the acquired land. This is to be from the date of publication of the notification under Section 4 of the Act or the date of taking over of possession of the land, whichever is earlier in point in time.

6. Sub-section (2) of Section 23 of the Act further entitles the claimants for additional amount @ 30% on the enhanced amount of market value. Section 23 of the Act does not provide that the amount of solatium @ 30% payable in terms of sub-section (2) is also to be paid on the amount so determined under sub-section (1A). Both these sub-sections are independent and deal with different situations. Compensation paid under sub-section (1A) is independent and dehors of any amount of compensation which may be determined under sub-section (2) of Section 23 of the Act. No solatium @ 30% is payable on the additional amount @ 12% per annum awarded under sub-section (1A) of Section 23 of the Act.

7. In view of the aforesaid discussions, present appeal needs to be allowed and as such the impugned award dated 26.12.2012 is modified to the extent that the claimants shall not

be entitled to the amount of solatium @ 30% so paid under sub-section (2) on the additional compensation so awarded under Section 23 (1A) of Section 23 of the Act.

Appeal stands disposed of accordingly.

CMP No. 4772 of 2016

8. Learned counsel for the applicants seeks permission to withdraw the present application with liberty to file the same afresh. Liberty granted. Application stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Raj Kumar .....Appellant.

Versus

Narcotics Control Bureau .....Respondent.

Cr. Appeal No. 69 of 2015.
Reserved on: June 29, 2016.
Decided on: June 30, 2016.

N.D.P.S. Act, 1985- Section 8, 20 and 29- Accused P was carrying a red and blue coloured bag on his shoulder - accused R was with him- search of bag was conducted during which 1.3 kg charas was recovered- they were tried and convicted by the trial Court- held, in appeal that accused P was apprehended with the bag- an option to be searched was given to him- he consented to be searched by the police- all the codal formalities were completed on the spot- independent witness had not supported the prosecution version but he admitted his signatures on the memo and the parcels- contraband was found to be charas- prosecution case was proved beyond reasonable doubt- accused were rightly convicted by the trial Court- appeal dismissed.

(Para-11 to 13)

For the appellant: Mr. G.R.Palsra, Advocate.

For the respondent: Mr. Ashwani Pathak, Sr.Advocate with Mr.Sandeep K. Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.11.2014, rendered by the learned Special Judge-II, Mandi, H.P., in Sessions trial No. 9/2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 8, 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted along with the co-accused Pawan Kumar. Accused Raj Kumar was 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 under Section 29 of the ND & PS Act. Accused Pawan Kumar alias Lucky Sharma was sentenced with rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine to undergo simple imprisonment for a period of one year for commission of offence under Section 20(b)(ii)(C) and 29 of the ND & PS Act.

2. The case of the prosecution, in a nut shell, is that Intelligence Officer Karamveer Singh, NCB Sub Zone, Mandi, received a secret information. The grounds of belief were reduced

into writing vide Ext. PW-5/J. The secret information was sent to Superintendent, NCB Chandigarh vide memo Ext. PW-5/K. The Superintendent, NCB Chandigarh asked him to constitute a raiding party. Raiding party was constituted. Two independent witnesses, namely, Narain Singh and Jai Lal were also associated. At 7:20 AM, two persons were seen coming from Katindhi side. They were stopped. Accused Pawan Sharma was carrying a bag of red and blue colour on his shoulder. The accused were apprised of their legal right to be searched either before a Magistrate or a Gazetted Officer vide Ext. PW-5/A and Ext. PW-5/A-1. The accused gave their willingness to be searched by the NCB team. During search of the bag, one polythene bag was recovered from the bag which was containing finger shape brown substance packed in a transparent polythene. The substance was found to be charas. It weighed 1kg. 300 grams. The recovered charas was taken into possession vide memo Ext. PW-2/A. Two samples of 25 grams each were separated from the recovered charas and the same was kept in polythene packet and sealed and thereafter it was wrapped in paper envelope. The samples were marked as Mark A-1 and Mark A-2. The remaining bulk was also packed in polythene bag which was also heat sealed and put in a cloth parcel. It was marked as Lot A. The packing material and the bag of the accused were sealed in a separate marked cloth and it was marked as Lot-P. The I.O. affixed four seals on Mark A-1, A-2 each and three seals on Lot-A and Lot-P, each. The statements of the witnesses were also recorded under Section 67 of the ND & PS Act. The contraband was produced and handed over to Office In-charge Godown at NCB Chandigarh against receipt Ext. PW-5/G. The chemical examiner's report is Ext. PW-1/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 six 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. G.R.Palsra, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ashwani Pathak, Sr. Advocate, for the NCB, has supported the judgment of the learned trial Court dated 26.11.2014.

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 V.K.Sharma, testified that he was serving as Chemical Examiner, Grade-II in CRCL, Pusha New Delhi. On 21.12.2012, he received forwarding letter written by Superintendent, NCB Chandigarh along with sample parcel, seal, NCB form in duplicate in the Crime case No. 35/2012 dated 19.12.2012. He chemically examined the sample and issued report Ext. PW-1/A.

7. PW-2 R.L.Negi, testified that he was posted at Mandi from April, 2011. On 19.12.2012, Karamveer telephonically called him to the office and disclosed that he has received a secret information. The raiding party was constituted by associating him, IO Varinder Singh, IO Rahul and others. In the raiding party, two independent witnesses, namely Narain Singh and Jai Lal were also associated. The naka was laid at about 1 Km from Katindhi towards Mandi on the main road. At about 7:15 AM, two persons were coming from Katindhi side. One of them was carrying a bag with him. Both of them disclosed their identity. I.O. apprised the accused about the information that they were carrying contraband. The I.O. issued notice under Section 50 of the ND & PS Act. The accused gave their consent to give their search to I.O. Karamveer Singh. During search one polythene bag was recovered from the bag which was containing finger shape dark brown substance. The substance was checked and it was found to be charas. It weighed 1kg. 300 grams. Two samples of 25 grams each were drawn. Sampling proceedings were completed. The bulk charas was marked as Lot-A. Notices were issued to the accused under Section 67 of the ND & PS Act. In his cross-examination, he deposed that the independent witnesses were associated on Katindhi road near Shiv Mandir. They were walking on the road. They had laid naka at Katindhi at 6:45 AM. The log books of their vehicles were maintained

regularly. He admitted that there are Judicial Magistrates and Executive Magistrates posted at Mandi and many Gazetted Officers reside in Mandi town.

8. PW-3 Jai Lal testified that NCB officials called him to their office for work and obtained their signatures on the papers. He and Narain Singh used to work as labourers in Ram Nagar, Mandi. He was declared hostile and cross-examined by the learned Special Public Prosecutor, NCB. He denied that he along with Narain Singh was present near Shiv Mandir from where Katindhi leads from Mandi. He denied that the IO Karamveer along with NCB officials came there and stopped their vehicle. He denied that they both were associated as witnesses in the raiding party. However, the fact of the matter is that he has admitted his signatures on memo mark "X". He denied that one of the accused was holding bag in his hand. He denied that on search of the bag, charas was found. He denied that NCB team had taken into possession charas vide Ext. PW-2/A. He denied his signatures on memo Ext. PW-2/A. However, he has admitted his signatures on parcel sample Lot-A-1 and Lot-A-2. He also admitted that parcel Lot-P and Lot-A were also signed by him. He also deposed that four parcels bear the signatures of witness Narain Singh. He admitted his signatures on Panchnama Ext. PW-2/B. He admitted that he has signed the statement of accused Pawan Kumar as witness and accused Raj Kumar also in red circle. The arrest memo and Jamatalashi were also signed by him. Witness Narain Singh has died. Mark X-1 was also signed by him. In his cross-examination by the learned defence counsel, he deposed that documents and parcels were prepared and signatures were obtained in the office. He has studied up to 5th standard. He knows Hindi. He did not know English though he used to sign in English.

9. PW-4 Ramesh Kumar deposed that he carried sample mark A-1 to CRCL, Pusha New Delhi. He proved report Ext. PW-4/B.

10. PW-5 I.O. Karamveer Singh testified that he received secret information from the informer. He apprised the Superintendent, NCB Chandigarh about this information. He was asked to constitute a raiding party. He constituted the same. Two independent witnesses were also associated. Naka was laid. At about 7:20 AM, two persons were noticed coming from Katindhi side. They were stopped. Accused Pawan Kumar was carrying a bag of red and blue colour on his shoulder. The accused were apprised of their legal right to be searched either before a Magistrate or a Gazetted Officer vide Ext. PW-5/A and Ext. PW-5/A-1. Accused consented to be searched by the NCB team. The bag was searched. It contained charas. It weighed 1kg. 300 grams. Sealing proceedings were completed on the spot. He obtained signatures of independent witnesses on the documents. On 19.12.2012 Lot-A, Lot-P and sample packets Mark-A-1 and Mark-A-2 were handed over to In-charge Godown at NCB Chandigarh against receipt Ext. PW-5/G. In his cross-examination, he deposed that he has reached his office at 5:15 AM. Superintendent S.K. Singh had not visited Mandi on 18.12.2012 to 20.12.2012. Volunteered that he was holding the additional charge of Sub-Zone, Mandi. He sent Ext. PW-5/J information to Superintendent through Fax. He had not attached the receipt of the fax in the Court file. No other document was sent through fax to Chandigarh. Sh. S.K. Singh made endorsement over Ext. PW-5/J at Chandigarh on 19.12.2012.

11. PW-6 DSP, CBI, S.K.Singh deposed that he was holding the additional charge of Chandigarh zone in the month of December, 2012. On 19.12.2012, he was at Chandigarh. I.O. Karamveer Singh from Mandi intimated him about the secret information against the accused through telephone. He had authorized him to constitute raiding party and conduct the investigation. Raiding party was constituted. He made endorsement vide Ext. PW-6/A on written information Ext. PW-5/J. In his cross-examination, he deposed that he received telephonic information early in the morning at about 5:30 AM.

12. The accused were seen coming from Katindhi side in the early hours on 19.12.2012. Accused Pawan Kumar was carrying a bag of blue and red colour on his shoulder. Both the accused were apprised of their legal right to be searched either before a Magistrate or a Gazetted Officer vide Ext. PW-5/A and Ext. PW-5/A-1. However, they consented to be searched

by the NCB team. The bag was searched. It contained charas. It weighed 1kg. 300 grams. All the codal formalities were completed on the spot.

13. PW-5 I.O. Karamveer Singh has sent the information to the Superintendent, NCB Chandigarh vide Ext. PW-5/J on 19.12.2012. PW-6 DSP, CBI, S.K.Singh made the endorsement on Ext. PW-5/J vide Ext. PW-6/A, whereby the raiding party was constituted. There is no illegality or infirmity in Ext. PW-5/J and Ext. PW-6/A. The reasons of belief were reduced into writing by PW-5 I.O. Karamveer Singh. PW-3 Jai Lal, independent witness has not supported the case of the prosecution in its entirety, however, the fact of the matter is that he has admitted his signatures on memo Mark-X, Mark X-1, Parcel Lot-P and Lot-A as well as Lot-A-1 and Lot A-2. Another independent witness Narain Singh has expired. He has also signed as a witness the statements of accused Pawan Kumar and Raj Kumar in red circle. The arrest memo and Jamatalashi were also signed by him in red circle. He has also deposed that Narain Singh has also signed the documents.

14. PW-1 V.K.Sharma has proved report Ext. PW-1/A. According to this report, the contraband was found to be charas. 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 26.11.2014.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Shiv Lal ...Petitioner.
Versus
State of H.P. ...Respondent.

Cr. Revision No. 70 of 2013-E
Date of Decision: June 30, 2016

Indian Penal Code, 1860- Section 341, 325 and 506 read with Section 34- Accused assaulted complainant and her daughter due to which she sustained simple and grievous injuries- they were tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that complainant and her two sons were involved in a case of murder- brother of the petitioner was cited as a witness in that case, therefore, relations between parties are hostile- general statement was made by the complainant and her daughter - no specific role was assigned to the petitioner-, petitioner was present in his school till 4 P.M as per testimony of DW-2- distance between school and the place of incident is 190 k.m- travel time is 4-5 hours, therefore, it was not possible for the accused to reach at the place of the crime at 6:30 P.M.- merely because plea of alibi was not suggested to the prosecution witnesses is no ground to reject the same- Court had wrongly convicted the accused- revision accepted and accused acquitted. (Para 7 to 20)

Cases referred:
Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
State of Maharashtra Versus Narsingrao Gangaram Pimple, (1984) 1 SCC 446

For the Petitioner: Mr. Prem P. Chauhan, Advocate, for the petitioner.
For the Respondent: Mr. R.S. Verma and Mr.R.M. Bisht, Addl. AGs., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this Revision Petition filed under the provisions of Section 397 read with Section 401 of the Code of Criminal Procedure, 1973, convict-petitioner has assailed the judgment dated 28.12.2009/29.12.2009, passed by Judicial Magistrate, 1st Class, Theog, District Shimla, H.P., in Criminal Case No. 194/1 of 2007, titled as *State of H.P. Versus Mohan Lal* & others, as affirmed by the learned Additional Sessions Judge, Fast Track Court, Shimla, H.P., vide judgment dated 02.03.2013, passed in Criminal Appeal No. 9-S/10 of 2010, titled as *Shiv Lal Versus State of H.P.*, whereby he stands convicted and sentenced alongwith other co-accused as under:-

Convicted under Sections	Sentence imposed
341 read with Section 34 of IPC	Rigorous imprisonment for a period of one month.
325 read with Section 34 of IPC	Rigorous imprisonment for a period of one year and pay fine of Rs.1000/- and in default thereof further to undergo simple imprisonment for a period of one month.
506 read with Section 34 of IPC	Rigorous imprisonment for a period of six months and pay fine of Rs.500/- and in default thereof further to undergo simple imprisonment for a period of fifteen days.

2. On the basis of written complaint, so filed by complainant Ms. Shanti Devi (PW.3), FIR 59/2007, dated 31.03.2007 (Ex.PW.2/A), came to be registered under the provisions of Section 341, 323, 336 and 506 read with Section 34 of the Indian Penal Code, at Police Station, Theog, District Shimla, H.P. Investigation conducted by HC Parkash Chand (PW.1) and ASI Het Ram (PW.4), revealed that on 30.03.2007, at about 6.30 PM, convicts Mohan Lal, Dhani Ram, Kapil Dev and Shiv Lal, assaulted the complainant and her daughter Smt. Vidya Devi (PW.7). As a result thereof, complainant Ms. Shanti Devi sustained both grievous and simple injuries, which came to be affirmed by Dr. Pawan (PW.5), who issued MLC (Ex.PW.5/B). The convicts allegedly assaulted the complainant and her daughter with danda, which came to be recovered during the course of investigation. With the completion of investigation, which *prima facie* revealed complicity of the convicts in the alleged crime, *Challan* was presented in the Court for trial.

3. The convicts were charged for having committed offences punishable under the provisions of Sections 341, 325, 323, 427 and 506 read with Section 34 of IPC, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as seven witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded. Present petitioner Shiv Lal pleaded false implication. Also during the course of trial, he took plea of *alibi.* To establish the same, he led two witnesses in his defence.

5. Finding favour with the testimonies of the prosecution witnesses, trial Court convicted accused Shiv Lal alongwith other co-accused for having committed offences punishable under the provisions of Sections 341, 325 and 506 read with Section 34 of IPC and sentenced as aforesaid. Hence the present appeal by the convict.

6. Significantly, State did not assail the findings qua acquittal of the accused in relation to the charges framed under Sections 323 and 427 of IPC.

7. Having heard Mr. Prem P. Chauhan, learned counsel, on behalf of the petitioner as also Mr. R.S. Verma, learned Additional Advocate General, on behalf of the State, as also minutely examined the testimonies of the witnesses and other documentary evidence, so placed on record by the prosecution, Court is of the considered view that trial Court committed great

illegality in convicting the present petitioner, for the reasons discussed hereinafter. Contradictions and improbabilities which are glaring, rendering the prosecution case to be extremely doubtful, if not true, stand ignored.

8. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "...Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ...
> (Emphasis supplied)

9. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

10. It is a matter of record that independent petitions preferred by convicts Mohan Lal, Dhani Ram and Kapil Dev, stand duly disposed of vide separate judgment of the day. They have not assailed the findings on merit, but however, pleaded leniency insofar as sentence part is concerned.

11. Coming to the petition filed by convict Shiv Lal, one finds that the Courts below seriously erred in completely appreciating the testimonies of the witnesses, so examined by the parties qua the role of the present petitioner.

12. The prosecution case primarily rests upon the testimonies of complainant (PW.3) and her daughter Smt Vidya Devi (PW.7). Conjoint reading of the testimonies of these witnesses, establishes one fact and that being, the complainant and her two sons were involved in a case of murder and one of the brothers of the present petitioner was cited as a witness by the prosecution in the said case. Hence hostility and animosity *inter se* the parties, is quite apparent on record. However, there cannot be any presumption in law, of false implication on the part of the complainant, solely on the ground of previous hostility/animosity. Correspondently, it is the duty of the Court to appreciate the testimony of the interested/hostile witnesses with circumspection. And if so required, look for some corroboration, by other contemporaneous material on record, to lend assurance and credence to the testimony of the witnesses.

13. Now in the instant case, when one peruses the testimony of complainant, one finds that while she was returning from village Deothi to her own village at Baraun, all the accused persons assaulted her with a danda. Significantly, she does not ascribe any particular role to the present petitioner Shiv Lal. Testimony of her daughter is also to similar effect.

14. It is a settled principle of law that prosecution has to establish its case, beyond reasonable doubt. Equally it is open for the convict to lead evidence and probablize his defence/*alibi*, if any.

15. Now in the instant case, as has come through the testimony of Pratap Sharma (DW.2), present petitioner was posted as a Junior Basic Teacher (JBT) at Government Primary School, Khaniuri, which is still farther from Rampur. It has also come in his testimony that the present petitioner, on the date of the occurrence of the incident, was present in the school all throughout till 4.00 PM. It has also come in not only his testimony but also that of the Investigating Officer that distance from Khaniuri up to the spot of crime is approximately 190 kms and the travel distance by vehicle is about 4-5 hours. Now if that were so, then obviously the present petitioner could not have been present on the spot at the time of occurrence of the incident, which according to Ms.Shanti Devi (PW.3) and Smt. Vidya Devi (PW.7), took place on 30.03.2007 at 6.30 PM. It has also not come on record through the testimony of any of the prosecution witnesses, that the present petitioner with a common intent, travelled all the way

from his school up to the place of incident and joined the assailants with a premeditated mind of assaulting the victims. It has also not come on record that the petitioner used to daily visit his school from his native place. As such, it cannot be said that the present petitioner, with a common intent, voluntarily obstructed the complainant and her daughter from proceeding in any direction, resulting into their wrongful restrain. It also cannot be said that the present petitioner, with a common intent, voluntarily caused hurt by giving a blow with a danda to the complainant (PW.3) or that he criminally intimidated her or her daughter.

16. While rejecting the petitioner's plea of *alibi*, trial Court erred in holding that no such plea came to be suggested to Ms. Shanti Devi (PW.3) or Smt Vidya Devi (PW.7). Plea of *alibi* can be independently proved by leading clear, cogent, consistent and reliable evidence, which in the instant case, was so done through the testimony of Pratap Sharma (DW.2), who in fact, also proved the record of the attendance (Ex.DW.2/A) of the present petitioner. It is nobody's case that the said record was either interpolated or forged by the present petitioner. There is no challenge to the authenticity thereof.

17. The ratio of law laid down by the Apex Court in *State of Maharashtra Versus Narsingrao Gangaram Pimple*, (1984) 1 SCC 446, cannot be said to have correctly applied to the given facts. In fact, lower Appellate Court erred in reading Shiv Lal as Shyam Lal, who in fact is a Water Carrier in the school and not a JBT.

18. From the material placed on record, prosecution has failed to establish that convict Shiv Lal is guilty of having committed the offence, he stands charged for. The circumstances cannot be said to have been proven by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved, beyond reasonable doubt, to the hilt.

19. Findings returned by the Courts below, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as present petitioner stands wrongly convicted for the charged offence.

20. Hence, for all the aforesaid reasons, petition is allowed and the judgment of conviction dated 28.12.2009 / 29.12.2009, passed by Judicial Magistrate, 1st Class, Theog, District Shimla, H.P., in Criminal Case No. 194/1 of 2007, titled as *State of H.P. Versus Mohan Lal* & others, as affirmed by the learned Additional Sessions Judge, Fast Track Court, Shimla, H.P., vide judgment dated 02.03.2013, passed in Criminal Appeal No. 9-S/10 of 2010, titled as *Shiv Lal Versus State of H.P.*, qua convict Shiv Lal is set aside and he is acquitted of the charged offences. Amount of fine, if deposited by the convict, be refunded to him. Petition 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.

Vs.

Praveen Kumar and others .....Respondents.

Cr. Appeal No.: 438 of 2011
Reserved on : 21.06.2016
Date of Decision: 30.06.2016

Indian Penal Code, 1860- Section 364, 302, 201, 120-B read with Section 34- Complainant made a complaint that his daughter was kidnapped by the accused- investigation revealed that A-1 had got attested an affidavit regarding marriage with the daughter of the complainant- A-1 was not taking her to his house on which she pressurized him to transfer the property in her name- she demanded to Rs.20-30 lakhs or transfer of the house- A-1 had taken her in a car towards Barad road- accused had entered into a criminal conspiracy and had killed her- accused were tried and acquitted by the trial Court- held, in appeal that prosecution case is based upon circumstantial evidence- evidence must be complete and should point towards the guilt of the accused – statement of prosecution witness that he had seen a bag being thrown in river from a distance of about 1 km is highly improbable- PW-4 and PW-20 had not supported the prosecution case regarding the making of disclosure statement- circumstances do not point towards the guilt of the accused- accused were rightly acquitted by the trial Court- appeal dismissed.

(Para-35 to 47)

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. Advocate General, with Mr. Vikram Thakur, Dy. Advocate General.
For the respondents:	Mr. K.S. Banyal, Sr. Advocate, with Mr. Shivendra, 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, Kinnaur, Sessions Division at Rampur Bushahr in Sessions Trial No. 45 of 2010 dated 17.06.2011, vide which the learned trial Court has acquitted the accused for offences under Sections 364, 302, 201, 120-B read with Section 34 of the Indian Penal Code.

2. Case of the prosecution was that FIR No. 6/2010 was registered under Section 364 read with Section 34 at Police Station, Ani on 11.01.2010 on the basis of a complaint sent by complainant Jasbir Singh through fax. The complainant, who is resident of Village Naldehra, Post Officer and Tehsil Ani, District Kullu made a complaint dated 04.01.2010 to SHO, Police Station, Ani with regard to kidnapping of his daughter Aninder Kaur. According to the complainant, the husband of deceased Aninder Kaur, accused Praveen Kumar (hereinafter referred to as 'A-1') had provided her with an accommodation at Rampur Bushahr/Jagatkhana in the house of one Sh. K.C. Thakur on rent. On 31.12.2000, accused Bakshi Ram (hereinafter referred to as 'A-3'), father-in-law of Aninder had called her to Ani on the pretext that he had to register land/house in her name. As on that date the documents were not complete, he again called her to Ani on 04.01.2010. According to the complainant, Aninder told him on mobile on 03.01.2010 that on 04.01.2010, she was going to Tehsil Office, Ani as instructed by A-3. On 04.01.2010 at around 8 a.m., she told the complainant to meet her at Bus Stand, Ani at 9:45 a.m. Accordingly, the complainant reached Ani Bus Stand at 9:30 a.m. on 04.01.2010 to meet his daughter. She reached there at 10:45 a.m. by Chowai bus. He took her to a shop at Ani bazaar for having tea. She told him that her father-in-law had called her on mobile for execution of registry of a house in her favour. While they were having tea, his daughter received a call from A-3, who inquired from her as to why she had not reached Ani. She told A-3 that she was having tea with her father and that she had reached Ani. On this, A-3 asked her to meet him at Kiran bazaar, Ani. He again rang her and asked her to reach the Tehsil alone as it was a matter only between them. On this, she left for Tehsil alone. After 15-20 minutes, the complainant received a call from Sh. K.C. Thakur informing him that he had been asked by A-3 to come to Tehsil for being cited as witness and that at Tehsil, nether Aninder had reached nor A-3 or his son Praveen Kumar (A-1) had

reached. He also told him that their phones were being reported as switched off. The number of his daughter was 94186-15611 and the same was not responding till 11 p.m. on 04.01.2010 and thereafter it was reported to be switched off.

3. During investigation, the call details of the said number as well as those of A-1, A-3, Karam Chand, landlord and the complainant were obtained. Search was made for Aninder, but of no avail.

4. Investigation revealed that A-1 had got attested an affidavit on 27.10.2009 from Public Notary at Rampur regarding being married to Aninder. As A-1 was not taking her to his house, Aninder pressurized him to transfer his property in her name. Karam Singh brought this fact into the knowledge of A-3, who talked with Aninder on telephone. Through landlord Sh. K. C. Thakur, she demanded `20-30 lakhs or transfer of the house at Ani in her name. On 31.12.2009, A-1, A-3, Aninder and Sh. K.C. Thakur gathered at Tehsil, on which date, the registry could not be effected on account of non-availability of Kisaan Pass Book. The next date to do the needful was accordingly proposed as 04.01.2010. On 04.01.2010, A-3 contacted Aninder on her mobile seven times between 7-27.43 to 11-53.45 a.m. He had asked her to come alone to Tehsil.

5. Investigation further revealed that at abut 11 a.m., when she reached near a under construction Hospital, A-1 alongwith his cousin Diwan Chand (hereinafter referred to as 'A-2') were waiting for her in his Car bearing registration No. HP-35-0638. She talked for a while with A-1 and thereafter boarded the Car. Instead of taking the Car to Tehsil, she was driven away via Barad road. While in custody, A-1 made a disclosure statement to the effect that the dead body of Aninder was thrown in river Sutluj from Loohri-Suni road with the help of A-2 near Baru temple after killing her because he was fed up with the demands of `30/- lakhs. On this, the demarcation of the spot was done from where the dead body was alleged to have been thrown into the river Sutluj by A-1 and A-2.

6. As per the prosecution, Daya Nand and Bikham had seen A-1 and A-2 throwing the dead body in river Sutluj. It further came in investigation that on 04.01.2010, Sh. Deep Chand and Ashwani Kumar had seen A-1 taking Aninder at around 11 a.m. from near under construction Hospital in his Car with A-2.

7. Investigation further revealed that A-1 to A-3 had entered into a criminal conspiracy and under that conspiracy, Aninder was called to Ani on 04.01.2010 on the pretext that A-3 was to get the registry executed in the name of deceased. Thus, on this pretext, the conspiracy was hatched to do away with the deceased.

8. After completion of the investigation, challan was presented in the Court. As a prima facie case was found against the accused, accordingly they were charged for commission of offence under Sections 364, 302, 201, 120-B read with Section 34 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried.

9. 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 that any criminal conspiracy was entered into between the accused to kidnap and kill Aninder and further in order to screen themselves from legal punishment to throw her dead body into river Sutluj. Learned trial Court further concluded that the prosecution has also not been able to prove that A-1 and A-2 in furtherance of their common intention had kidnapped Aninder and thereafter committed her murder and threw her dead body in river Sutluj near a place at Baru temple. Accordingly, the learned trial Court acquitted the accused of the offences alleged against them.

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

11. In order to substantiate its case, the prosecution in all examined 22 witnesses.

12. PW-1 Jasbir Singh has deposed that deceased was his daughter and was married to accused Praveen Kumar. Marriage took place in a temple and thereafter an affidavit to this effect was got attested from Notary on 27.10.2009. Thereafter, he has deposed what he had stated in his complaint with regard to the occurrence of the incident. He also deposed that he suspected that his daughter might have been kidnapped by the accused persons and accordingly, he made a report at Police Station, Ani Ex. PW1/A. He further deposed that as no FIR was lodged till 10.01.2010 on the basis of his report Ex. PW1/A, accordingly on 11.01.2010, he sent a written complaint to Superintendent of Police, Kullu through registered post and also through fax. On the basis of the same, FIR was registered on 11.01.2010 and accused Praveen Kumar was arrested on 19.01.2010.

13. PW-2 Sandeep has deposed that he runs a tea shop in the name and style of Babaji Sweet Corner. He further deposed that he knew deceased and also her father Jasbir Singh. As per him, on 04.01.2010 at around 10/10:30 a.m., the deceased and her father came to his shop and took tea. Thereafter, first deceased went away and thereafter her father left the shop after making payment. He also deposed that deceased was married to accused Praveen Kumar with whom she was residing. In his cross-examination, he has stated that he knew the deceased being neighbour.

14. PW-3 Sangat Ram has deposed that he remained as a Document Writer at Ani and on 31.12.2009, accused Bakshi Ram came to him for getting scribed the sale deed which he wrote partly. The document could not be completed as he had asked Bakshi Ram to bring one year average of the property and also agriculture certificate of the vendee. The sale deed partially scribed by him was Ex. PW3/A. He also deposed that on that date, Bakshi Ram was not accompanied by any lady.

15. PW-4 Meena Ram did not support the case of the prosecution and stated that nothing had happened in his presence. He was declared as a hostile witness. In his cross-examination, he denied that any disclosure statement was ever made in his presence by accused Praveen Kumar, though he admitted his signatures on the said disclosure statement. He stated that his signatures were taken on the said document in the Police Station, where he was called.

16. PW-5 Himesh Sood has stated that he runs a shop of utensils and on 11.1.2010, someone called him and asked to give fax tone and thereafter he gave fax tone and received complaint Ex. PW1/B, which he sent to Police Station, Ani.

17. PW-6 Bhikham Ram has deposed that one year back, he was cutting fuel wood across river Sutluj and Daya Nand was also present guarding the crop from monkeys. At about 2/2:30 p.m., he saw something in the shape of katta being thrown in river Sutluj by two persons who had come in a saleti colour vehicle. Throwing of the gunny bag in the river created sound. After throwing the said gunny bag, those two persons went away in the vehicle towards Sunni side. He has further deposed that thereafter he rang a shopkeeper Heera Lal, who was at his shop some distance away from Badu temple in order to know the number of the vehicle as something had been thrown by the occupants in the river. Heera Lal told him that he was at Karsog. In his cross-examination, he has stated that the vehicle in which those persons had come was similar to a Tata Sumo. He also stated that from that point, he was at a distance of about 1 km. across the river.

18. PW-7 Hira Lal has deposed that he has a shop at place known as Nathan at Sunni road. He had received a call from Daya Nand that near Badu temple, something had been thrown in river Sutluj and for this reason, he had asked him to note the number of the vehicle in which those persons had come. He further deposed that he told Daya Nand that he was at Karsog.

19. PW-8 M.L. Sharma has deposed that he was working as Assistant Nodal Officer, Reliance Communication, Shimla and he had provided the details of mobile numbers.

20. PW-9 Sh. Anil Kumar Sharma, who was posted as TM in B.S.N.L., Rampur Bushahr has also proved the details of mobile numbers.

21. PW-10 Constable Mohinder Singh is witness to taking into possession of Santro Car, which was bearing registration No. HP-35-6031 vide Ex. PW10/A.

22. PW-11 HHC Gulab Singh is witness to taking into possession of documents of the above mentioned Santro Car.

23. PW-12 Head Constable Pushp Dev is witness to receipt of fax Ex. PW1/B at Police Station, Ani on 11.01.2010, on the basis of which FIR Ex. PW12/A was registered and was marked to ASI Jagat Singh for investigation.

24. PW-13 Pratap Chand has stated that he remained posted as SHO, Police Station Ani. According to him, on 10.04.2010, Inspector Amar Singh handed over the case file after completion of investigation to him and he prepared the challan and presented the same in the Court.

25. PW-14 HHC Roshan Lal is witness to taking into possession of incomplete sale deed papers.

26. PW-15 SI Jagat Singh had recorded the statements of Jasbir Singh, Prabhjit Kaur and K.C. Thakur under Section 161 Cr. P.C. He also recorded the statement of Sandeep Kumar on 14.01.2010.

27. PW-16 Diwan Singh has stated that he was working as Notary Public. On 27.10.2009, Praveen Kumar and Aninder Kaur had come with Karam Chand for attestation of marriage affidavit, which was attested by him.

28. PW-17 Kuldeep Kumar did not support the case of the prosecution and he resiled from his earlier statement. Accordingly, he was declared as hostile witness.

29. PW-18 Dr. Chhering proved on record that accused Bakshi Ram was working as M.P.W. in Sub Centre, Olwa and on 04.01.2010, he was on compensatory leave.

30. PW-19 Lady Constable Tikma Devi produced on record rapat No. 21A dated 04.01.2010 Ex. PW19/A.

31. PW-20 Balbir Thakur also did not support the case of the prosecution and he resiled from his previous statement.

32. PW-21 Inspector Amar Chand deposed that he partially investigated the case by recording the statements of Hira Lal, Prabhjeet Kaur and Bodh Raj as per versions given by them. He further deposed that he also recorded the statements of Bhikham Ram and Daya Nand. He also arrested accused Bakshi Ram and handed over the case file to Inspector Pratap Singh.

33. PW-22 SI Gurbachan Singh deposed that accused Praveen Kumar made a disclosure statement Ex. PW4/A under Section 27 of the Evidence Act while in custody and on the basis of the said disclosure statement, demarcation of the place from where dead body of Aninder Kaur was thrown in a gunny bag was done. He has also stated that the said disclosure statement was made in the presence of witnesses Balbir and Mina Ram.

34. 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 at length.

35. In the present case, there is no eye witness who has supported the case of the prosecution *inter alia* to the effect that the deceased was kidnapped by A-1 and A-2 from near the under construction hospital and thereafter she was murdered. Thus, the case of the prosecution is based on circumstantial evidence.

36. 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."*

37. 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

(x) 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."

38. 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."

39. 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.

40. 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.

41. 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.

42. The first important circumstance is the alleged kidnapping of the deceased by A-1 and A-2 on 04.01.2010 from near the under construction Hospital at Ani. Case of the prosecution is that on 04.01.2010, the deceased was called at Ani by A-3 on the pretext that sale deed had to be executed in her favour with regard to a house. This fact was brought into the notice of her father by the deceased. Further, as per the prosecution, on the morning of 04.01.2010, deceased met her father at Bus Stand Ani, from where they went to Babaji Sweet Corner and had tea. When they were having tea, deceased received a call from A-3 Bakshi Ram and the deceased was asked to reach at Tehsil Office alone. On this, deceased left her father for Tehsil Office. The case of the prosecution further is that A-1, husband of the deceased met her near the under Construction Hospital at Ani and the deceased thereafter left alongwith her husband A-1 in the Santro Car. After this, the deceased was never seen. According to the prosecution, Deep Chand and Ashwani Kumar had seen A-1 taking the deceased from near the under construction Hospital in his vehicle alongwith A-2. Incidentally, neither Deep Chand nor Ashwani Kumar were examined by the prosecution as witnesses. Therefore, there is no material on record to substantiate this contention of the prosecution that A-1 met the deceased near the under construction Hospital at Ani and from there, the deceased left with A-1 and A-2 in a Santro Car. Further, according to the prosecution, A-1 while in custody made a disclosure statement to have thrown the dead body of Aninder with the help of A-2 in river Sutluj after killing her. The disclosure statement alleged to have been made by A-1 in police custody under Section 27 of the Indian Evidence Act has not been exhibited and is on record only as a marked document. Further, according to the prosecution, A-1 and A-2 were seen by Daya Nand and Bikham while throwing the dead body of Aninder in river Sutluj from Loohri-Suni road. Bhikham Ram has entered into the witness box as PW-6. Daya Nand has not been examined by the prosecution. PW-6 has stated that he was cutting fuel wood across river Sutluj and Daya Nand was also present guarding the crop from monkeys, when around 2/3:30 p.m. he saw that something in the shape of Katta was thrown in river Sutluj by two persons who had come in a saleti colour vehicle. He further deposed that on account of the gunny bag being thrown, sound was generated and after

throwing the gunny bag, the said two persons went towards Sunni side in the said vehicle. He further deposed that as the gunny bag went into the flowing water, nothing could be observed. Thereafter, he rang a shopkeeper Heera Lal, who had his shop near Badu temple in order to inquire the number of the vehicle. However, Heera Lal told that he was at Karsog. In his cross-examination, he has stated that the vehicle in which the persons had come was similar to Tata Sumo. He has further deposed that point, i.e. from the point from which the gunny bag was allegedly thrown by A-1 and A-2, he was at a distance of about 1 km. across the river. In his statement, PW-6 has nowhere stated that the alleged bag which he saw being thrown in river Sutluj by two persons was actually being thrown by A-1 and A-1 or that he saw A-1 and A-2 when they threw the said gunny bag in river Sutluj. His statement otherwise seems to be improbable because according to him, he saw bag being thrown in river Sutluj from a distance of about 1 km. He further states that what drew his attention was the noise of the bag being thrown in river Sutluj. In our considered view, the testimony of this witness seems to be highly improbable and on the basis of such statement, it cannot be said that the prosecution has been able to connect the accused with the commission of the offence. This is for the reason that neither the said witness has said that he saw A-1 and A-2 throwing a gunny bag in river Sutluj nor it seems humanly possible that a person will hear the noise of a bag being thrown in a river from a distance of 1 km. As per the prosecution the Car in which the deceased was taken from near the under construction Hospital by A-1 and A-2 was Santro Car. However, according to PW-6 the vehicle in which the persons came to threw the bag was Tata Summo. Thus, it is apparent that the testimony of this witness is neither cogent nor reliable. Further, the truthfulness of this witness has also been impinged by the defence. Accordingly, it cannot be said beyond reasonable doubt that the accused threw the dead body of the deceased in river Sutluj in the manner as has been put forth by the prosecution.

43. Another important aspect of the matter is that PW-4 Meena Ram has not supported the case of the prosecution that any disclosure statement was made by accused Praveen Kumar in his presence and in the presence of Balbir Singh. Though he admits his signatures on the statement made under Section 27 of the Evidence Act allegedly by A-1, however, according to him, the said signatures of his were obtained by the police in the Police Station where he was called. He was declared as a hostile witness. In his cross-examination by the defence, he has admitted it to be correct that A-1 did not take the police to the spot, i.e. Badu temple nor any demarcation/*Nishandehi* of any place was conducted on the basis of the statement made by A-1.

44. Similarly, PW-20 Balbir Thakur has also not supported the case of the prosecution with regard to the disclosure statement. Though both the above witnesses were declared as hostile, however, the prosecution has not been able to elucidate anything cogent or fruitful to further their cause from the cross-examination of the said witnesses.

45. Ex.-PY, which is the statement of Daya Nand recorded by a Judicial Magistrate, 1st Class, Karsog also does not furthers the case of the prosecution because Daya Nand has not mentioned in his statement that the persons who allegedly threw bag in river Sutluj were accused A-1 and A-2.

46. Therefore, on the basis of the evidence placed on record, it cannot be said that the prosecution has been able to prove its case to the effect that A-1 and A-2 kidnapped Aninder while acting in furtherance of their common intention and thereafter they killed her and allegedly threw her body in river Sutluj. Neither the last seen evidence nor circumstantial evidence placed on record by the prosecution is able to prove beyond reasonable doubt the guilt of the accused. Further, a perusal of the judgment passed by the learned trial Court demonstrates that all these aspects of the matter have been gone in detail by the learned trial Court. It has taken into consideration all the material placed on record by the prosecution and after analyzing the same in detail, it has come to the conclusion that the prosecution has not been able to prove its case against the accused beyond reasonable doubt.

47. We fully concur with the findings so returned by the learned trial Court. In our considered view also, the prosecution has not been able to prove its case against the accused beyond reasonable doubt. The prosecution has not been able to establish that Aninder was kidnapped, murdered and thereafter her body was thrown in river Sutluj in furtherance of a conspiracy hatched in this regard by the accused. 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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